AN ABRIDGMENT

OF

CASES

ARGUED AND DETERMINED

IN

The Courts of Law,

DURING THE REIGN OF HIS PRESENT MAJESTY,

KING GEORGE THE THIRD.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

By THOMAS WALTER WILLIAMS, Esq.
OF THE INNER TEMPLE, LONDON, BARRISTER AT LAW.

AUTHOR OF

THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE.

VOLUME THE FIRST.

LONDON:

PRINTED FOR G. G. AND J. ROBINSON, PATERNOSTER-ROW;
AND G. KEARSLEY, FLEET-STREET.

1798.


G.R. III.
BRITISH MUSEUM

TO

THE RIGHT HONOURABLE

LLOYD LORD KENYON,

BARON OF GREDINGTON,

IN THE COUNTY OF FLINT,

LORD CHIEF JUSTICE OF ENGLAND,

THIS WORK

IS

MOST RESPECTFULLY INSCRIBED,

BY

HIS LORDSHIP'S MOST OBEDIENT

AND DEVOTED SERVANT,

THO. WALTER WILLIAMS.

Inner Temple,
July, 1798.

TO THE GENTLEMEN OF THE LAW.

THE following Abridgment of the Judicial Deciſions of the Courts of Law in Weſtminſter Hall was undertaken at the inſtance of ſome profeſſional friends, and under an idea that a work of this nature is much wanted in the law-library to facilitate reſearch.

It commences with, and includes, the adjudications of the preſent reign; and forms a conciſe, but at the ſame time clear and intelligible, Digeſt of the principal matters contained in Sir *James Burrows'* and other ſubſequent reporters, arranged under proper titles. By this diſpoſition, every determination is exhibited at one view, under the head to which it belongs, in orderly ſucceſſion; and the uniformity of the authorities is traced and preſerved, or their diſtinctions marked.

In this compilation, the Editor has only conſulted books of unexceptionable repute; and among theſe he particularly acknowledges the Term Reports of B.R. and C.B. and the ſeries of Caſes publiſhed by *Wilſon*, *Burrows*, *Blackſtone*, *Cowper*, *Douglas*, and *Caldecot*. To mention any one reporter whom he has been under the neceſſity of rejecting, on account of inaccuracy and want of preciſion, would be invidious.

To

To render the Work as convenient as poſſible, there are ſubjoined to each volume an Index to the names of the caſes, and a copious Table of Contents.

This is the general plan of the undertaking: and the final end of the Editor's deſign has been to relieve gentlemen from the irkſome taſk of referring to a variety of books; by concentrating, in one work, the ſubſtance of the Deciſions in the Courts of Law during the preſent reign, with correct references to the reporters in which they are to be found.

If this has been done with any degree of accuracy, it is preſumed that the utility of the Book will be acknowledged; and whether he has ſucceeded or not, he ſubmits to the candid judgment of a liberal profeſſion.

AN

ALPHABETICAL TABLE

OF THE

NAMES OF THE CASES COMPRISED IN

THIS VOLUME.

ABBOT *v.* Smith, 3
Abbot *v.* Plumbe, 361
Abernethy *v.* Landale, 542
Ackworth *v.* Kempe, 193
Adams *v.* Richards, 131
Addiſon *v.* Overend, 3
Addiſon *v.* Grey, 728
Adlem *v.* Grinaway, 226
African Comp. *v.* Torrane, 329
Alcinbrook *v.* Hale, 275
Alexander *v.* Owen, 555
Alexander *v.* Comber, 557
Alexander *v.* Biſs, 771
Allan *v.* Hundred of Kirton, 681
Allen *v.* Keyt, 776
Amery *v.* Smalbridge, 365
Anderſon *v.* Hayman, 561
Anderſon *v.* Noah, 778
Andrews *v.* Sharp, 696
Ankerſtein *v.* Clarke, 346
Anonymous caſes, 213, 213, 293, 349, 349, 722, 774
Anſell *ex parte*, 616, 629
Anſell *v.* Evans, 734
Anthon *v.* Fiſher, 569
Appleton *v.* Smith, 224
Aquilla Cole *v.* Hindſon, 194
Arnold *v.* Baas, 347
Arthington and Hardcaſtle *v.* Biſhop of Cheſter and Jackſon, 505
Aſhcroft *v.* Bertles, 642
Aſtle *v.* Grant, 255
Atchiſon *v.* Everett, 431
Atkinſon *v.* Abraham 734
Atkinſon *v.* Jameſon, 676
Atkinſon *v.* Teaſdale, 81
Atkins *v.* Hill 233, 286
Attorney-general *v.* Le Merchant, 433
Avarillo *v.* Rogers, 26
Aylett *v.* Lowe, 340
Ayres *v.* Wilſon, 540

B.

Bach *v.* Owen, 309
Bache *v.* Proctor, 345
Badkin *v.* Powell, King, and Chancellor, 195
Baddeley *v.* Adams, 775
Badley *v.* Loveday, 737
Bagſhaw *v.* Boſſley, 326
Bailley Smeathman, 788
Baker *v.* Liſcoe, 914
Baldee *v.* Elers, 352

Ball *v.* Herbert, 208
Bally *v.* Wells, 685
Balls *q. t. v* Atwood, 421
Banks Howard, *v.* 12
Barber *v.* Palmer, 716
Barclay *v.* Lucas, 335
Barclay *v.* Heygena, 58
Barclay *v.* Hunt, 523
Barker *v* Braham and Norwood, 163
Barker *v.* Parker, 333
Barker *v.* Braham, 714
Barker *v.* Buther, 726
Barker *v.* Tibſon, 737
Barnes *v.* Foley, 50
Barnfather *v.* Jordan, 413
Barret *v.* Giubb, 511
Barwick *v.* Reade, 600
Barwis *v.* Keppel, 36
Bartlet *v.* Hebbes, 671
Baſſet *v.* Godſchall, 39
Batchelor *v.* Bigg, 185
Bateſon *v.* Green, 217
Bates *v.* Barry, 766
Bayley *v.* Merril 129
Beach *q. t. v.* Turner, 652
Beal *v.* Langſtaff, 525
Bearcroft *ex parte*, 723
Bean *v.* Bloom, 79
Beavor *v.* Hides, 19
Beck *ex dim* Fry *v.* Phillips, 687
Beckford *v.* Hood, 915
Beckwith *v.* Shordike, 211
Belchier *v* Ganſell, 784
Beluher *v.* Gibbs, 762
Bell *v.* Harwood 417
Bell *v.* Burrows 257
Bell *v.* Jackſon, 790
Bellour *v.* Weiton, 377
Bellis *v.* Milford, 770
Belk *v.* Broadbent, 178
Bengough *v.* Roſhier, 744, 746
Bennet *v.* Mellor, 67
Bennet *v.* Allcott, 188
Bennet *v.* Nichols, 772
Bertie *v.* Pickering, 200
Berryman *v.* Wiſe, 20
Berry *v.* Bentley, 604
Bexwell *v.* Chriſtie, 137
Beſt *v* Barber, 252
Bevan *v.* Bevan, 524
Biddieſon *v.* Whytel, 769
Bigby *v.* Kennedy, 633
Biggs *q.* Lawrence, 271
Bingham *v.* Garnault, 180
Birch *v.* Wright, 315
Bird *v.* Randall, 16, 144
Birt *v.* Barlow, 184
Biſe *v.* Dickaſon, 231
Biſſex *v* Biſſex, 738
Biſhop of London *v.* Fytche, 327
Blake *v.* Lanyon, 144
Blandford *v.* Bates, 762
Blaney *v.* Hendrick, 312
Blatch *v.* Archer, 666
Blunt's caſe, 703
Boddy *v.* Leyland, 775
Bohoun *v.* Burton, 584
Boldero *v.* Gray, 781
Boliand *v.* Pritchard, 760
Bonafous *v.* Rybot, 367
Bonafous *v.* Schoole, 670
Bonfield *q. t v.* Milner, 427
Bonnel *v.* Beighton, 198
Boot *v.* Cooper, 200
Boone *v.* Eyre, 392, 393
Bologne *v.* Vautrin, 760
Borthwick *v.* Carruthers, 279
Boulton and Watt *v.* Bull, 96
Boyter *v.* Dodſworth, 260
Brounſall's caſe, 704
Bradley *v.* Tunſtow, 738
Branch *v.* Ewington, 643
Brander *v.* Robſon, 781
Brandon *v.* Neſbit, 570
Brandon *v.* Payne, 9
Brangwin *v.* Perrot, 365
Brecknock and Abergavenny navigation *v* Pritchard, 379
Bree *v.* Holbeach, 235
Brery *q. t. v.* Levy, 431
Bright *v.* Purrier, 517
Briſtow *v.* James, 910
Briſtow *v.* Towers, 571
Britiſh Caſt-plate Glaſs Manufacturers *v.* Meredith, 75
Bromley *v.* Greathead, 630
Brooke *v.* Maſon, 726
Brooke *v.* Bryant, 718
Brooke *v.* Warren, 793
Broomhead *v.* Eyre, 623
Brown *v.* Chapman, 31
Brown *q. t. v.* Bailey, 431
Brown *v.* Goodman, 839, 928
Browning *v.* Morris, 241
Brucker *v.* Fromont, 191
Brudnell *v.* Roberts, 407
Brymer *v.* Atkins, 442

Buchannan

Buchannan *v.* Parnſhaw, 132
Buck *v.* Tyte, 620
Buddle *v.* Wilſon, 2, 9
Buggin *v.* Bennet, 524
Buller *v.* Harriſon, 231
Bullock *v.* Dommitt, 378
Burrough *v.* Skinner, 236
Buſh *v.* Bates, 762
Byers *v.* Dobey, 554

C

Calcraft *v.* Gibbs, 434
Calland *v.* Troward, 492
Camden *v.* Home, 469
Cameron *v.* Reynolds, 38
Cameron *v.* Lightfoot, 169
Campbell *v.* Jones, 393
Carr *v.* Shaw and Price, 593
Carſlake *v.* Mappledoram, 23
Carter's caſe, 702
Carter *v.* Murcott, 219
Carty *v.* Aſhley, 585
Cates *q. t. v.* Knight, 423
——— *v.* Melliſh, 423
——— *v.* Winter, 433
Catmur *v* Knatchbull, 694
Cecil *v.* Briggs, 767
Chamberlain *v.* Greenfield, 201
Champion *v.* Gilbert, 755
Chancellor *v.* Poole, 412
Chapman *v.* Snow, 757
Chapman *v.* Pickerſgill, 30
Charter *v.* Jaques, 519
Chater *v.* Becket, 565
Cheap *v.* Harley, 239
Cheetham *v.* Hampſon, 120
Cheſter *ex parte*, 602
Chorley *v.* Bolcot, 284
Chriſtie *v.* Filleul, 775
Churchill *v.* Wilkins, 305
Clarke *v.* Cawthorne, 754
Clark *v.* Shee and Johnſon, 239
Clarke *v.* Donnevan, 725
Clarkſon *v.* Woodhouſe, 215
Clay *v.* Willan, 65
Clayton *v.* Andrews, 562
Clegg *v.* Molyneux, 225
Clerk of Taunton *v.* Kimberly, 6
Clifton *v.* Walmeſley, 406
Clugas *v.* Penaluna, 271
Cobden *v.* Kendrick, 243, 706
Cockſhott *v.* Bennet, 247, 279
Coghlan *v.* Williamſon, 361
Cole *v.* Hindſon, 194
Cole's caſe, 704
Coles *v.* De Hayne, 785
Collier *v.* Godfrey, 774
Collier *v.* Gaillard, 29, 30
Collins *v.* Blantern, 329
Collins *v.* Powell, 767
Colton *v.* Goodrige, 347
Comer *v.* Baker, 226
Comerford *v.* Price, 1. 720
Compagnon *v.* Martin, 26
Coombe *q. t. v.* Pitt, 426
Cooke *v.* Jennings, 924
Cooke *v.* Dobree, 519
Cooke *v.* Oxley, 293
Cooke *v.* Loxley, 319
Cooling *v.* Noyes, 307
Coope *v.* Eyre, 551
Cooper *v.* Elſton, 560
Cope *v.* Cooke, 517
Coppell *v.* Smith,
Coppin *q. t. v.* Carter, 425
Corniſh *v.* Roſs, 761
Cornu *v.* Blackburne, 567
Cort *v.* Birkbeck, 88
Cotterell *v.* Hooke, 599
Cotterell *ex parte*, 324
Cotteril *v.* Tolly, 160
Couſins *v.* Thompſon, 606
Cowperthwaite *v.* Owen, 590
Cox *q. t. v.* Munday, 585
Cox *v.* Wright, 604
Crawford *v.* Whittall, 342
Crawfurd *v.* Caines, 618
Creſpigny *v.* Wittenoom, 608
Cripps *v.* Reade, 234
Croke *v.* Dowling, 32
Crooke *v.* Davis, 520
Crooks *v.* Holdich, 677
Croſsley *v.* Shaw, 2
Croſsley, Clarke, and Brierly, caſe of, 693
Croſs *v.* Salter, 87
Croſs *q. t. v.* Kaye, 429
Crowther *v.* Ramſbottom, 917
Curry *v.* Edenſor, 547

D.

D'Avrolles *v.* Howard, 219
Da Coſta *v.* Davis, 921
Dacre, Ld. *v.* Tebb, 227
Dahl *v.* Johnſon, 929
Dale *v.* Soilet, 310
Dalmer *v.* Barnard, 628, 922
Dann *ex dim.* Dolman, *v.* Dolman, 624
Danſer *v.* Berryman, 716

Darling *v.* Atkins, 581
Davidſon *v.* Ld. Foley, 601
Davis *v.* Cottle, 527
Davis and Jordan *v.* James, 66
Davis *v.* Lewis, 913
Davis *v.* Maſon, 328
Davis *v.* Mazzinghi, 516
Davis, Mary Ann, her caſe, 641
Davis *ex dim.* Povey *v.* Doe, 696
Dawkins *v.* Reid, 774
Day *v.* Buller, 20
Day *v.* Edwards, 189
Deeks *v.* Strutt, 289
De la Cour *v.* Reed, 769
Dennie *v.* Elliott, Hill. *& al.* 715
Deriſley *v.* Cuſtance, 413
Dickenſon *v.* Plaiſted, 594
Dixon *v.* Birch, 630
Dixon *v.* Plant, 723, 723
Dodſworth *v.* Bowen, 720
Doe *ex dim.* Coore *v.* Clare, 530
——— Bromfield *v.* Smith, 533
——— Duroure *v.* Jones, 573
——— Hardman *v.* Pilkington and Ruſſel, 582
——— Church *v.* Perkins, 589
——— Baſs *v.* Roe, 593
——— Jupp *v.* Andrews, 706
Mears *v.* Dolman, 925
Donaldſon *v.* Becket, 117
Doughty *v.* Laſſcelles, 9
Downes *v.* Parkhurſt, 602
Drage *v.* Brand, 389
Duberly *v.* Gunning, 182
Dudley *v.* Folliott, 383
Duffield *v.* Scott, 338
Dundas *v.* Ld. Weymouth, 415
Dunſtan *v.* Treſider, 218
Dye *v.* Leatherdale and Simpſon, 197
Dyſon *v.* Birch, 719

E.

Eaton *v.* Jaques, 410
Echlin *v.* Hartop, 766
Eddowes *v.* Hopkins, 27, 315, 588
Edmondſon *v.* Stephenſon, 24
Edmondſon *v.* Machell, 181
Edward *v.* Williams, 37
Edwin *v.* Allen, 776
Eichorn *v.* Le Maitre, 11
Elſee *v.* Gatward, 69
Emery *v.* Fell, 341
Evans *v.* Atkins, 675
Evans *v.* P——, 726
Evans *q. t. v.* Stevens 430
Evelyn *v.* Chicheſter, 254
Exeter, Dean and Chapter of, *v.* Seagell, 521

F.

Faikney *v.* Reynous, 325
Fallon and Wife *ex parte*, 603, 621
Fallowes *v.* Taylor, 921
Farmer *v.* Arundel, 279
Farmer *v.* Darling, 31, 37
Farrel *v.* Nun, 30, 32
Farquar *v.* Morris, 921
Feiſer *v.* Randall, 530
Feltham *v.* Terry 281
Fenner *v.* Evans, 610
Fenner *v.* Mears, 323
Fenton *v.* Embiers, 564
Fenwick *v.* Hunt, 757
Fielder *v.* Starkin, 130
Fields *v.* Lewen, 717
Fiſher *v.* Briſtow, 32
Fiſher *v.* Lane, 699
Fiſher *v.* Levi, 761
Fiſher *v.* Perry, 793
Fiſher *v.* Prince, 157
Fiſher *v.* Sutton, 793
Fiſherwood *v.* Cannon, 197
Fletcher *v.* Dyche, 546
Fletcher's caſe, 702
Fletcher *v.* Angell, 795
Flureau *v.* Thornhill, 236
Folkard *v.* Hemmet, 214
Folliot *v.* Ogden, 356
Fontainier *v.* Heyl, 579
Forbes *v.* Wale, 362
Ford *v.* Maxwell, 726
Fores *v.* Diemar, 923
Forward *v.* Pitward, 57
Foſter *v.* Allanſon, 368
Foſter *v.* Pierſon, 415
Fowler *v.* Dunn, 786
Fox *v.* Chandler, 347
Fox *v.* Smith, 727
Freame *v.* Pinneger, 728
Frederick *v.* Lookup, 424

French *q. t. v.* Adams, 652
Friend *v.* Eaſtabrook, 416
Frogatt *v.* Tapſcott, 717
Fulk *v.* Bourke, 788
Fuller *v* Prentice, 694
Fuller *v.* Preſt, 773
Fulweil *v.* Hall, 418

G.

Galbraith *v.* Neville, 344
Gallini *v.* Laborie, 388
Garforth *v.* Fearon, 267
Garrood *v.* Sanders, 613
Garſide *v.* Trent and Merſey Navigation, 58
Gates *v.* Bayley, 196
Gaunt *v.* Marſh, 754
Gawler *v.* Jolley, 791
Gely *v.* Day, 229
Gerrard's caſe, 722
Gibbon *v.* Paynton, 63
Gilby *v.* Lockyer, 520
Giles *v.* Edwards, 918
Glaſſe *v.* Mount, 629
Glead *v.* Mackay, 776
Godfrey *v.* Saunders, 230
Goff *q. t.* Popplewell, 428
Golden *v.* Manning and Payton, 59
Goldſmith *v.* Baynard, 718
Goodtitle *ex dim.* Eſtwick, *v.* Way, 529
Goodiſon *v.* Nunn, 399
Goodwin *v.* Crowle, 389
Goodwin *q. t. v.* Parry, 515
——— Smith, 515
Gordon *v.* Auſtin, 6
Gordon *v.* Powis, 696
Goſling *v.* Wilcock, 31
Gowlet *v.* Hanforth, 367
Grant *v.* Hawding, 700
Grant *v.* Foley, 630
Grant *v.* Ld. Sondes, 1, 9
Greathead *v.* Bromley, 619
Green *v.* Kennet, 590
Green *v.* Redſhaw, 923
Green *v.* Waring, 735
Greenſill *v.* Hopley, 776
Griffin *v.* Eyles, 710
Griffiths *v.* Mathews, 85
Griffiths *v.* Brome, 405
Grimſtead *v.* Marlowe, 218
Grocer's Comp. *v.* Archbiſhop of Canterbury and Backhouſe, 487
Gundry *v.* Sturt, 227
Gundry *v.* Feltham, 210
Gunnis *v.* Erhart, 140

H.

Hall *v.* Lawrence, 734
Halley *v.* Tipping, 766
Halſey *v.* Hales, 631
Hambly *v.* Trott, 152
Hammond *v.* Foſter, 624
Hamp *v.* Vaucher, 784
Handaſyde *v.* Morgan, 772
Hardinge, *v.* Biſhop of Wincheſter, 498
Hardwick *v.* Bluck, 777
Harbord *v.* Perigal, 9
Hardy *v.* Holliday, 219
Hardy *v.* Burn, 390
Hargrave *v.* Le Breton, 16, 24
Harker *v.* Birkbeck, 13, 686
Harris *v.* Mantle, 417
Harris *v.* Stapleton, 618
Harriſon *v.* Davis, 792
Hart *v.* Aldridge, 142
Hart *v.* Lovelace,
Hatch *v.* Cannon, 595
Hatfield *v.* Linguard, 756
Haward *v.* Banks, 12
Hawkes *v.* Saunders, 287
Hawkins *v.* Plomer and Hart, 775
Hawkins *v.* Magnall, 760
Hayne *v.* Maltby, 115
Haynes *v.* Hare, 595
Heathcote *v.* Crookſhanks, 307
Heathfield *v.* Chilton, 578, 578, 579
Henzell *v.* Lodge, 584
Herries *v.* Jameſon, 341
Herver *v.* Dowſon, 26
Heyrick *v.* Foſter, 427
Hicks *v.* Richardſon, 737
Higginſon *v.* Neſbit, 737
Hill *v.* Goodchild, 224
Hill *ex parte*, 703
Hill and Hargrave *ex parte*, 704
Hixon *v.* Binns, 8
Hobſon *v.* Todd, 82
Hobſon *v.* Campbell, 519
Hockin *v.* Cooke, 305
Hodges *v.* Mendy, 606
Hodgſon *v.* Nugent, 787
Holford *v.* Hatch, 408
Holland *v.* Brookes, 839, 928

Holland

Holland *v.* Bothmar, 516
Holland *v.* Johnſon, 768
Holland *v.* Richards, 768
Holliday *v.* Camſell and White, 151
Hollis *v.* Brandon, 753
Holloway *q. t. v.* Bennet, 434
Holman *v.* Johnſon, 269
Holt *v.* Scholefield, 19, 28, 589
Holward *v.* Andre, 775
Home *v.* Ld. Camden, 456, 469, 476
Hooper *v.* Harcourt, 706
Hooper *v.* Till & *ux*, 724
Hope *v.* Colman, 351
Hopkins *v.* Waller, 600
Hopkins *v.* De Robeck, 669
Horner *v.* Moor, 346
Horwood *v.* Smith, 155
Hotham *v.* Ea. Ind. Com. 401
Hotham *v.* Ea. Ind. Com. 534
Houghton *v.* Butler, 212
Houſon *v.* Burrow, 676, 756
Howard *v.* Caſtle, 138
Howell *v.* Hanforth, 366
Hubbard *v.* Pacheco, 519
Hudſon *v.* Skinner, 610
Hughes *v.* Richman, 405
Hughes Sir Rich. *v.* Mayre, 710
Humble *v.* Bland, 435
Humphrey *v.* Leite, 788
Hunt *v.* Kendrick, 585
Hunt *v.* Coxe, 788, 789
Hurd *v.* Fletcher, 382
Huſſey *v.* Jordan, 718
Huſſey *v.* Wilſon, 521
Hutton *v.* Lewis, 609
Hyde *v.* Hill, 385
Hyde *v.* Trent and Merſey Navigation, 60

I.

Jacks *v.* Pemberton, 520
Jackſon *v.* Doleman, 7
Jackſon *v.* Lomas, 247
Jackſon *v.* Duchaire, 249
Jackſon *v.* Williamſon, 525
Jackſon *v.* Vernon, 552
Jackſon *v.* Warwick, 651
Jackſon *v.* Barnard, 716
Jackſon *v.* Hunter, 751
Jackſon *v.* Morris, 776
Jackſon *v.* Haſſel, 780
Jackſon *v.* Trinder, 761
James *v.* David, 223
Jaques *v.* Golightly, 242
Jaques *v.* Withy and Reid, 243
Jaques *v.* Nixon, 772
Ibbotſon *v.* Ld. Galway, 768
Jenkins *v.* Tucker, 261
Jenkins *v.* Edwards, 349
Jennings *v.* Martin, 517
Jennings *v.* Webb, 8
Jeſſer *v.* Gifford, 78
Jeſtons *v.* Brooke, 263
Ince *v.* Everard, 630
Johnſtone *v.* Dutton, 31, 33
Jones *v.* Macquillin, 5
Jones *v.* Barkley, 245, 404
Jones *v.* Williams, 345
Jones *v.* Clay, 916
Jones *v.* Cooper, 564
Jones *v.* Lander, 792
Iriſh Society *v.* Needham, 337
Iſrael *v.* Douglas, 296
Judd *v.* Evans, 366

K

Kaye *v.* Bolton, 550
Kaye *v.* Demattos, 705
Keane *v.* Boycott, 143
Keate *v.* Temple, 566
Kelſe *v.* Ambroſle, 926
Kendal *v.* Carey, 771
Kennard *v.* Jones, 311
Kennet and Avon Canal Co. *v.* Jones, 755
Kenny *v.* Thornton, 792
Kernot *v.* Norman, 768
Kerſhaw *v.* Cartwright, 793
Keymer *v.* Sommers, 92
Kinder *v.* Paris, 593
Kinder *v.* Williams, 674
King *q. t. v.* Clifton, 431, 693
———— Cole, 513, 524
———— Horne, 513
———— Pacey, 514
The King *v.* Arkwright, 93, 96
———— Baltimore, Ld. 743
———— Bank of England, 56
———— Barwick, 646
———— Berry, 26
———— Bowes, 683, 761
———— Breeme, 680
———— Cator, 685

The

The King *v.* Clapp, 644
——— Dixon, 705
——— Devonſhire, Juſtices of, 643
——— Dornevan, 678
——— Dunn, 760
——— Elſe, 96
——— Evered, 642
——— Edwards and Symonds, 697
——— Elkins, 697
——— Grainger, 8
——— Hall, 694, 698
——— Hamſtall Ridware, 647
——— Harriſon, 524
——— Hindringham, 643
——— Holland, 591
——— Horſley, 697
——— Joliffe, 527
——— Ireland, 698
——— Judd, 683
——— Leighton, 648
——— Lewis, 696
——— Lyme regis, 56
——— Lynn, Mayor and Burgeſſes of, 587
——— Lyon, 778
——— Marſhall, 653
——— Myers, 669
——— Peckham, 696
——— Pedley, 678
——— Phillips, Lucas, and Gibſon, 694
——— Plunket, 697
——— Price, 207
——— Rebord, 755
——— Routledge, 722
——— Reynolds, 648
——— Rudd, 654
——— Rudge, 695
——— Sharpneſs, 526
——— Sheriff of Middleſex, 696, 696, 777, 777
——— Sheriff of Eſſex, 793
——— Smithies, 518
——— Spalding, 680
——— St. Petrox, 641, 649
——— St. Nicholas, 644
——— Stafford, Marquis of, 502
——— Stafford, Mayor of, 592
——— Stobbs, 671
The King *v.* Stokes, 698
——— Taylor, 639
——— Tunſtead and Happing, 645
——— Wallace, 526
——— Wheeler, 694
——— Wilſon, 526
——— Wilkes, 582, 660, 740
——— Woodfall, 524
Kingſton *v.* Preſton, 392, 398
Kinlyſide *v.* Thornton, 77
Kirk *v.* Strickland, 767
Kirkman *v.* Price, 605
Kirkman *v.* Shawcroſs, 549
Knight *v.* Preſton, 350

L.

Ladbrooke *v.* Cricket, 439
Laing *v.* Cundale, 760
Lane *v.* Wheat, 720
La Roche *v.* Waſbrough, 590
Lardner *v.* Baſſage, 795
Latham *v.* Barber, 300
Layton *v.* Pearce, 306
Lazard *v.* Vaucher, 784
Leader *v.* Moxon, 74
Le Caux *v.* Eden, 173
Ledwith *v.* Catchpole, 668
Lee *v.* Carlton, 9
Lee *v.* Ganſell, 526, 662
Leery *v.* Goodſon, 283
Legh *q. t. v.* Kent, 420
Levi *v.* Roſs, 754
Levy *v.* Duponte, 757
Lewis *v.* Price, 77
Lewis *v.* Pottle, 763
Liardet *v.* Johnſon, 92
Lightfoot *v.* Cameron, 659
Lindo *v.* Rodney, 436
Lindon *v.* Hooper, 280
Littler *v.* Holland, 416
Lockwood *v.* Coyſgarne, 578, 580
Lockwood *v.* Hill, 787
Lockwood *v.* Standard, 162
Long *v.* Linch, 522
Longchamp *v.* Kenny, 282
Lonſdale, Ld. *v.* Church, 363
Lookup *q. t. v.* Frederick, 418
Loveridge *v.* Plaiſtow, 677
Loveridge *v.* Botham, 726
Lowe *v.* Peers, 386, 388

Lloyd *v.* Tomkies, 381
Ludwell *v.* Newman, 384
Luxton *v.* Robinſon, 301
Lynn *v.* Bruce, 308

M.

Mace *q. t. v.* Lovett, 428
Mackenſie *v.* Mackenzie, 517
Macquillin *v.* Cox, 340
Macpherſon *v.* Roriſon, 704
Maddock *v.* Hammet, 922
Malcolm *v.* Fullarton, 732
Manſell *v.* Burredge and Roberts, 736
Marks *v.* Upton, 600
Marder *v.* Cox, 737
Marriot *v.* Liſter, 302, 583
Marriott *v.* Hampton, 919
Marſen *v.* Touchett, 366
Marſhali's caſe, 726
Martin *v.* Keſterton, 212
Martin *v.* Hind, 290
Maſon *v.* Hunt, 537
Mather *v.* Brinker, 304
Matſon *v.* Wharam, 564
Maughan *q. t. v.* Walker, 431
Maule *v.* Murray, 677
Mayor of Norwich *v.* Swann, 223
Mayor of Norwich *v.* Berry, 721
Mears *v.* Greenaway, 161
Meaſe *v.* Meaſe, 346
Meadowcroft *v.* Holbrooke, 704
Meadowcroft *v.* Sutton, 794
Meekins *v.* Smith, 674
Melan *v.* Duke Fitzjames, 763
Merrick *v.* Vaucher, 784
Menetone *v.* Athawes, 285
Menetone *v.* Gibbons, 441
Meyer *v.* Ring, 593
Meyſey *v.* Carnel, 792
Milbourn *v.* Ewart, 353
Millar *v.* Taylor, 12, 92, 116, 120
Mitchell *v.* Turbutt, 2
Mitchell *v.* Neale, 160
Mitchell *v.* Oldfield, 711
Mitchell *v.* Morris, 776
Mitchell *v.* Gibbons, 780
Moore *v.* Wilſon, 66
Moore *v.* Beaumont, 205
Moravia *v.* Levy, 369
Morgan *v.* Hughes, 14, 32
Morgan *v.* Mourgue, 142
Morland *v.* Laſhly, 712
Morley *v.* Gaisford, 191
Morriſon *v.* Kelly, 36
Morris *v.* Branſon, 96
Morris *v.* Ludlam, 701
Morris *v.* Miller, 183
Morris *v.* Pugh and Harwood, 419
Morris *v.* Rees, 779
Morris, *v.* Wall, 925
Morton *v.* Lamb, 920
Moſs *v.* Birch, 769
Moſtyn *v.* Fabrigas, 41, 172
Moulſdale *v.* Birchall, 294
Munt *v.* Stokes, 276

N.

Neale *v.* De Garay, 909
Neat *v.* Allen, 776
Nerot *v.* Wallace, 248
Neſbitt *v.* Pymm, 757
Nightingale *v.* Deviſme, 282
Nightingale *v.* Nightingale, 763
Noble *v.* King and Smith, 385
Norris *v.* Tyler, 37
Norris *v.* Waldron, 227
North *v.* Evans, 774
Northumberland, Duke of, *v.* Errington, 379
Norton *v.* Danvers, 757
Norwich, Mayor of, *v.* Swann, 223,
Norwich, Mayor of, *v.* Berry, 721
Noyes *v.* Price, 282
Nunes, *v.* Modigliani, 715
Nutt *v.* Verney, 768

O.

Ogden *v.* Folliett, 359
Ogilvy *v.* Foley, 366
Olding *v.* Arundel, 347
Oldham *v.* Peake, 18
Oldham *v.* Langmead, 116
Onſlow *v.* Horne, 18, 20, 21
Oxford, Mayor and Commonalty of, *v.* Richardſon, 221, 222
Orton *v.* Vincent, 781
Oſborn *v.* Tatum, 923
Oſwald *v.* Legh, 347
Oulton *v.* Perry, viii
Owen *v.* Hurd, 731

Owen *v.* Nail, 752
Oxley *v.* Watts, 196
Oxley *v.* Young, 299

P.

Page *v.* Creed, 162
Pallant *v.* Roll, 228
Palmer *v.* Edwards, 409
Palmer *v.* Needham, 761
Paris *v.* Salkeld, 10
Parker *v.* Anſell, 586
Parker *v.* Patrick, 156
Parrot *v.* Fiſhwick, 37
Parſons *v.* Lloyd, 165
Parſons *v.* Thompſon, 265
Partridge *v.* Whiſton, 328
Paſley *v.* Freeman, 124
Pawley *v.* Holly, 156
Payne *v.* Rogers, 120
Payne *v.* Bacomb, 306
Payne *v.* Cave, 140
Peach *v.* Bath, 577, 579
Pearſon *v.* Pearſon, 584
Peddell *v.* Kiddle, 918
Pedley *v.* Goddard, 729
Perrigal *v.* Melliſh, 790
Perrot *v.* Hele, 716, 788
Perry *v.* Campbell, 790
Petrie *v.* Hannay, 275, 590
Philips *v.* Fielding, 402
Pickering, *v.* Watſon, 728
Pickering *v.* Truſte, 916
Pieters *v.* Luytjes, 750
Pillans and Roſe *v.* Van Meirop, 294
Pitt *v.* Yalden, 40
Plaiſtow *v.* Vanuxem, 343
Plumbe *v.* Carter, 263
Pole *v.* Johnſon, 59
Pool *v.* Wills, 789
Polyblank *v.* Hawkins, 416
Pope *v.* Foſter, 304
Pope *v.* Redfearn, 716
Porter *v.* Shephard, 399
Poſtle *v.* Williams, 785
Poſtlethwaite *v.* Parkes, 187
Powell *v.* Portherch, 518
Powell *v.* Milburn, 500
Power *v.* Wells, 131, 134, 147
Preſton *v.* Eaſtwood, 731
Preſton *v.* Morceau, 319
Price *v.* Fletcher, 415
Pritchett *q. t. v.* Croſs, 515
Puckford *v.* Maxwell, 676
Pugh *v.* Robinſon, 303
Purdy *v.* Stacey, 22
Purton *v.* Honnor, 914
Pyne *v.* Dor, 147

R.

Rackham *v.* Jeſſup and Thompſon, 147
Rafael *v.* Vereiſt, 170
Randle *v.* Fuller, 713
Rann *v.* Green, 303
Ravee *v.* Farmer, 733
Rawlinſon *v.* Gunſton, 791
Read *v.* Dupper, 712
Redridge *v.* Palmer, 226
Reed *v.* Cole, 541
Reed *v.* Harriſon, 204
Rees *v.* Morgan, 590
Repington *v.* Tamworth School, 487
Reynolds *v.* Edwards, 228
Ribbans *v.* Crickett, 919
Rice *v.* Shute, 2, 3
Rich *v.* Coe, 284
Richardſon *v.* Morris, 776
Richardſon *v.* Mayor and Commonalty of Oxford, 222
Richards *q. t. v.* Brown, 428
Richards *v.* Symmonds, 583
Ricord, *v.* Bettenham, 567
Rider *v.* Smith, 121
Ridoat, *v.* Pye, 734
Roberts *v.* Moon, 5
Robinſon *v.* Bland, 273, 313
Robſon *v.* Eaton, 238
Roche *v.* Carey, 524
Roe *ex dim.* Jackſon *v.* Aſhburner, 531
——— Wood *v.* Doe, 785
Rogers *v.* Halhed, 497
Rogers *v.* Brooks, 85
Rogers *v.* Payne, 416
Rogers *v.* Reeves, 543
Roles *v.* Roſewell, 391
Rondeau *v.* Wyatt, 557
Roſher *v.* Hurdis, 602
Roſs *v.* Johnſon and Dowſon, 149
Rowland *v.* Veale, 178, 179
Rowning *v.* Goodchild, 38, 48
Rudder *v.* Price, 340
Rumball *v.* Murray, 604

Ruſſel *v.* Palmer, 39
Ruſſel *v.* Men of Devon, 122
Ruſſel *v.* Stokes, 373

S.

Sabine *v.* Johnſon, 913
Sadgrove *v.* Kirby, 213
Sadler *v.* Evans, 232
Salter *q. t. v.* Shergold, 767
Samuel *v.* Evans, 783
Samuel *v.* Payne, 667
Saunders *v.* Hardinge, 611
Saunderſon *v.* Baker and Martin, 192
Savignac *v.* Roome, 16, 190
Savile *v.* Jardine, 20, 29, 30
Say *v.* Ellis, 758
Sayer *v.* Pocock, 586
Sayre *v.* Earl of Rochford, 180
Sayre *v.* Minns, 351
Schinotti *v.* Bumſtead, 56
Schoole *v.* Noble, Lett, and Byrne, 715
Scott *v.* Godwin, 688
Scott *v.* Nelſon, 261
Scott *v.* Perry, 585
Scott *v.* Shepherd, 156
Scott *v.* Whalley, 611
Seddon *v.* Tutop, 310
Sedgworth *v.* Overend, 911
Seward *v.* Baker, 255
Seymour *v.* Ld. Courtenay, 220
Sharp *v.* Sheriff, 786
Shaw *v.* Pickering, 724
Sheers *v.* Brooks, 796
Sheldon *v.* Baker, 523
Shepard *v.* Baillie, 4
Sherſon *v.* Oxlade, 601
Shettelworth *v.* Neville, 354
Shiells *v.* Blackburne, 72
Shipman *q. t. v.* Henbeſt, 421
Shipwick *v.* Blanchard, 148
Short *v.* Coffin, 583
Shove *v.* Webb, 233
Shubrick *v.* Salmond, 376
Silk, *v.* Rennet, 717
Simon *v.* Motivos, 563
Simpſon *v.* Hundred of Aſhwardh rn, 681
Sinclair *v.* Frazer, 343
Skutt *v.* Woodward, 592
Slater *v.* Baker and Stapleton, 68
Small *ex dim.* Baker *v.* Cole and Skinner, 582
Smart *v.* Wolff, 446
Smith *v.* Alliſon, 182
Smith *v.* Barrow, 240
Smith *v.* Bromley, 244
Smith *v.* Cattle, 31
Smith *v.* Cologan, 141
Smith *v.* Edge, 162
Smith *v.* Laſcelles, 141
Smith *v.* Mappleback, 545
Smith *v.* Miller, 778
Smith *v.* Powditch, 50, 51
Smith *v.* Scandrett, 775
Smith *v.* Shepherd, 773
Smith, Eliz. *v.* John Taylor, 639
Snellger *v.* Shelly, 27
Soulſby *v.* Hodgſon, 735
Southcote *v.* Braithwaite, 773
Sowerby *v.* Harris, 608
Spalding *v.* Mure, 522
Sparenburgh *v.* Bannatyne, 571
Sparrow *v.* Naylor, 780
Spencer *v.* Goter, 28
St. Albans, Duke of, *v.* Shore, 396
St. Saviour's, Churchwardens of, *v.* Smith, 408
Stackpole *v.* Earle, 272
Stafford, Mayor and Burgeſſes of, *v.* Bolton, 912
Steadman *v.* Purchaſe and Cox, 616
Stean *v.* Holmes, 311
Steel *q. t. v.* Sowerby, 429
Steel *v.* Houghton, 205
Steers *v.* Laſhley, 278
Stephens *v.* Coſtor, 258
Stephenſon *v.* Hardy, 302
Stephenſon *v.* Taylor, 725
Stevenſon *v.* Mortimer, 252.
Stevens *v.* Carrington, 404
Stewart *v.* Smith, 757
Stinton *v.* Hughes, 521
Stock *v.* Harris, 46
Stocks *v.* Booth, 83
Stokes *v.* Lewis, 262
Stokes *v.* Ruſſel, 372
Stokes *v.* Woodeſon, 693
Stone *v.* Cartwright, 78
Stonehouſe *v.* Elliott, 15
Stratton *v.* Raſtall, 236
Studd *v.* Acton, 758

Stuart *v.* Wilkins, 133
Sturdy *v.* Arnaud, 355
Surman *v.* Shelleto, 20, 29
Sutherland *v.* Murray, 44
Swayne *v.* Crammond, 523
Swinton *v.* Molloy, 45, 173
Swire *v.* Bell, 362
Swithen *v.* Vincent, 27
Syeds *v.* Hay, 150
Symmers *v.* Watson, 753
Symmons *v.* Mortimer, 620

T

Tarlton *v.* Fisher, 166
Tatem *v.* Chaplin, 407
Taylor *v.* Cole, 201, 203
Taylor *v.* Shum, 692
Tenant *v.* Elliot, 920
Terry *v.* Duntze, 395
Thompson *v.* Roubell, 761
Thompson *v.* Spencer, 307
Thorold *v.* Fisher, 775
Thurskill *v.* Wallace, 603
Tinkler *v.* Poole, 148
Toldervy *v.* Allan, 627
Tomlinson *v.* Blacksmith, 592
Tonna *v.* Edwards, 755
Touson *v.* Collins, 12
Toussaint *v.* Martinnant, 321
Towers *v.* Barrett, 135
Trelawney *v.* Thomas, 285, 312
Trinder *v.* Shirley, 784
Tripp *v.* Frank, 90
Triquet *v.* Bath, 577, 579
Troward *v.* Cailland, 496
Trueman *v.* Fenton, 250
Tubb *v.* Woodward, 312
Tullidge *v.* Wade, 187
Turner *v.* Vaughan, 324
Turner *v.* Winter, 93

V

Vaise *v.* Delaval, 525
Vale *v.* Bayle, 283
Vaux *v.* Ansell, 926
Velthasen *v.* Ormsley, 486
Verelst *v.* Rafael, 586
Vicars *v.* Haydon, 587

W

Wadham *v.* Brett, 518
Waghorne *v.* Fields, 720
Walden *v.* Davis, 348
Walker *v.* Witter, 343
Walker *v.* Perkins, 325
Walker *v.* Reeves, 411
Walker *v.* Ld. Grosvenor, 694
Walker *v.* Carter, 780
Wallace *v.* King, 149
Wallace *v.* Telfair, 141
Wall *v.* Macnamara, 44, 172
Walton *v.* Bent, 779
Ward *v.* Macaulay, 194
Warburn *v.* Birch, 605
Watts *v.* Millard, 622
Watson *v.* Turner, 260
Watson *v.* Shaw, 516
Waymell *v.* Reed, 272
Weakley *ex dim* Yea *v.* Bucknel, 528
Weatherstone *v.* Hawkins, 25
Webb *v.* Harvey, 789
Webb *v.* Matthew, 929
Webb *v.* Pritchett, 928
Webb *v.* Russel, 369
Webster *v.* Bannister, 541
Weedon *v.* Timbrell, 183, 186
Weigall *v.* Waters, 378
Wellington *v.* Arters, 311
Welsh *v.* Troyte, 311
Welsh *v.* Hole, 710
Weston *v* Downes, 134
Wheeler *v.* Copeland, 520
Wheston *v.* Packman, 584
White, *q. t. v.* Boot, 419
White *v.* Clarkson, 364
White *v.* Shaw, 160
White *v.* Sealey, 363
Whitfield *v.* Hunt, 253
Whitfield *v.* Ld. Le Despenser, 53
Whiting *v.* Punchard, 325
Whitten *v.* Fuller, 157
Wicks *v.* Fentham, 33
Wilde *v.* Clarkson, 364
Willis *v.* Baldwin, 264
Williams *v.* Frith, 723
Williams *v.* Jackson, 518
Williams *v.* Millington, 297
Williams *v.* Leper, 562
Williams *ex parte*, 724, 724
Wilkins *v.* Despard, 197
Wilkins *v.* Carmichael, 709
Wilkins *v.* Wingate, 320
Wilkinson *v.* Jacques, 670

Wilſon *v.* Mackreth, 13
Wilſon *v.* Raſtal, 433, 707
Wiltſhire *v.* Lloyd, 717
Winter *v.* Payne, 725
Winter *v.* Trimmer, 418
Withy *v.* Woolley, 927
Wolferſtan *v.* Biſhop of Lincoln and Whitehead, 508
Wood *v.* Webb, 696
Wood *v.* Mitchell, 786
Woolley *v.* Thomas, 923
Worlidge *v.* Manning, 205
Worſley *ex parte*, 923
Wright *v.* Reed, 605
Wright *v.* Ruſſel, 334

Y.

Yardly *v.* Burgeſs, 769
Yarmouth (Mayor of) *v.* Eaton, 256
Yates *v.* Doughan, 781
Yates *v.* Freckleton, 705
Yea *v.* Field, 154
Yeardly *v.* Roe, 716

Z.

Zachary *v.* Shepherd, 729

ADDENDUM

In page 311, line 32, to the caſe of *Kennard* v. *Jones*, after the words, "firſt application of the kind," add the following note:

In the caſe of *Oulton* v. *Perry*, Mic. Ter. 5 *Geo.* 3. B.R. it was moved to ſtay the plaintiff's proceedings, upon an affidavit, "*that the defendant owed the plaintiff only nine ſhillings*"; and the caſe of *Machin* v. *Robinſon*, Tr. Ter. 21 *Geo.* 2. B.R. was cited: PER CUR. In that caſe, it appeared on the very face of the declaration to be only for twenty ſhillings; and therefore it was holden to be *infra dignitatem curiæ*: Here the plaintiff demands more; the defendant alleges it to be leſs: the Court cannot try the quantum upon affidavit. The diſtinction is, Whether it appears upon the face of the declaration or not? Motion denied, 3 *Burr.* 1592.

ERRATA

In the Names of the Caſes.

In page 8, inſtead of Rex *v.* "Ginger" read "Grainger".
——— 264, inſtead of "Willes" read "Willis" *v.* Baldwin.
——— 272, inſtead of "Waymill" read "Waymell" *v.* Reed.
——— 417, inſtead of "Bentielo" read "Bonfield" *v.* Milner.
——— 529, inſtead of "Eſtwich" read "Eſtwick".
——— 537, inſtead of Maſon *v.* "Hewit" read "Hunt".
——— 758, inſtead of "Preters" read "Pieters" *v.* Luytjes.

AN

AN ABRIDGEMENT

OF

CASES

ARGUED AND DETERMINED

IN

THE COURTS OF LAW.

Abatement.

I. *Plea to the Juriſdiction.*

IF the court has not *a general juriſdiction* of the ſubject-matter, the defendant muſt plead to the juriſdiction, and cannot take advantage of it upon *the general iſſue.* Moſtyn *v.* Fabrigas, M. 15 Geo. 3. B.R. *Cowp.* 172.

And in every plea to the juriſdiction, you muſt ſtate another juriſdiction; therefore, if an action be brought in *B.R.* for a matter ariſing in *Wales*; to bar the remedy ſought in that court, you muſt ſhew the juriſdiction of the court of *Wales.* And in every caſe to repel the juriſdiction of the king's court, you muſt ſhew a more proper and more ſufficient juriſdiction; for *if there is no other mode of trial,* that alone will give the king's court a juriſdiction.

Alſo, the defendant, if he would plead to the juriſdiction, muſt appear *in his proper perſon,* and if he does not, but appears by attorney, that admits the juriſdiction, and he cannot afterwards plead to the juriſdiction in his proper perſon. Grant, *v.* Lord Sondes, Ea. 16 Geo. 3. C.B. 2 *Black.* 1094.

II. *Plea of Privilege.*

If a bill of exchange be directed to, and accepted by, a perſon who is an attorney (1), ſuch perſon, if he is ſued thereon by ORIGINAL, may plead his privilege in abatement, in like manner as in any other perſonal action; for by accepting a bill, an attorney ought not to be conſidered as aſſuming a new character, ſo as to loſe his privilege; and, Comerford *v.* Price, H. 20 Geo. 3. B.R. *Doug.* 312.

(1) In this caſe, the very bill of exchange was directed to the party by the deſcription of Mr. William Price, *attorney at law.*

by lord *Mansfield*, the case is extremely clear. A man does not make himself a merchant by drawing or accepting a bill of exchange: there are no cases, but it is because the privilege cannot admit of a doubt.

Crossley *v.* Shaw, E. 16 Geo. 3. C.B. *Black.* 1085.

But an attorney who is arrested by *capias*, on a special original, out of the same court, is not entitled to his discharge on serving the sheriff with a writ of privilege, but must plead such privilege in abatement.

III. *Plea of Joint Contract.*

Buddle *v.* Wilson, T. 35 Geo. 3. B.R. 6 *Ter. Rep.* 369.

In an action upon the case, on the custom of the realm, against a common carrier, for not safely conveying goods, the defendant may plead, in abatement, that the goods mentioned in the declaration, were delivered to, and received by the defendant and others *jointly*, they being partners in the trade or business of a carrier, and *not* by the defendant *solely*, averring that those other persons are living: For if in an action of assumpsit, all the contracting parties are not made defendants, the party sued may plead, in abatement, that the others ought to have been joined with him; and in this case, as the cause of action does not arise from a tort (2), but *ex contractu*, the defendants must have the same right to put in the same plea. The form of the action being for a misfeasance, cannot alter the nature of it, or the obligation of the parties; it is an action *ex quasi contractu*, and it is not the contract of one, but of all, there is no other tort, but a breach of trust; and with regard to any inconvenience that may be

(2) There is a distinction between *torts* and *assumpsits*, viz. in *torts*, all the trespassers need not be made parties; but in actions *upon contract*, every partner must be made a defendant, Rice *v.* Shute, Ea. 10 Geo. 3. 5 *Burr.* 2613.

Thus, in an action on the case for negligence, the declaration stated in substance, that the defendants were possessed of a ship called the Amity Hall, whereof one Young was master, and that the defendants, by their said servant Young, so negligently navigated their ship, that it struck against another ship, then sailing with the plaintiff's goods on board, and so damaged his goods, that they were wholly lost to the plaintiff. To this the defendants pleaded, in abatement, that the grievance, if any, was committed by the defendants and one A. S. C. B. S. O. and J. N. jointly, and not by the defendants only; to which there was a general demurrer and joinder in demurrer. By the court, upon this question, it is impossible to raise a doubt: in all the books this doctrine is clearly established, viz. if the cause of action arise *ex contractu*, the party must sue all the contracting parties; but where it arises *ex delicto*, he may sue *all* or *any* of the parties at his election, upon each of whom individually a separate trespass attaches; and this being an action *ex delicto*, the trespass is several.—Judgment for the plaintiff. Mitchell *v.* Tarbutt and others, Tr. 34 Geo. 3. 5 Ter. Rep. 649.

supposed

ſuppoſed to ariſe to the ſuitors, on account of the proprietors of public coaches generally living in different parts of the kingdom, and their names not being uſually known, the anſwer is, that there is no other inconvenience in this, than in any other caſe where the plaintiff does not ſue all the partners; and in all theſe caſes, the inconvenience is removed by the plea which gives the plaintiff a better writ.

But a partnerſhip cannot be given in evidence by a defendant on the general iſſue; to avail himſelf of that fact, he ought to *plead it in abatement*. He then muſt ſay *who the partners are*. If the defendant does not take advantage of it at the beginning of the ſuit, and plead it in abatement, it is a waver of the objection; and he ought not to be permitted to lie by, and put the plaintiff to the delay and expence of a trial, and then ſet up a plea not founded on the merits of the cauſe, but on the form of proceeding; and there is no difference whether the plaintiff in fact *knows* of the partnerſhip or not. Rice *v.* Shute, Ea. 10 Geo. 3. B.R. 5 *Burr.* 2611. 2 *Black.* 695.

Alſo, in another caſe, where a new trial was moved for, after a verdict for the plaintiff on the general iſſue, grounded upon the objection, that, as it appeared in evidence on the trial, that the defendant and another perſon were merchants in partnerſhip, and known to be ſo to the plaintiff; the judge who tried the cauſe ought to have nonſuited the plaintiff. The court, after a ſolemn argument, recognized the doctrine laid down in the caſe of Rice and Shute, and determined, that if a defendant means to take advantage of a partnerſhip, *it ought to be pleaded in abatement*; elſe it is ſuppoſed to be waived, and that as it is for the benefit of the defendant, he ought to claim it in the earlieſt ſtage, and not put the plaintiff to the trouble of making out his caſe, and then bring this objection after. Abbot *v.* Smith, Ea. 14 Geo. 3. C.B. 2 *Black.* 947. 5 *Burr.* 2615.

So, in an action of treſpaſs for running down the plaintiff's ſhip, in one count of the declaration it was alleged, that the plaintiff was the ſole owner of the ſhip; in another, that he was a part owner, namely, of one-fourth of the ſhip: after a verdict for the plaintiff, with general damages, it was moved in arreſt of judgment, becauſe a part owner cannot ſue alone, and though this matter muſt have been pleaded in abatement if the plaintiff had not ſhewn this defective title in the declaration; it was contended, that it was not neceſſary to plead it in this caſe, as the defect appeared on the declaration. By Lord *Kenyon*, Ch. J. formerly, eſpecially in caſes of contract, it was held, that if it appeared at the trial, that there was a joint contract, and only one of the contracting parties was ſued, it was a deciſive objection againſt the plaintiff's action. But afterwards, for the convenience of ſuitors, on conſidering the principles on which thoſe deciſions proceeded, it was held, that if a defendant meant to avail himſelf of ſuch an objection, he muſt Addiſon *v.* Overend, Tr. 36 Geo. 3. B R. 6 *Ter. Rep.* 766.

plead in abatement; and we think that this caſe is in the ſame ſituation as if the ſame facts had appeared on a ſpecial verdict. Therefore, we are of opinion, that it is much more commodious to the ſuitors, that if the defendant mean to take an advantage of ſuch an objection, he ſhould plead it in abatement; and that if there be no ſuch plea, the plaintiff may recover, though it ſhould appear that others might have been joined with him, and, conſequently, that the rule in this caſe to arreſt the judgment ſhould be diſcharged.

Sheppard *v.* Baillie, Tr. 35 Geo. 3. B.R. 6 *Ter. Rep.* 327.

And although ſome of the parties to the contract be out of the juriſdiction of the court, they muſt be joined in the action, and outlawed, otherwiſe the defendant may *plead in* abatement.—In an action of aſſumpſit, on a bill of exchange againſt the defendant as acceptor, with the uſual counts, the defendant pleaded, in abatement, that the ſuppoſed promiſes in the declaration mentioned, were made by him, and J. G. R. R and A. K. jointly, and not by the defendant only, averring that thoſe three perſons are ſtill alive: there was a replication to this plea, that J. G. R. R. and A. K. were at the commencement of the ſuit, and ſtill continued, in that part of *Great Britain* called *Scotland*; and that they had not any goods, lands, or other property in *England*, or within the juriſdiction of this court, whereby they could be ſummoned, attached, or diſtrained to anſwer, &c. To this the defendant demurred, and the plaintiff joined in demurrer. By Lord *Kenyon*, Ch. J. this replication is a perfect novelty. Nothing can be more clearly eſtabliſhed, than that in caſes of contract, the plaintiff muſt ſue all the contracting parties, and proceed to outlaw ſuch of them as do not appear to anſwer to the writ. It has been argued, however, that even a proceeding in the preſent caſe would have been *felo de ſe*, that it would have been abſolutely void, and could not have been attended with any good conſequences whatever. But that is by no means the caſe; the outlawry could only have been reverſed by error. By the ſtatute of *Weſtminſter*, 13 Ed. I. ſt. 1. c. 1. a fine levied contrary to that act is declared to be *ipſo jure nullus*, and yet it is not an abſolute nullity, but muſt be reverſed by a writ of error. So here the party outlawed is under many diſabilities as long as the outlawry continues in force; he can acquire no property, but his property becomes the property of the crown on office found; and the crown may, and often does, aſſign ſuch property for the benefit of the creditors of the outlaw. In order to enable the party to reverſe the outlawry, he muſt put in bail, ſo that this proceeding may be the means of bringing him back into the country (3);

(3) And the defendant, being intereſted in ſuch an event, has a right to inſiſt that the plaintiff ſhould adopt that mode of proceeding.

in

in which caſe, the perſons defending may ſue him for a contribution. Great inconveniences, therefore, would reſult to the defendants who are now ſued, if the plaintiff were not to outlaw thoſe who are out of the kingdom. Beſides, it muſt be remembered, that pleas in abatement, on account of all the contracting parties not being ſued, were firſt made neceſſary in the time of Lord Manſfield, when it was held neceſſary, for the convenience of juſtice, that if a defendant wiſhed to avail himſelf of ſuch a defence, he ſhould plead it in abatement; for, originally, as the contract was conſidered to be entire, if it were proved on the trial, that other perſons, beſides thoſe named in the record, joined in making it, the plaintiff was nonſuited. Therefore, at that time, the difficulty ſuppoſed to exiſt in this caſe, did not appear on the record. Without, however, conſidering the convenience or the inconvenience of the law on this ſubject, it is ſufficient for us to ſay, that it is the eſtabliſhed law of the country, that the party muſt ſue all the parties to the contract on which he brings his action. *Groſe*, J. agreed: *Lawrence*, J. this is a new attempt to avoid the neceſſity of proceeding to outlaw thoſe contracting parties who are out of the kingdom. In *Symonds v. Parminter*, where the plaintiff having proceeded to outlaw one defendant, claimed the whole demand from the other defendant, who appeared; the latter pleaded, in bar, that the outlawry was illegal, becauſe the party outlawed was not commorant within the realm: but the court gave judgment for the plaintiff, becauſe ſuch outlawries are not void, but voidable; and voidable only *ſub modo*, by putting in bail by the party himſelf. This ſhews, that the mode of proceeding is by outlawry; and as between the plaintiff and the defendant, the outlawry has the ſame effect as if the perſons outlawed had property liable to be attached under it.—Judgment for the defendant.

IV. *Plea of Miſnomer.*

Where the declaration was againſt the defendant by the Chriſtian names of James Richard; there was a plea, in abatement, that he was baptized by the name of Richard James, and not of James Richard; and had always ſince been known by the Chriſtian name of Richard James. To this there was a general demurrer, and joinder: BY THE COURT, this objection cannot be got over: the miſplacing of the names makes them as different from the real names as the ſubſtitution of any other inſtead of theſe.—Judgment for the defendant. Jones v. Mac-quillin, Ea. 33 Geo 3. B R 5 *Ter. Rep.* 195.

To an action of aſſumpſit, the defendant pleaded, in abatement, as follows: and THE SAID *Richard*, againſt whom Roberts, v. Robert Moon, Mil.

34 Geo 3. B.R. 5 *Ter. Rep.* 487.

the ſaid R. Roberts hath exhibited his ſaid bill, by the name of Robert, &c.: to this there was a ſpecial demurrer, and the plaintiff aſſigned for cauſe, that THE SAID *Richard*, by his plea aforeſaid, admitted himſelf to be the perſon named in the declaration: By Lord *Kenyon*, Ch. J. the court cannot hold too ſtrict a hand over theſe ſort of pleadings, which are calculated to defeat the juſtice of the caſe. If indeed a plea in abatement be drawn correctly, the court cannot deprive the defendant of the benefit of it; but if there be the leaſt inaccuracy in it, it cannot be ſupported. Now in this caſe, the defendant, by introducing the word *ſaid*, has admitted himſelf to be the perſon ſued, and according to 1 *Shower*, 394. it is bad; *per Cur. reſpondeat ouſter.*

Clerk of Taunton market *v.* Kimberly, M. 17 Geo. 3. C.B. 2 *Black.* 1120.

If a miſnomer of the plaintiff be not pleaded in abatement, it cannot be moved in arreſt of judgment; for where an action of aſſumpſit was brought in the name of *the clerk of the truſtees of Taunton market*, without naming him perſonally, under the act 9 Geo. 3, c. 44, which directs, that "all actions on behalf of the truſtees ſhall be brought *in the name*, and by the deſcription of clerk of the truſtees of Taunton market;" a verdict having been given for the plaintiff at the aſſizes, it was moved, in arreſt of judgment, that the action could not be ſuſtained in the name of the clerk of the market, without naming him perſonally; but to this it was anſwered, that the miſnomer, if any, was pleadable in abatement, and therefore cannot be moved in arreſt of judgment; and of that opinion was the court; for by *De Grey*, Ch. J. if this matter, which ariſes on the face of the record, be matter of abatement, and pleadable as ſuch (3), it ought to be taken advantage of in the firſt inſtance, and not moved in arreſt of judgment.

Gordon *v.* Auſtin and others, Ea. 32 Geo. 3. B R. 4 *Ter. Rep.* 611.

But if an action be brought upon a written inſtrument, and one of the parties be miſnamed in the declaration, advantage may be taken of the miſnomer upon the general iſſue, on the ground of a variance between the contract declared upon, and that proved.—This was an action on a promiſſory note made by the firm of Auſtin, Strobell, and Shirtliff, who were declared againſt by the names of William Auſtin, "Robert" Strobell, and William Shirtliff, the two laſt of whom were ſtated to be outlawed. The defendant Auſtin pleaded non aſſumpſit. At the trial the note was given in evidence, ſigned by the name of the firm, in the manner firſt mentioned; and it was proved that the partnerſhip conſiſted of the preſent defendant, William Auſtin, "Daniel" Strobell, and William Shirtliff; whereupon it was contended, that the plaintiff ought to be nonſuited, on the ground of a variance between

(4) If the Chriſtian or ſurname of the plaintiff be omitted, it ſhall be pleaded in abatement. *Comyns Dig.* Tit. *Abate*, E. 18, 19.

the

the contract declared upon, and that proved; it appearing to be between different perſons. The cauſe, however, was ſuffered to proceed, and a verdict was taken for the plaintiff. A rule *niſi* was afterwards obtained, to ſet the verdict aſide; and by Lord *Kenyon*, Ch. J. at the trial, I conſidered this like a miſnomer of a defendant, who muſt, in general caſes, plead in abatement. But on further conſideration, I am of opinion, that as this is an action on a written inſtrument, the objection was well founded at *niſi prius*, becauſe the evidence produced did not prove the inſtrument declared on. *Buller*, J. if this caſe be conſidered without the outlawry, it is perfectly clear; and the outlawry is only ſtated as an excuſe on the record for not proceeding againſt the party outlawed. Then it ſtands thus: the plaintiff declared upon a note given by three perſons, deſcribing them; and the note given in evidence was made by different perſons; the evidence, therefore, did not ſupport the contract declared upon.

In aſſumpſit againſt *Harriot Ford*, there was a plea of non-age, and the plea began thus: "*and the* SAID *Anne* "*White, who is ſued by the name of Harriot Ford.*"—Upon demurrer, the plea was held bad, becauſe it began, *and* THE SAID Ann White, when no ſuch perſon was mentioned in the declaration; and ſo it was no anſwer to the declaration (5). The court were alſo of opinion, that the plea ought to have mentioned that ſhe was ſued by the plaintiff, but that it, in fact, did not ſay *by whom ſhe was ſued*, it was only *ſued by the name of Harriot Ford.* Jackſon *v.* Ford, Ea. 13 Geo 3. C. B. 3 *Wilſ.* 413.

Alſo, if a defendant be ſued by the name of *Richard*, and appears by his right name *John*, and the plaintiff declares againſt him by his right name John, the court will not interpoſe, in a ſummary way, upon motion to ſet aſide the proceedings of the plaintiff for irregularity. Hole *v.* Finch, H. 9 Geo. 3. C. B. 2 *Wilſ.* 393.

So, alſo, if a defendant has a wrong addition given him in a capias, as *eſquire*, inſtead of *doctor in phyſic*, and he gives a bail bond by his right addition, and the plaintiff afterwards declares againſt him by his right addition of *doctor in phyſic*, the court will not interpoſe, and ſet aſide the proceedings for irregularity. For, by the court, if the defendant will take advantage of a *variance* between the writ and count, he muſt demand oyer of the *writ*, and ſhew it to the count. One reaſon why the court ſhould not interpoſe, is, that *after the defendant hath appeared, and is in court, there is an end to the meſne proceſs; and if the defendant craves oyer, it muſt be of the original writ, he cannot have it of the meſne proceſs.* And if application was to be made to the maſter of the rolls, he cer- Jackſon *v.* Doleman, ſame term, C. B. 2 *Wilſ.* 393.

(5) It was contended on the behalf of the defendant, that the words *the ſaid* were only ſurpluſage, but the court thought otherwiſe.

tainly would not refuſe to order right originals to be made out in both theſe caſes.

V. *Plea to be verified on oath.*

Rex v. Ginger, H. 5 Geo. 3. B. R. 3 *Burr.* 1617.

The ſtatute which requires all pleas in abatement to be verified on oath (6), extends to pleas on indictments; for it being moved to ſet aſide a defendant's plea to an indictment, and that judgment might be entered againſt him by default, as the proſecutor had, by reaſon of this *dilatory* plea, loſt the benefit of trial at the ſittings after term, the objection taken was, that "*the plea was a dilatory one, and yet not verified by affidavit:*" nor was any probable matter ſhewn to the court, to induce them to believe that the fact of it was true. And by Lord *Mansfield*, it is *uſual* to annex affidavits to pleas of this ſort in the crown office; and I do not ſee why they ſhould not be annexed. The rule was accordingly made abſolute, to ſet aſide the plea, for want of an affidavit.

VI. *Concluſion of Plea.*

Hixon v. Binns, Ea. 29 Geo. 3. B.R. 3. *Ter. Rep.* 185.

Demurrer to a plea of miſnomer, in abatement, concluded with praying *if* the bill, and that *the ſame may be quaſhed*. The cauſe aſſigned being, that the defendant did not pray *judgment* of the bill; which omiſſion, it was inſiſted, was bad on ſpecial demurrer, as not being according to the uſual form of ſuch pleas. THE COURT ſaid, that in dilatory pleas, the greateſt preciſion was required; and that as the defendant had not, in his plea of abatement, complied with the neceſſary forms, the plaintiff might take advantage of it on a ſpecial demurrer, and adjudged *quod reſpondeat ouſter*.

VII. *When Plea to be filed.*

Jennings v. Webb, Tr. 26 Geo. 3. B.R. 1 *Ter. Rep.* 277.

Every plea to the juriſdiction of the court, or in abatement, muſt be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unleſs the declaration be delivered ſo late in term, that the defendant is not bound to plead to it in that term or is delivered after term; in both which caſes, the defendant may, within the firſt *four days, incluſive*, of the ſubſequent term, plead any plea in

(6) By ſtat. 4 & 5 Ann. c. 16, § 11, no dilatory plea ſhall be received in any court of record, unleſs the party offering ſuch plea, do, by affidavit, prove the truth thereof, or ſhew ſome probable matter to the court, to induce them to believe that the fact of ſuch dilatory plea is true.

abatement,

abatement, or to the juriſdiction, *as of the preceding term*, whether a rule be given or not, and Sunday is one.

And the court were of opinion, that all pleas to the juriſdiction, and in abatement, being dilatory, ought not to be favoured; and that *the four days allowed for pleading them are both to be reckoned incluſive.*

In this caſe, the declaration was filed on the 17th of February; the 21ſt was on a Sunday, and on the 22d the defendant filed a plea in abatement. The plaintiff, conceiving that it was not filed in time, ſigned judgment, as for want of a plea: BY THE COURT, the judgment is regular; for in the caſe of pleas in abatement, the four days are reckoned incluſively; and, conſequently, the time for pleading expired on the Saturday. Harbord *v.* Perigal, Ea. 33 Geo. 3. B.R. 5 *Ter. Rep.* 210.

And the plaintiff may ſign judgment if the defendant pleads in abatement *after the four days*, though no rule to plead has been regularly ſerved (7), for the defendant by pleading in abatement, ſuperſedes the neceſſity of a rule to plead. Brandon *v.* Payne, Ea. 27 Geo. 3. B.R. 1 *Ter. Rep.* 689.

But if the laſt of the four days happen on a Sunday, the defendant may file ſuch plea on the fifth day, for Sunday is only to be conſidered as one of the days when it is not the laſt: if it were otherwiſe, as no plea can be filed on a Sunday, the time would, in fact, be limited to three days. Lee *v.* Carlton, Ea. 30 Geo. 3. B.R. 3 *Ter. Rep.* 642.

VIII. *Plea after Imparlance.*

After a ſpecial imparlance, ſaving and reſerving all advantages and exceptions whatſoever, a defendant may plead in abatement; but this ſort of imparlance can only be had by leave of the court, upon motion, within the four days. Grant *v.* Lord Sondes, Ea. 16 Geo. 3. C.B. 2 *Black.* 1094.

But no plea in abatement can be pleaded after a general imparlance; becauſe when you aſk a favour, and gain time, you admit all before to be right. Same caſe.

And if a plea in abatement be in fact pleaded after a general imparlance, it is bad. Buddle *v.* Wilſon, T. 35 Geo. 3. B.R. 6 *Ter. Rep.* 369, 373.

And the plaintiff may, in ſuch caſe, ſign judgment; for where a declaration was delivered, *as of Trinity term*, before the eſſoign day of Michaelmas term, with notice to plead within the four firſt days of the latter term; and the defendant within that time filed a plea in abatement: as follows. "And Laſcelles Laſcelles, who is ſued by the name of "Sturdy Laſcelles, in his proper perſon comes, and pleads "that he was baptized by the name of Laſcelles," &c. The plaintiff, conſidering this plea in abatement as deliver- Doughty, *v.* Laſcelles, H 32 Geo. 3. B.R. 4 *Ter. Rep.* 520.

(7) In this caſe, the rule to plead was ſerved on February 7th, and the notice of the declaration having been filed was not delivered till the 8th.

ed

ed out of time, ſigned judgment, in order to ſet aſide which, a rule was obtained: and in ſhewing cauſe againſt the rule, after noticing the caſe of Jennings *v.* Webb, as above, in which it was held that when a defendant has the four firſt days of a term, ſubſequent to that in which the declaration is delivered to plead, he muſt plead within the firſt four days, *as of the precedent term*; it was urged, that this plea was neither pleaded *as of the preceding term*, nor *after a ſpecial imparlance*; and that therefore the plaintiff was intitled to ſign his judgment; and of this opinion was the court. For, PER CUR. ſuch a plea as this can only be received after a ſpecial imparlance, which ſhould be ſtated on the record, but that not appearing here, the plaintiff was intitled to ſign judgment.

IX. *Plea after laſt Continuance.*

Paris *v.* Salkeld, H. 2 Geo. 3. C.B. 2 *Wiſ.* 137.

Matters ariſing after the laſt, and before the next continuance, may be pleaded in abatement, being verified by affidavit: thus, where iſſue was joined, and the *venire facias* awarded returnable *quinden Hilarii*, which is the 27th day of January; the defendant, after this laſt continuance, on the 30th of January, pleaded generally, that *puis darrein continuance*, viz. on ſuch a day he became a bankrupt; and that the cauſe of action did accrue before ſuch time as he became a bankrupt; and *hoc paratus eſt verificare, and verified this plea by an affidavit.* Upon motion, a rule was made to ſhew cauſe why this plea ſhould not be ſet aſide, as a frivolous and dilatory plea; alleging, that by law it was wholly in the diſcretion of the court, whether they would receive it or not. But THE COURT, after argument and full conſideration, were all clearly of opinion, that they had it not in their power to reject the plea, but were bound to receive it; and whether it was a good plea or not, they could only determine upon a demurrer. And the chief juſtice ſaid that there is no difference between a plea *puis darein continuance*, and any other defence, but this, viz. that the fact which warrants this plea firſt exiſted or happened ſince the laſt, and before the next continuance: it is a defence which the party could not poſſibly make when he firſt pleaded, and which he is bound to make after the laſt continuance, and before the next; but it muſt be verified by affidavit; for if it was not to be ſo, great delays would enſue by pleas of this kind (8).

(8) The plea was therefore received, but afterwards, upon demurrer, held to be bad, for want of the allegation that he had in all things conformed and obtained his certificate.

X. *Judgment upon Plea in Abatement.*

If the defendant plead in abatement, and the plaintiff demur to it, the judgment ſhall be only, that the defendant *reſpondeat ouſter*, if the plea be diſallowed, becauſe every man ſhall not be preſumed to know the matter of law, which he leaves to the judgment of the court.

Fichorn *v.* Le Maitre, H. 8 Geo. 3. C.B. 2 *Wiſ.* 367.

But if the plaintiff join iſſue upon a plea in abatement, and it be found againſt the defendant, the judgment ſhall be final; for in an action for goods ſold and delivered, the defendant pleaded miſnomer in his Chriſtian name, in abatement; the plaintiff replied, that the defendant was called and known as well by the name of A. L. as by the name of B. L. and thereupon iſſue was joined. *Upon the trial, the jury found a verdict for the plaintiff, but did not aſſeſs any damages*; and now it was moved on the behalf of the plaintiff, that a writ of enquiry might iſſue, to aſſeſs the damages.—The FIRST queſtion was, whether the court, upon this iſſue, ought to pronounce a final and peremptory judgment? and, if they ought, the SECOND queſtion was, whether they could, *ex officio*, award a writ of enquiry to ſupply the omiſſion of the jury, or whether a writ of *venire facias de novo*, muſt not go? And the COURT were all of opinion, on the FIRST queſtion, that the judgment ſhould be peremptory, and that there is no difference whether the iſſue be joined upon a fact in a plea in abatement, or in a plea in bar; for wherever a man pleads a fact, that he knows to be falſe, and a verdict be againſt him, the judgment ought to be final, and every man muſt be preſumed to know whether his plea be true or falſe.—As to the SECOND queſtion, they were all of opinion, that a writ of enquiry could not be awarded to ſupply the omiſſion of the jury, in not finding damages. But that a *venire facias de novo* muſt go, for *where a man may have an attaint, there no damages ſhall be aſſeſſed by the court, if they be not found by the jury.* And this is an aſſumpſit in which damages are the whole object of the writ and ſuit, and though iſſue be joined upon a fact in abatement, yet, as to the defendant, it is concluſive, to all intents and purpoſes, and involves the damages upon finding the fact againſt him, and if outrageous damages had been given, an attaint would have laid. *A venire facias de novo* was accordingly awarded.

Actions.

Tonſon *v.* Collins, Tr. 2 Geo. 3. and M. 3 Geo. 3. B.R. 1 *Black. Rep* 301, 321. 4 *Burr.* 2327, 2400.

IF an action be brought colluſively to obtain the opinion of the judges upon a doubtful queſtion, the court, on diſcovery of the colluſion, will refuſe to proceed in the cauſe. In this caſe, the queſtion reſpecting literary property was brought before the court upon a ſpecial verdict, but after two arguments, as the court ſuſpected that the action was brought by colluſion, and a nominal defendant ſet up, in order to obtain a judgment, which might be a precedent againſt third perſons; and that therefore a judgment in favour of the plaintiff would certainly have been acquieſced in; upon this ſuſpicion, and becauſe the court inclined to the plaintiff, it was ordered to be heard before all the judges in the exchequer chamber. Afterwards, upon certain information received by the judges, "*that the whole was a colluſion*; that the defendant was *nominal* only; and *the whole expence* paid by the plaintiff;" they refuſed to proceed in the cauſe, though it had been argued *bona fide*, and very ably, by the counſel who appeared for the defendant. They thought this contrivance to get a colluſive judgment, was an attempt of a dangerous example, and therefore to be diſcouraged.

Action upon the Caſe.

Millar *v.* Taylor, Ea. 9 Geo. 3. B.R. 4 *Burr.* 2345.

THE remedy by action on the caſe, is ſuited to every wrong and grievance that the ſubject may ſuffer from *a ſpecial* invaſion of his right, for this ſort of action varies according to the variety of the caſe. *Per Aſton*, J.

I. *Diſtinction between Treſpaſs and Caſe.*

Haward *v.* Banks M. 1 Geo. 3. B.R. 2 *Burr.* 1113.

The diſtinction between treſpaſs and caſe, is this: *immediate damage* to the plaintiff's property, is a ground for treſpaſs; *conſequential damage* to it, is a ground for caſe.

Therefore, in an action *upon the caſe*, for damage done to the plaintiff's colliery, by what the defendant had done *in his own colliery*, and within *his own ſoil*; which colliery belonging to the defendant, lay near to that of the plaintiff, and communicated *with it*, though not *immediately* but *mediately*, there being ſome other collieries lying between them, where there was a verdict for the plaintiff; it being objected, on a motion in arreſt of judgment, that the counts were really and eſſentially in treſpaſs (though laid as in caſe) and that treſpaſs and treſpaſs upon the caſe could not be joined in the ſame action: The court over-ruled the objection, and ſaid, the plaintiff deſcribes, in his declaration, a fact, which, as it comes out at the trial, may, or may not, be a proper ſtrict

treſpaſs, it might, at the trial, be proved to be either treſpaſs or caſe, either one or the other of them, according to the evidence; and it appears, that it was here proved at the trial to be treſpaſs upon the caſe. If it had been proved to be treſpaſs *vi & armis*, the plaintiff muſt, in *that event*, have been nonſuited. Before the trial, it ſtood indifferent, whether it would come out to be the one or the other. However, in the nature of the thing, it muſt be a conſequential damage, as the act complained of was done upon the plaintiff's *own* ſoil.

So, in an action of treſpaſs *upon the caſe*, where the plaintiffs declared that they had *the ſole liberty and privilege* of digging for, getting, and raiſing lead ore, and taking the benefit thereof, in a certain place; but that the defendants, to deprive them thereof, did ſink for, raiſe, and get, within the ſame place a great quantity of ore, and convert the ſame to their own uſe; on the general iſſue pleaded, at the trial, a verdict was given for the plaintiff, with a ſhilling damages, ſubject to the opinion of the court upon two queſtions: one of which was, whether, for this injury, an action on the caſe will lie, or an action of treſpaſs only? And it was urged, that the diſtinction between *treſpaſs*, and treſpaſs upon the caſe, is, that where the act is itſelf *immediately* injurious to the plaintiff, he muſt bring *treſpaſs*, but where it is ſo only in *conſequence*, caſe is the proper remedy; that here the injury complained of was *immediate* and not conſequential, the act of the defendants which immediately affected the plaintiffs *was digging for the lead ore within their limits, and thereout raiſing it:* and this diſtinction is ſettled, that if the plaintiff might and ought to have brought treſpaſs, caſe will not lie. BY THE COURT, it appears that the plaintiffs were in poſſeſſion of the mine, and the injury done is a treſpaſs, therefore the proper action, is an action of treſpaſs; whoever is in poſſeſſion may maintain an action of treſpaſs againſt a wrong done to his poſſeſſion. We are all clear that the action ought to have been treſpaſs, and the *poſtea* muſt be delivered to the defendants.

Harker, & *al.* v. Birkbeck, & *al.* Tr. 4 Geo. 3. B.R. 3 *Burr.* 1556. 1 *Black.* 482.

And in another caſe, it was laid down that wherever there is an excluſive right, treſpaſs *vi & armis* is the proper remedy: for in an action of treſpaſs for entering the plaintiff's cloſe, and digging and carrying away his turf and peat, upon the general iſſue pleaded; there was a verdict for the plaintiff, ſubject to the opinion of the court, whether *the action was maintainable?* It appeared in evidence upon the trial, that the plaintiff was ſeiſed in fee of a freehold tenement, in the manor of Upper Stavely, in which manor there was a large waſte, with divers large moſſes thereon, out of which turfs and peats were uſually dug: and that the plaintiff, and all thoſe whoſe eſtate he had in the ſaid tenement, had, time out of

Wilſon v. Mackreth, H. 6 Geo. 3. B. R. 3 *Burr.* 1824.

of mind, had and uſed *an excluſive right* of digging turfs in a certain moſs in the ſaid waſte, called Carr Moſs, marked and bounded out from the other tracts of moſs in the ſaid waſte, by certain meer ſtones. *The objection was, that it ought to have been an action on the caſe*; becauſe the plaintiff had *no right of ownerſhip*, either in the ſoil, or in the profits of the ſoil, but only a right to dig for turf. But by Lord *Mansfield*, Ch. J. the plaintiff's right is in a ſeveral piece of ground, butted and bounded; a ſeparate right of property, to take the profit of the turf, and to dig it for that purpoſe. The plaintiff has this right excluſively of all others, and the defendant has diſturbed him in it; therefore treſpaſs lies, though he has not an abſolute right to the ſoil: *Wilmot*, J. if this was *only a right of common of turbary*, treſpaſs would not lie; but *this is an excluſive right to dig turf*. This muſt be taken to be a grant from the lord of the ſoil. He ſtands in the place of the lord of the manor. The property of the turf is in the plaintiff; no other perſon could maintain this action; therefore he may. There is a difference between *excluſive* rights, and right of common: in the former caſe, the grantee may take away thorns cut, but the commoner cannot. Theſe moſſes are ſevered, and the others are enjoyed by other people. This is deciſively *a ſeparate right*; and therefore the plaintiff may ſupport this action of treſpaſs. *Yates*, J. ſaid it was a clear caſe; for *wherever there is an excluſive right, treſpaſs lies*. And this is clearly an excluſive right. I do not ſee that this right differs from a right to a ſole and ſeparate paſture for a time; and in that caſe during that time treſpaſs lies. *Aſton*, J. of the ſame opinion.

Morgan v. Hughes, H. 28 Geo. 3. B.R. 2 *Ter. Rep.* 225.

So, alſo, in an action for a malicious proſecution, *if the immediate act of impriſonment* proceeds from the defendant, the action muſt be treſpaſs and treſpaſs only: but where the act of impriſonment by one perſon is in conſequence of information from another, there an action upon the caſe is the proper remedy, becauſe the injury is ſuſtained *in conſequence* of the wrongful act of that other: therefore, where the plaintiff declared, in a ſpecial action on the caſe, that the defendant being a juſtice of the peace, *without any charge or accuſation* having been made to him againſt the plaintiff, made his certain warrant under a pretended charge of felony, directed to the conſtable, by virtue of which the plaintiff was taken and arreſted by ſuch conſtable, and in priſon kept, from 14th July, until 1ſt September; there was a ſpecial demurrer, and one cauſe aſſigned was, that "the ſaid ſuppoſed impriſonment in the ſaid declaration mentioned was, "if committed at all by the defendant, a direct treſpaſs "and injury to the perſon of the plaintiff, and a falſe im-"priſonment of the plaintiff with force and arms, and

"againſt

" againſt the peace of our lord the king; and the plaintiff " ought, for ſuch injury, to have brought an action of treſ- " paſs, and not an action of treſpaſs on the caſe." Upon this there was judgment for the defendant: for, by *Aſhurſt*, J. (after noticing the general doctrine) here the act of impriſonment was by the defendant alone; for it cannot be ſaid to be the falſe impriſonment of the conſtable, who was bound to execute the warrant of a juſtice, having competent juriſdiction; and therefore if it were not an impriſonment by the defendant, it was not an impriſonment by any perſon. But where a perſon is committed to priſon by the warrant of a juſtice, without any accuſation, ſome perſon is guilty of falſe impriſonment, and it muſt be the impriſonment of the juſtice, *who is the immediate*, and not the remote cauſe of it. *Buller*, J. the gravamen in the preſent caſe is, that the defendant perſonally took and arreſted the plaintiff illegally, and impriſoned him. This is falſe impriſonment, and is an immediate injury to the perſon of the plaintiff; and it is ſtated on the record, that the warrant was illegally granted; and it never was doubted but that in ſuch a caſe treſpaſs was the proper remedy.

So in an action of treſpaſs, aſſault, and falſe impriſonment, the facts given in evidence on the trial were, that the defendant, whoſe pocket had been picked at the play-houſe, ſuſpected the plaintiff; and having laid hold of him, gave him in charge to a conſtable who was preſent, and to whom ſhe had before communicated her ſuſpicions; the plaintiff was taken to the office in Bow Street, where the defendant ſtill perſiſted in her charge againſt the plaintiff: but after ſome examination, it appeared that the defendant was miſtaken in her ſuſpicions of the plaintiff, and he was releaſed. It was objected that the plaintiff had miſconceived his action; that he ſhould have brought an action on the caſe for making the malicious charge, and that treſpaſs would not lie in ſuch a caſe as the preſent: the cauſe, however, proceeded, and the plaintiff obtained a verdict, ſubject to the opinion of the court, whether the action, in its preſent form could be maintained: afterwards on a motion to ſet aſide the verdict, and enter a non-ſuit? The council for the plaintiff having mentioned and relied on the above caſe of Morgan *v.* Hughes, were ſtopped by the court—Lord *Kenyon*, Ch. J. I thought, at the trial, that as the conſtable's power to arreſt, *flagrante delicto*, for the purpoſe of putting the ſuppoſed offender into a courſe of juſtice, was allowed by the law, the perſon making the charge could only be liable in an action on the caſe for making ſuch a charge maliciouſly; but I am now ſatisfied that treſpaſs will lie in this caſe, this having been the conſtant courſe of proceeding.

Stonehouſe *v.* Elliott, Tr. 35 Geo. 3. B.R. 6 *Ter. Rep.* 315.

And

Savignac v. Roome, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 129.

And it is of importance, that the boundaries between the different actions ſhould be preſerved; for if in an action of treſpaſs the plaintiff recover leſs than 40 s. he is entitled to no more coſts than damages; whereas a verdict with nominal damages only, in an action on the caſe, carries all the coſts.

Bird v. Randall, Mic. 3 Geo. 3. B.R. 3 *Burr.* 1353. 1 *Black.* 388.

And there is an eſſential difference between actions upon torts and joint contracts; and actions upon the caſe: the firſt are actions *ſtricti juris*, and therefore a former recovery, releaſe, or ſatisfaction cannot be given in evidence, but muſt be pleaded; but an action upon the caſe is founded upon the mere juſtice and conſcience of the plaintiff's caſe, and is in the nature of a bill in equity, and, *in effect*, is ſo; and, therefore, ſuch a former recovery, releaſe, or ſatisfaction, need not be pleaded, but may be given in evidence. For, whatever will, in equity and conſcience, according to the circumſtances of the caſe, bar the plaintiff's recovery, may in this action be given in evidence by the defendant, becauſe the plaintiff muſt recover upon the juſtice and conſcience of his caſe, and upon that only.

II. *Action upon the Caſe for Slander of Title.*

Hargrave v. le Breton, Ea. 9 Geo. 3. B.R. 4 *Burr.* 2422.

To maintain an action for ſlander of title, there muſt be *malice*, either expreſs or implied, and the words ſpoken muſt go to defeat the plaintiff's title.—In an action upon the caſe *for ſlander of the plaintiff's title*, there was a verdict for the plaintiff, with 50l. damages; and the defendant moving to ſet it aſide, and to have a new trial, the caſe appeared to be as follows: the defendant, who was an attorney, went to a public ſale by auction, as a meſſenger from, and agent of a Mr. Lee, who was a creditor of one Loveday, who had committed an act of bankruptcy, and whoſe eſtate, which he had mortgaged to the plaintiff, was then ſelling, for the benefit of the parties reſpectively intereſted therein, and by their joint agreement, and ſaid, that *he was ſent by one of Mr. Loveday's creditors, to acquaint them Mr. Loveday was a bankrupt, before he made a mortgage to the plaintiff, and that there was a docket made out for a commiſſion againſt him, and that his name would be in the Gazette on the Saturday evening following*; by which the bidding immediately ceaſed, and the eſtate remained unſold. What the defendant declared was partly true and partly otherwiſe: it was true that *he was really ſent by his client, Mr. Lee, who was a creditor of Loveday*, on purpoſe to make this public declaration, at the auction, of Loveday's being a bankrupt before he made the mortgage to the plaintiff, *and that he intended to take out a commiſſion againſt him*; but it was not true in fact, nor did Mr. Lee, his client, authorize him

him to say, *that there was a docket made out for a commission against him, nor that his name would be in the Gazette* on the Saturday evening following, neither was there any docket or commission, nor had his name ever appeared in the Gazette. However, no *actual malice* was either alleged or proved, but the counsel for the plaintiff inferred malice from his false assertion, which was merely his own, without any authority from his client; and which, they said, he could not but know to be false, as he was himself Mr. Lee's attorney, and the person to be employed in suing out the commission of bankruptcy, if it had been sued out at all. Lord *Mansfield* delivered the opinion of the court, as follows: It is to be considered, in point of law, FIRST, "Whether this "action would have lain against the defendant, if he had "only delivered the message in *his client*'s own words?" And SECONDLY, "Whether *the variation* he made from "them will subject him to this action?"—As to the FIRST, we are all clear, that *it would not:* he is not more liable to the action than the creditor himself would have been. He was sent by his client to make this declaration, and *qui facit per alium, facit per se.* But the plaintiff could not have recovered against his client, for *to maintain such an action as this there must be malice either express or implied; and the words spoken must go directly to defeat the plaintiff's title*; but in this case, the assertion does not go to defeat the plaintiff's title. Neither is there any malice, either express or implied. The words of the message sent by the client are true, and they proceed from a person called upon to give notice, either to protect his own property, or (what is his duty, as a moral act) to save another from being cheated. The client had notice of Loveday's bankruptcy, he had an interest in his effects, and was intitled to take out a commission against him. He reads an advertisement for the sale of Loveday's estate. He was thereby *called upon*, in order to preserve his own interest, and that of the rest of the creditors, as an honest and prudent man, to give this notice. For if the estate had been purchased without notice of the bankruptcy, such purchaser would have been protected by a satisfied term prior to the act of bankruptcy still standing out (1). When an auction was advertised, and was proceeding, for the sale of his estate, with intent to cheat purchasers by a false title, shall not he, as an honest man, give this notice, and prevent iniquity? But here this man had a property of his own to secure: he was a creditor of Loveday, and intended to sue out a commission. We are clear,

(1) The plaintiff, to whom the premisses had been mortgaged, had also got in a prior assignment of them.

that, *under ſuch circumſtances*, malice cannot be implied.—As to THE SECOND QUESTION, whether the defendant's varying from the meſſage he was charged with, and adding more than he was commiſſioned to declare, or even authorized to ſay in point of ſtrict truth, will ſubject him to this action?—It appeared that his client had *told* him that he would take out a commiſſion that night; and if he had done ſo, Loveday's name would have been in the Gazette on the Saturday evening following; ſo that there was no material variation from what he was commiſſioned by his client to ſay: nor did it make any difference with regard to the plaintiff or his title; for Loveday was then become bankrupt, and liable to a commiſſion, which commiſſion might have been taken out upon that day, and the bankrupt's name inſerted in the Gazette of the Saturday evening following.—Verdict ſet aſide, with coſts, and new trial ordered.

III. *Action upon the Caſe for Slander of the Perſon.*

Onſlow *v.* Horne, Ea. 11 Geo. 3. C.B. 3 *Wilſ.* 186. 2 *Black.* 750.

The firſt rule whereby courts of juſtice have governed themſelves, in order to determine words ſpoken of another to be actionable, is, that the words muſt contain an expreſs imputation of ſome crime liable to puniſhment, ſome capital offence, or other infamous crime or miſdemeanor, and the charge upon the perſon ſpoken of muſt be preciſe.

Oldham *v.* Peake, M. 15 Geo. 3. 2 *Black.* 959, affirmed by the court of King's Bench, on a writ of error, Ea. 15 Geo. 3. *Cowp.* 275.

Thus, the words, *you are a bad man, and "I am thoroughly convinced" you are guilty of "the death" of Dolly* (meaning of the murder of the ſaid Dolly) *and rather than you ſhould want a hangman, I would be your executioner*, are actionable. For, firſt, as to the certainty of the charge, *I am thoroughly convinced* is equal to poſitive averment; for a man only avers a thing becauſe he is convinced of the truth of it. Secondly, death muſt, in this caſe, be underſtood to mean murder: for, when the converſation was of the death of Dolly, and the defendant ſaid the plaintiff was guilty of it (1), he muſt infer ſuch a ſpecies of death as would infer guilt, and murder is ſuch a ſpecies; the inuendo is not therefore contradictory, but explanatory, not introductory of new matter, but aſcertaining the meaning, and uniting the general word death, to the particular ſpecies of it, murder, the inuendo is therefore ſufficiently regular; and whether it is true or not that ſuch was the defendant's meaning, is a fact for the conſideration of the jury. Beſides, the defendant, in order to explain his meaning, goes on, and ſays, *and rather than you ſhould want a hangman, I would be*

(1) If the words had been, *you were the cauſe of his death*, it might have been very different, as a man might be an innocent cauſe.

your

your executioner; which words plainly ſhew what ſpecies of death the defendant meant; and, therefore, in themſelves, manifeſtly import murder.

Alſo, the words *he* (meaning the plaintiff) *was put into the round-houſe, for ſtealing ducks, at Crowland*, which were alleged in the declaration to be ſpoken of the defendant *falſely and maliciouſly*, have upon motion in arreſt of judgment, after verdict, been held to be actionable. For, by the court, we muſt take it upon this record, that the plaintiff was really not put in the round-houſe or impriſoned for ſtealing of ducks, becauſe the jury have found that the words were falſely ſpoken; the words clearly import that the plaintiff had been guilty of a crime; and if the fact had been true, the defendant might, and ought to have juſtified. We lay great ſtreſs upon the word *falſe*; if words are true, they are no ſlander, but may be juſtified. The objection here is, that the words do not expreſsly allege that the plaintiff ſtole ducks; but words are to be taken according to the common *parlance*, and to be ſpoken in the worſt ſenſe, according to the common underſtanding of the bye-ſtanders; the words in the preſent caſe muſt be taken to be *falſe*, and to throw a ſtain upon the plaintiff's character. Beavor *v.* Hides, Ea. 6 Geo. 3. C.B. 2 *Wilſ.* 300.

But where the words were, "*Tim Holt* (meaning the plaintiff) *has* FORSWORN *himſelf*," (meaning that the plaintiff had committed wilful and corrupt perjury) *and I* (meaning the defendant) *have three evidences that will prove it.* Upon motion in arreſt of judgment after verdict, objection was taken that *theſe words are not in themſelves actionable*, becauſe they do not neceſſarily imply that the plaintiff had *forſworn* himſelf in a judicial proceeding, which alone will conſtitute the crime of perjury; and the meaning of them cannot be varied by an inuendo, unleſs with reference to ſome colloquium (which is not here ſtated) from whence it might appear that the words were ſpoken concerning ſome judicial proceeding that had before taken place, in which the plaintiff had given teſtimony, and which ought to have been averred, in order to warrant the inuendo: and of this opinion were the court; for, by Lord *Kenyon*, Ch. J. either the words themſelves muſt be ſuch as can only be underſtood in a criminal ſenſe; or it muſt be ſhewn by a colloquium in the introductory part of the declaration, that they have that meaning: and he added, that he remembered a caſe, where the judgment was arreſted on an information for a libel on ſome juſtices in Suffolk, becauſe there was no averment that the libel was of and concerning the juſtices in Suffolk. *Groſe*. J. there is a diſtinction in the books between being *perjured*, and being *forſworn*; the former means falſe ſwearing in a judicial proceeding, but the other has not the ſame meaning. *Lawrence*, J. if the words Holt *v.* Scholefield, Tr. 36 Geo. 3. 6 *Ter. Rep.* 691.

here are not actionable *in themſelves*, their meaning cannot be extended by an inuendo; and it is clear that *forſworn* cannot be extended by an inuendo to mean falſe ſwearing in a court of juſtice.

Savile *v.* Jardine, Tr. 35 Geo. 3. C.B. 2 Hen. *Black.* 531.

Alſo the word *ſwindler* is not actionable, it has no definite meaning; it only imports in common acceptation *a cheat*; and to call another *a cheat*, has always been holden not to be actionable (1).

Onſlow *v.* Home, Ea. 11 Geo. 3. C.B. 3 *Wilſ.* 187. 2 *Black.* 750.

Another general rule whereby courts of juſtice have governed themſelves, in order to determine words ſpoken of another to be actionable is, that words are actionable when ſpoken of one in an office of profit, which may probably occaſion the loſs of his office: or when ſpoken of perſons touching their reſpective trades, profeſſion, and buſineſs, and do, or may, probably tend to their damage.

Thus, for the imputation of *ignorance* to one in a profeſſion, or an office of profit, an action will certainly lie (2).

Day *v.* Buller, Ea. 10 Geo. 3. C.B. 3 *Wilſ.* 59.

Therefore the words, *What, does he pretend to be a lawyer? he is no more a lawyer than the devil!* being ſaid of an attorney, are actionable: for to ſay of an attorney he is no lawyer, is a great reflection on him, and means that he does not underſtand his buſineſs. The words are as great a ſlander upon ſuch a perſon, and as injurious to him as any words can be.

Berryman *v.* Wiſe, Tr. 31 Geo. 3. B.R. 4 *Ter. Rep.* 366.

And in an action by an attorney for words ſpoken of him in his profeſſion, he need not prove that he is an attorney by his admiſſion, nor by a copy of the roll of attornies; proof that he acted as ſuch is ſufficient.--This was an action by an attorney, for words ſpoken of him in his profeſſion, charging him with having ſwindled a perſon out of a ſum of money, by whom he had been employed in a certain ſuit, and threatening to have him ſtruck off the roll. The plaintiff proved the words, and alſo his having been employed as attorney in that and ſeveral other ſuits: it was objected for the defendant, that the plaintiff ſhould have proved that he was an attorney, by producing his admiſſion, or a copy of the roll of attornies; but the judge was of opinion that the evidence offered was ſufficient, and over-ruled the objection, reſerving the point. Afterwards, on a motion for a new trial, the court concurred with the judge.

---

(1) It ſeems that the reaſon the calling a man a thief is actionable, but the calling him a *cheat* is not ſo, is becauſe thief always implies felony, but cheat not always, 2 Hen. *Black.* 531. But to call another a *rogue*, and add, *thou haſt cheated me of ſeveral pounds*, is actionable, Surman *v.* Shellato. Ea. 5 Geo. 3. B.R. 3 *Burr.* 1688.

(2) But it ſeems that to impute *ignorance* to a perſon in an office of *credit* only, ſuch as a juſtice of peace, is not actionable. See 2 *Salk.* 694, and 3 *Wilſ.* 186.

But

But to impute to any man the mere defect or want of moral virtue, moral duties or obligations, which render a man obnoxious to mankind, is not actionable (1).

Thus, where the defendant ſaid at a public county meeting, convened for the purpoſe of ſupporting the rights of election: *as to inſtructing our members to obtain redreſs, I am totally againſt that plan; for as to inſtructing Mr. Onſlow, we might as well inſtruct the winds; and ſhould he even promiſe his aſſiſtance, I ſhould not expect him to give it us.* For theſe words Mr. Onſlow brought his action; and having on the trial of the cauſe, obtained a verdict for 400l. damages, it was moved, in arreſt of judgment, on the ground that the words were not actionable; and of that opinion were the court, after ſolemn argument. *De Grey*, Ch. J. this is a civil ſuit for a reparation or ſatisfaction in damages for a ſuppoſed private injury; but if every imputation like this, ſpoken upon ſo public and popular an occaſion, was to be deemed actionable, public buſineſs would be impracticable. There muſt be ſome certain or probable temporal loſs or damage to make words actionable; as to ſay, a woman is a whore in London, where ſhe is ſubject to be whipt for whoredom, or to impute to a woman want of chaſtity, who holds an eſtate *dum ſola & caſta fuerit.* Now, in this caſe, it doth not appear to the court, that the leaſt perſonal damage, or probability of damage, is likely to happen to the plaintiff, for ſpeaking the words, "*as to inſtructing our members to obtain redreſs, I am totally againſt that plan.*" The defendant doth not point out any mode of inſtruction for redreſs, or what kind of redreſs he wiſhes or deſires: whether he deſires an application to the king, the parliament, or a court of juſtice, doth not appear: whether it was intended to be endeavoured to be obtained by vote, petition, motion, or bill in parliament, doth not appear. So we think theſe words injure nobody. The other words: "*for as to inſtructing Mr. Onſlow, we might as well inſtruct the winds,*" the defendant was of opinion that the plaintiff was wavering as the winds; whereby he meant that inſtructions to him would be ineffectual; or that he would have no good will to ſerve the cauſe of that public meeting of the freeholders of Surrey. This is mere opinion, *not imputing any thing to Mr. Onſlow, whereby he ſuſtains any preſent damage; nor can we ſee any probability of his ſuffering any future damage thereby.* The other words are, "*and ſhould he*

Onſlow v. Horne, Ea. 11 Geo. 3. C.B. 3 *Wilſ.* 187. 2 *Black.* 750.

(1) Notwithſtanding the general terms in which this principle is laid down by the learned chief juſtice *De Grey*, it can only apply to perſons in the ordinary ſituations of life; for to impute vice and immorality to thoſe who hold eccleſiaſtical or religious eſtabliſhments, or ſuperintend the inſtruction of youth, is certainly actionable.

" *even promiſe his aſſiſtance, I ſhould not expect him to give it* " *us.*" Mr. Horne's declaring his opinion of Mr. Onſlow's promiſes, cannot be any poſſible damage to Mr. Onſlow: to be ſure, the words cannot be underſtood to be ſpoken in his honour; but I will ſuppoſe them to be ſpoken moſt maliciouſly, yet we are all of opinion they are not actionable, let the malice of the defendant have been ever ſo great on that occaſion. *In the caſe of a malicious proſecution, let the malice be ever ſo great, yet if there was a reaſonable and probable cauſe for the proſecution, no action lies.* The arreſting the judgment in this caſe doth not contradict the jury; they thought this a popular ungentleman-like reflection upon the plaintiff; but every popular reflection upon a gentleman is not ſuch a ſcandal for which the law will give him an action. The words do not relate to Mr. Onſlow's paſt conduct in parliament; they do not charge him with breach of his duty, his oath, or any crime or miſdemeanour, whereby he has ſuffered any temporal loſs in fortune, office, or in any way whatſoever; there is no occaſion to ſay any thing concerning any future preſumptive contingent damages which Mr. Onſlow may poſſibly ſuſtain at ſome future time (nobody knows when) by reaſon of the defendant's reflection upon him. I know of no caſe where ever an action for words was grounded upon eventual damages which may poſſibly happen to a man in a future ſituation, notwithſtanding what the chief juſtice throws out in 2 *Ventriſs.* p. 266. where he is made to ſay, " that when a man had " been in an office of duty, to ſay that he behaved him- " ſelf corruptly in it, as it imported great ſcandal, *ſo it* " *might* prevent his coming into that or the like office again, " and therefore was actionable;" and I think the counſel went a little too far, when they ſaid that the words imported, that Mr. Onſlow would betray his truſt, would, as member for Surrey, betray his conſtituents: we think they mean no more than that the defendant was of opinion Mr. Onſlow *would break his word*; but to ſay, *he has broke his word*, is not actionable, *à fortiori*, the words in this count are not actionable.—Judgment arreſted *per tot. cur.*

Purdy *v.* Stacey, H. 11 Geo. 3. B.R. 5 *Burr.* 2698.

Alſo, on a motion in arreſt of judgment, after a general verdict for the plaintiff in an action for defamatory words, charging the plaintiff with having given 200l. for a warrant to be purſer of a man of war, but *not ſpecifying to whom* he gave the money, judgment was arreſted. The queſtion was, whether the words of the declaration imported that the plaintiff *gave the money to the commiſſioners of the admiralty* for this warrant? If the words had clearly imported that he gave money to the commiſſioners themſelves, who had the diſpoſal of the warrant, the court had no doubt but that would have been a corruption of a public truſt, and

and a crime both in the commiſſioners, and the perſon tempting them to ſuch corruption; and, conſequently, the words would have imported a criminal charge, and been actionable. But they declared it to be their opinion, that the charge was ſo looſe, that it did not of itſelf import a crime: and nothing can be intended; no averment of the meaning of the words by an inuendo. If the plaintiff does not ſhew that the words are actionable, that defect cannot be ſupplied. Now here is nothing that ſhews *to whom* this money was given; and as it is not averred, we cannot intend it. If the commiſſioners of the admiralty were to take money for their warrant to appoint a perſon to be purſer, it would be criminal in the corrupter and corrupted. But there are caſes where it may not be unlawful to give money to other perſons. In the preſent caſe, it is defectively laid, and does not appear to be defamation, or a charge of any indictable crime.

Likewiſe, theſe words ſpoken of a woman, "I have kept "her common theſe ſeven years; ſhe *hath* given me the "bad diſorder, and three or four other gentlemen," are not actionable; for the defendant having libelled the plaintiff in the archdeacon's court of Exeter for ſpeaking the above words, *a prohibition was moved for, after ſentence, on the ground that the words ſpoken were actionable*; and that the court below had therefore no juriſdiction. Againſt the prohibition it was contended, that this application being made after ſentence, unleſs it appeared on the face of the proceedings, that the court below had no juriſdiction over the ſubject-matter, a prohibition ought not to be granted; and here theſe words were not actionable in themſelves; that there are two grounds on which words are actionable, as producing a temporal damage: *firſt* charging a perſon with having committed a crime, for which he may be afterwards puniſhed; and, *ſecondly*, charging a perſon with *having at the time*, a contagious diſorder. But charging a man with the firſt of theſe at a time paſt is actionable, becauſe he is liable to puniſhment at any diſtance of time: but that the latter charge does not ſubject the perſon making it to an action, unleſs it be confined to the preſent time; ſince *the having* had a contagious diſorder, is no reaſon why his ſociety ſhould be avoided in future. And of this opinion were the court; for, by *Aſhhurſt*, J. it ſeems, on the whole, that the court below had a juriſdiction over the ſubject-matter. If the plaintiff had called the defendant *a whore*, ſuch a charge would have given the court below juriſdiction; and theſe words, *he hath kept her common theſe ſeven years*, are tantamount to it. Then, notwithſtanding the latter words, if the archdeacon's court had a juriſdiction as to part of the charge, theſe latter words would not make any difference; as to

Carſlake v. Mapledoram, E. 28 Geo. 3. B.R. 2 *Ter. Rep.* 473.

thoſe the diſtinction has been properly taken. Charging a perſon with having committed a crime is actionable, becauſe the perſon charged may ſtill be puniſhed; it affects him in his liberty; but charging another with *having had* a contagious diſorder, is not actionable; for unleſs the words ſpoken impute a continuance of the diſorder at the time of ſpeaking them, the giſt of the action fails, for ſuch a charge cannot produce the effect which makes it the ſubject of an action, namely, his being avoided by ſociety. Therefore, unleſs ſome ſpecial damage be alleged in conſequence of that kind of charge, the words are not actionable. *Buller*, J. after ſentence, it is incumbent on the party making this application, to ſhew clearly that the ſpiritual court had no juriſdiction. If therefore it be doubtful, it is an anſwer to the application. Now, in this caſe, it is taking the words againſt their natural import, to ſuppoſe that they were ſpoken of the preſent time. If they relate to time paſt, I do not think they are actionable. There is no diſtinction between a charge of this ſort, and a charge of the leproſy, which is to be found in the old books. In thoſe caſes, it is ſaid, that a charge of *having had* ſuch a diſorder, is no imputation on another, ſince it does not ſubject him to any of the inconveniencies attending the having of ſuch a diſeaſe; ſo, of all other diſorders which are contagious: the reaſon why the making ſuch a charge is actionable is, becauſe the having a contagious diſorder renders the perſon an improper member of ſociety; but there is no reaſon why the company of a perſon who *has had* a contagious diſorder ſhould be avoided; and therefore ſuch a charge is not actionable. *Groſe*, J. of the ſame opinion.

Edmondſon *v.* Stephenſon & *ux.* Sittings at Weſtminſter after Ea 6 Geo. 3. B.R. *Buller's* N.P. 8.

So, when words are ſpoken in confidence, and without malice, no action lies; therefore, where A. a ſervant, brought an action againſt her former miſtreſs, for ſaying to a lady who came to enquire for the plaintiff's character, that ſhe was ſaucy and impertinent, and often lay out of her own bed; but was a clean girl, and could do her work well: though the girl proved, that ſhe was by this means prevented from getting a place, yet, per Lord *Mansfield*, this is not to be conſidered as an action in the common way, for defamation by words; but that *the giſt of it muſt be malice, which is not implied from the occaſion of ſpeaking, but ſhould be directly proved*; that it was a confidential declaration, and ought not to have been diſcloſed; but if, without ground, and purely to defame, a falſe character ſhould be given, it would be a proper ground for an action.

Hargrave *v.* Le Breton, Ea. 9 Geo. 3. B.R. 4 *Burr.* 2425.

Alſo, in another caſe, Lord *Mansfield* ſaid no action lies for giving *the true* character of a ſervant, upon application made to his former maſter, to enquire into his character,

character, with a view of hiring him; unleſs there ſhould be extraordinary circumſtances of expreſs malice.

Weatherſton v. Hawkins, H. 26 Geo. 3. 1 *Ter. Rep.* 110.

Neither can a ſervant maintain an action againſt his former maſter, for a letter written by him, aſſigning a reaſon for having given a diſadvantageous character of the ſervant, unleſs the latter can prove the words to be *malicious*, as well as *falſe:* for where the defendant had given a diſadvantageous character of a ſervant who had lived with him, and been turned away, to a perſon who applied for his character, and was afterwards called upon repeatedly by the brother-in-law to aſſign a reaſon for giving ſuch a character; in conſequence of which the defendant wrote a letter, containing, among others, the following words: "Two days "ago, I gave him money to go into the city and buy "books; one day I looked over his accounts, article by "article; and in one, a book I well knew the price of, *I* "*found he had charged me one ſhilling more than it coſt, and* "*that ſhilling he kept in his pocket.* The next day, the very "ſame affair, and both theſe days my neighbour Metcalf "was in my ſhop, and knows it well; and ſaid he would not "keep ſuch a man a day, or ſomething to that purpoſe. *Two* "*magazines he charged two ſhillings for binding; the people* "*received no more than one ſhilling and eight-pence, and ſay* "*he paid no more.* This I can prove." This letter was written with an intent to prevent an action by the plaintiff for the words ſpoken by the defendant, but a writ was ſued out on the ſame day the letter was written; and upon the trial, at the ſittings at Guildhall, there was a verdict for the plaintiff, ſubject to the opinion of the court on the caſe, and the *queſtion was whether this action would lie?* and the court held that it would not; for, by Lord *Mansfield*, Ch. J. I have held more than once that an action will not lie by a ſervant againſt his former maſter for words ſpoken by him in giving a character of the ſervant; to every libel there may be a neceſſary and implied juſtification from the occaſion. So that what, taken abſtractedly, would be a libel, may, from the occaſion, prove to be none; as if it were read in a judicial proceeding. Words may alſo be juſtified on account of the ſubject matter, or other circumſtances. In this caſe, inſtead of the plaintiff's ſhewing it to be falſe and malicious, it appears to be incident to the application to the maſter of the ſervant for his character; and the letter was written to the brother-in-law of the plaintiff, for the expreſs purpoſe of preventing an action being brought. *Buller*, J. though it is in general not neceſſary in an action for a libel, to prove expreſs malice, it being ſlanderous being ſufficient to imply malice, yet *this is an exception of the general rule, on account of the occaſion of writing the letter.* Then it is incumbent on the plaintiff to prove the falſehood of it; and in actions of this

this kind, unleſs he can prove the words to be malicious, as well as falſe, they are not actionable. On this caſe, it evidently appears that the defendant has been entrapped, becauſe the letter was written on the application of the plaintiff's brother-in-law; and, beſides, the writ was ſued out on the ſame day the letter was written. Judgment for the defendant.

Herver *v.* Dowſon, C.B. Sittings after Tr. 5 Geo. 3. *Buller's* N.P. 8.

So, in an action for ſaying of the plaintiff, who was a tradeſman, *he cannot ſtand it long, he will be a bankrupt ſoon*, where ſpecial damage was laid in the declaration, viz. that one Lane refuſed to truſt the plaintiff for a horſe. Lane, the perſon named in the declaration, was the only witneſs called for the plaintiff; and it appearing on his evidence, that the words were not ſpoken maliciouſly, but in confidence and friendſhip to Lane, and by way of warning to him; and that in conſequence of that advice, he did not truſt the plaintiff with the horſe. *Pratt.* Ch. J. directed the jury, that though the words were otherwiſe actionable, yet if they ſhould be of opinion, that the words were not ſpoken out of malice, but in the manner before-mentioned, they ought to find the defendant not guilty; and they did ſo accordingly.

Avaſillo *v.* Rogers, Guildhall ſittings, Tr. Ter. 1773, before Lord Mansfield, *Buller's* N.P. 5.

The plaintiff muſt prove the words as laid; therefore, if the words be laid in the third perſon, as for inſtance: *he deſerves to be hanged, for a note he forged on A.* proof of words ſpoken in the ſecond perſon, viz. *you deſerve*, &c. will not ſupport the declaration: for there is a great difference between words ſpoken in a paſſion to a man's face, and words ſpoken deliberately behind his back.

Rex *v.* Berry, H. 31 Geo. 3. B R. 4 *Ter. Rep.* 217.

So alſo, on an indictment, for ſaying of a juſtice of the peace, in the execution of his office, that HE *was a broken-down juſtice, a perjured juſtice:* proof that the defendant ſaid YOU *are a broken-down juſtice*, &c. ſpeaking *to* him, and not *of* him, was held inſufficient.

Compagnon & *ux. v.* Martin, M. 12 Geo. 3. C.B. 2 *Black.* 790.

But, though all the actionable words laid in one count of the declaration are not proved, yet if any of the actionable words are proved, it will be ſufficient to ſuſtain a verdict againſt the defendant: thus, where the words were, "I "have been to Newgate, to ſee a poor unhappy young fel- "low, that is going to be tranſported wrongfully, by a very "baſe woman (meaning the plaintiff's wife) who would do "any thing that is bad. She got a perſon to arreſt him falſely "for a debt of 10l. and was not content with that, but ſhe "afterwards ſwore a *falſe* debt of 100l. againſt him; and has "ſworn a robbery againſt him, and tranſported him falſe- "ly." All the words were proved, except as to the debt of 100l. being *a falſe debt*; the witneſs only proving that he ſaid, "ſhe ſwore *a debt* of 100l. &c." the Ch. J. directed the

the jury to give no damages for the words not proved: and they found a verdict for the plaintiff with 5l. damages. It was afterwards moved by conſent, in order to ſave the expence of a new trial, that judgment of nonſuit might be entered, on the ground that *all the words not being ſubſtantially proved, the plaintiff was not entitled to recover any damages.* But the court held it well enough, for that if any actionable words are proved, damages may be given for thoſe. And though, perhaps, in ſtrict regularity, the jury ſhould have found that the defendant did not ſpeak the word *falſe*, but that he was guilty as to all the reſt of the words; yet as no damages were given for that word, they could not upon that account either award a new trial or direct a nonſuit to be entered; it being clear that the plaintiff was entitled to recover ſome damages, and that thoſe given were in no degree exorbitant.

And the plaintiff may, upon the trial, give evidence of a repetition of the words *on days ſubſequent to thoſe laid in the declaration*, for though different words, actionable in themſelves, cannot be given in evidence by way of aggravation, yet *the ſame words* may, though ſpoken at different days: and this practice is founded on good reaſon, for an action for words ſpoken but once would, in moſt caſes, be deemed frivolous, as they might ſo be ſpoken in a heat; and therefore a plaintiff is often under the neceſſity of proving the ſlander repeated, in order to ſhew that it was malicious. Snellger *v.* Shelly, Somerſet Sum. Aſſ. 1780. Eſpin. *Dig.* 520.

Where two actions were brought for words, in the firſt of which the words were laid to be ſpoken by the wife of the defendant; and in the latter by the defendant himſelf; it was moved on the behalf of the defendants, that the two actions might be reduced or conſolidated, becauſe both required the ſame pleas; that the huſband and wife were one perſon in law in civil ſuits, and the huſband was liable to pay all the damages both for his own and his wife's ſlander; and it would ſave expence to the parties. BUT by the court, this cannot be done, for it would be error to join the wife in a declaration for words ſpoken by the huſband *only*; and the declaration would be ill, either upon a demurrer, or in arreſt of judgment. So the motion was refuſed. Swithin *et ux.* *v.* Vincent *et ux.* and Swithin *et ux. v.* Vincent only, Ea. 4 Geo. 3. C. B. 2 *Wilſ.* 227.

Damages in Slander.] If there be ſome counts that are good, and others that are bad, and the evidence upon the trial is only upon ſuch counts as are good and conſiſtent; if there is a general verdict, it may be amended by the judge's notes, and entered up only on thoſe counts that are good; but if there was *any* evidence which applied to the other bad or inconſiſtent counts (as, for inſtance, in an action for words, where ſome actionable words are laid, and ſome not actionable, and Eddowes *v.* Hopkins, E. 20 Geo. 3. B. R. *Doug.* 377.

and evidence be given of both ſets of words, and a general verdict) there the *poſtea* cannot be amended, becauſe it is impoſſible for the judge to ſay on which of the counts the jury had found the damages, or how they had apportioned them. And in ſuch caſe, the only remedy is by awarding a *venire de novo*. *per Buller*, J. and he mentioned an inſtance (1), where Sir Fletcher Norton had moved for, and obtained, a *venire de novo* in a caſe of that ſort.

Holt *v.* Scholefield, Tr. 36 Geo. 3. B.R. 6 *Ter. Rep.* 691.

So, where the plaintiff had obtained a general verdict for 50*l.* damages in an action for ſlander, and it appeared that the declaration in the firſt count charged that the defendant ſaid of the plaintiff *Tim Holt* (meaning the plaintiff) *has forſworn himſelf*; the ſecond, *you know he is perjured*; the third, *he was perjured*; and the fourth, *you* (the plaintiff) *are perjured*, it was moved that the judgment might be arreſted for a defect in the firſt count; contending that, as the damages were entire, if that count was bad, the judgment muſt be arreſted generally; the objection was, that the words, *he has forſworn himſelf, are not in themſelves actionable.* On the other hand, it was contended, that if the firſt count was defective (which the court decided it was) the other counts, and eſpecially the two laſt, were at all events good, and that *therefore judgment could not be arreſted in toto*, but that there muſt be a *venire de novo*, or the verdict might be amended by the judge's notes, and entered up on the good counts. But *Lawrence*, J. ſaid that the plaintiff ought not to have liberty to amend by the judge's notes in this caſe, *becauſe the evidence* applied as well to the bad, as to the good counts. And THE COURT were of opinion, that there ſhould not be a *venire de novo*; and that as the damages were entire, the judgment ought to be arreſted *in toto*, which it was.

Spencer *v.* Goter, M. 29 Geo. 3. C.B. 1 Hen. *Black.* 78.

In an action for words, the action conſiſted of ſix counts, the firſt five of which were for accuſing the plaintiff of being a dog-ſtealer, and ſtealing a dog from the defendant; and the laſt for maliciouſly, and without probable cauſe, giving information before a juſtice of the peace, that there was cauſe to ſuſpect, that a dog which had been ſtolen from the defendant was concealed in the houſe of the plaintiff; cauſing the juſtice to iſſue a ſearch-warrant, and a conſtable to enter the houſe, and ſearch for the dog, which was neither found in the houſe, nor there concealed. At the trial, there was ſufficient evidence to ſupport the counts for words;

(1) This was in the caſe of Auger *v.* Wilkins, B.R. 6 Geo. 2. *Barnes*, 4to *ed.* 478. *Buller*, N.P. 8.

(2) See this part of the caſe, in p. 19. *ſupra.*

but

but it alſo appeared that there was probable cauſe for the defendant's ſuſpicion, and of courſe for his applying for a ſearch-warrant. The judge directed the jury to find for the plaintiff on the counts for the words ſpoken, and for the defendant on the laſt; but they found a general verdict for the plaintiff, with one ſhilling damages, and forty ſhillings coſts. A rule having been granted to ſhew cauſe why the verdict ſhould not be entered for the plaintiff, on the firſt and ſecond counts only, agreeably to the notes of the judge, or why it ſhould not be ſet aſide, and a new trial granted? THE COURT ſaid, they could not alter a verdict, unleſs it clearly appeared on the face of it, that the alteration would be agreeable to the intention of the jury, and that the proper remedy in this caſe was a new trial; to which the parties ſubmitted.

Coſts in Slander.] By the ſtatute 21 *Jac.* 1. *c.* 16. it is enacted, *that in caſe for ſlanderous words to be ſued or proſecuted in the courts at Weſtminſter, or other courts that have power to hold plea thereof, if the damage is found to be under forty ſhillings, the plaintiff ſhall recover no more coſts than damages.*

In the conſtruction of this ſtatute, the following rule has been laid down, *viz.*

Where there are ſpecial damages laid in the declaration, *and the words are in themſelves actionable*, there, if the jury find a verdict for leſs than forty ſhillings, there ſhall be no more coſts than damages; for that is properly no more than an action for words within the ſtatute; the ſpecial damage is only laid as matter of aggravation, and not as the cauſe of action.

Surman *v.* Shelleto, Ea. 5 Geo. 3. B.R. 3 *Burr.* 1688. Collier *v.* Gaillard, Ea. 16 Geo. 3. C.B. 2 *Black* 1062.

But *if the words are not actionable in themſelves*, there ſhall be full coſts: *if ſpecial damages are laid*, though the damages found be under forty ſhillings; for in this caſe, the ſpecial damage is the only cauſe of action (1).

Saville *v.* Jardine, Tr. 35 Geo. 3. C.B. 2 Hen. *Black.* 531.

Thus, where an action was brought for theſe words; *thou art a rogue, and thou haſt cheated me of ſeveral pounds*; laying a ſpecial damage, that the plaintiff, by reaſon of the ſpeaking of ſuch words, loſt his buſineſs; the jury found only one ſhilling damages, but gave forty ſhillings coſts; and it was moved for full coſts, upon the ground that theſe words were not in themſelves actionable. But the court held the latter words, *thou haſt cheated me of ſeveral pounds*, to be actionable, and ſaid the plaintiff muſt be contented with his forty ſhillings coſts.

Surman *v.* Shelleto, Ea. 5 Geo. 3. B.R. 3 *Burr.* 1683.

(1) See the caſe of Moſes Barry *v.* Jeffrey Perry, in 2 Lord *Raymond*, 1588, where this rule was firſt laid down.

So,

Collier *v.* Gaillard, C.B. Ea. 16 Geo. 3. 2 *Black.* 1062.

So, where there was a motion for full coſts in an action for words, after a verdict for only one ſhilling, it appeared that the words were laid in the declaration with a ſpecial damage, and were as follows: "that at a public auction a ſmall glaſs bottle being miſſing, the defendant ſaid, firſt, *that man*, pointing to and meaning the plaintiff, *has put one in his pocket. I ſaw him take it; he has got it*; meaning to impute to the plaintiff that he had feloniouſly ſtolen it: ſecondly, that he ſaid, *that man has put one in his pocket; I ſaw him take it, and he has got it*; thirdly, that *I ſaw him take it, per quod*, &c. It was held, by the court, that all the words in every count were equally actionable, all the three ſets of words being under one and the ſame introduction, ſtating the good character of the plaintiff, and the intent of the defendant to cauſe him to be ſuſpected of ſtealing, and being under the ſame concluſion; and that therefore being in themſelves actionable, the plaintiff was entitled to no more coſts than damages.

Savile *v.* Jardine, Tr. 35 Geo. 3. C.B. 2 *Hen. Black.* 531.

But in an action for calling another a *ſwindler*, where ſpecial damages were laid, and there was a verdict for only one ſhilling, THE COURT, on a motion for full coſts, held, that the word *ſwindler* was not in itſelf actionable, and therefore made the rule abſolute for the prothonotary to tax the plaintiff his full coſts.

IV. *Action upon the Caſe for a malicious proſecution.*

Farrel *v.* Nun, Tr. 5 Geo. 3. B.R. *Bull.* N.P. 12.

To maintain an action for a malicious proſecution, there muſt be not only a thing done amiſs, but alſo a damage either already fallen upon the party, or elſe inevitable.

Chapman *v.* Pickerſgill, M. 3 Geo. 3. C.B. 2 *Wilſ.* 145.

Thus, an action upon the caſe lies for maliciouſly ſuing out a commiſſion of bankruptcy againſt another, for although the ſtatute 5 Geo. 2. hath given a remedy in the caſe, it hath not taken away the remedy which the party hath at common law: and a more deciſive reaſon is this: by that ſtatute, the petitioning creditor is, among other things, to give bond to the Lord Chancellor, in the penalty of 200*l.* to be conditioned for proving his debt, and the party a bankrupt, before the commiſſioners, and upon any trial at law; and if it appear that the commiſſion was taken out fraudulently or *maliciouſly*, the chancellor may order ſatisfaction to the party grieved, or may aſſign the bond to the party, who may ſue the ſame in his own name. Now this ſtatute-remedy is a moſt inadequate and uncertain remedy; for though there be the moſt outrageous malice and perjury, and the party injured ſuffer to the amount of ten or twenty thouſand pounds, yet the chancellor has no power to give him more than the penalty of 200*l.* Beſides, the method of applying to the chancellor is more tedious, expenſive, and inconvenient,

inconvenient, than this common law remedy; and this caſe, in its nature, is more properly the province of a jury, than of any judge whatever. *Per Pratt*, Ch. J.

The above judgment of the court of common pleas was afterwards affirmed by the court of king's bench, upon a writ of error brought there; for, by Lord *Mansfield*, Ch. J. there is no clauſe in the ſtatute, that takes away the common law remedy, nor that ſays that the party ſhall not recover more than 200l. damages, it never can be for the benefit of trade, that a man ſhould be at liberty to ſue out commiſſions of bankruptcy maliciouſly. Brown *v.* Chapman, M. 3 Geo. 3. B R. 3 *Burr.* 1418. 1 *Black.* 427.

So, an action on the caſe will lie for *falſely and maliciouſly ſuing another, and cauſing him to be arreſted, without any juſt or probable cauſe of action*; for though there are no caſes in the old books of actions for ſuing where the plaintiff had no cauſe of action, yet of late years, when a man is maliciouſly held to bail where nothing is owing, or when he is maliciouſly arreſted for a great deal more than is due; this action has been held to lie becauſe the coſts in the cauſe are not a ſufficient ſatisfaction for impriſoning a man unjuſtly, and putting him to the difficulty of getting bail for a larger ſum than is due. Goſlin *v.* Wilcock, Ea. 6 Geo. 3. C B. 2 *Wilſ.* 302.

The like point was determined in another caſe; and the court then ſaid, the ſting of all theſe kind of actions is malice and falſehood, and injury done in purſuance thereof. Smith *v.* Cattle, Ea. 8 Geo. 3. C.B. 2 *Wilſ.* 376.

And it is neceſſary for the plaintiff to prove malice, either expreſs or implied, and alſo the want of probable cauſe: for, *per* Lord *Mansfield*, the ground of this ſort of action, are malice either expreſs or implied, and the want of probable cauſe, and both muſt concur. Farmer *v.* Darling, M. 7 Geo. 3. B.R. 4 *Burr.* 1971.

But the eſſential ground of the action is, that a legal proſecution was carried on *without any probable cauſe*, becauſe every other allegation may be implied from this; but this muſt be ſubſtantially and expreſsly proved, and cannot be implied. Johnſtone *v.* Sutton in error, M. 27 Geo. 3. 1 *Ter. Rep.* 545.

And the queſtion of probable cauſe is a mixed propoſition of law and fact. Whether the circumſtances alleged to ſhew it probable, or not probable, are true and exiſted, is a matter of fact to be found by the jury: but whether, ſuppoſing them true, they amount to a probable cauſe, is a queſtion of law, to be decided by the court.

From the want of probable cauſe, malice may be, and moſt commonly is implied: yet from the moſt expreſs malice, the want of probable cauſe cannot be implied; for a man, from a malicious motive, may take up a proſecution for real guilt, or he may from circumſtances which he really believes, proceed upon apparent guilt; and in neither caſe is he liable to this kind of action.

And

Croke *v.* Dowling, E. 22 Geo. 3. *Bull.* N. P. 14.

And in an action for maliciouſly holding to bail, the court held, firſt, that it was not neceſſary to prove that there was any affidavit to hold to bail, for the indorſement on the writ is ſufficient: ſecondly, that if the declaration had averred that ſuch an affidavit had been made, an office copy of it would have been ſufficient; but if it were ſtated to have been made by the defendant himſelf, perhaps the original affidavit muſt be produced and proved.

Farrel *v.* Nun, 3 Geo. 3. B.R. *Bull.* N.P. 12.

But this caution muſt be obſerved, to maintain actions in theſe caſes; that the new action muſt not be brought before the firſt be determined.

Fiſher *v.* Briſtow, T. 19 Geo. 3. B.R. *Doug.* 215.

Thus, in an action for a malicious proſecution (for inceſt) in the eccleſiaſtical court, there was a demurrer to the declaration, and the cauſe aſſigned was, that it was not ſtated how the proſecution was diſpoſed of, or that it was ſtill depending; and the court were clearly of opinion, that the objection was fatal, and ſaid it was ſettled, that the plaintiff in ſuch an action muſt ſhew the original ſuit, wherever inſtituted to be at an end; otherwiſe he might recover in the action, and yet be afterwards convicted on the original proſecution.

Morgan *v.* Hughes, H. 28 Geo. 3. B.R. 2 *Ter. Rep.* 225.

So where a ſpecial action on the caſe was brought againſt the defendant, who was a juſtice of the peace, for falſely and maliciouſly granting a warrant againſt the plaintiff, upon a ſuppoſed charge of felony, without any charge or accuſation whatſoever having been made againſt him, and thereby cauſing him to be arreſted and impriſoned from 14th July, until 1ſt September then next following, *when he, the ſaid plaintiff, was releaſed and diſcharged from his ſaid impriſonment* (1); there was a demurrer to the declaration, and the cauſe aſſigned was that it appeared by the declaration that the plaintiff was committed and impriſoned by the defendant, as a juſtice of peace, by virtue of a warrant for a ſuppoſed felony, and that *it did not appear by the declaration, that the plaintiff had ever been tried for or acquitted, or by due courſe of law diſcharged*; and alſo that it did not appear that the ſaid charge or commitment was *without cauſe*. The court were of opinion, that the firſt objection was fatal, and there was judgment for the defendant, for, *per Buller*, J. the grounds of a malicious proſecution, are, firſt, that it was done maliciouſly; and, ſecondly, without probable cauſe; the want of probable cauſe is the giſt of the action: but that is not ſtated here; for *it ſhould have been ſhewn on the face of the record, that the proſecution was at an end*; ſaying that the plaintiff was *diſcharged* is not ſufficient, it is not

(1) For this tort *treſpaſs* only can be brought, and not an *action on the caſe*, See this point in p. 14. *ſupra*.

equal

equal to the word *acquitted*, which has a definite meaning, when the word *acquitted* is uſed, it muſt be underſtood in the legal ſenſe, namely, by a jury on the trial; but there are various ways by which a man may be diſcharged from his impriſonment, without putting an end to the ſuit; if indeed it had been alleged that he was diſcharged by the grand *jury's* not finding the bill, this would have ſhewn a legal end of the proſecution. Neither is there any diſtinction between a malicious commitment, and a malicious proſecution. The preſent is more like the caſe of an action for maliciouſly holding to bail than any other; in which caſe, it muſt be ſhewn that there is an end to the ſuit. The proceſs in a civil ſuit is merely to bring the party into court, and ſo here the warrant is to take up the party, that he may take his trial at the aſſizes.

And an action lies for a malicious proſecution, though the plaintiff be acquitted on a defect in the indictment; for where the plaintiff brought his action for a malicious proſecution, and it appeared that the defendant had indicted the plaintiff as *a conſtable*, for having permitted a priſoner to eſcape out of his cuſtody; upon which indictment the plaintiff had been acquitted becauſe he was *a headborough*, and not a conſtable: it was objected, that the plaintiff could not maintain ſuch action, becauſe he had not been acquitted on the merits; but the court held that the action was maintainable, becauſe a bad indictment ſerves all the purpoſes of malice, by putting the party to expence, and expoſing him, but that it ſerves no purpoſe of juſtice in bringing the party to puniſhment, if he were guilty. Wicks *v.* Fentham, E. 31 Geo 3 B.R. 4 *Ter. Rep.* 247.

But an action on the caſe will not lie againſt a commanding officer for a malicious proſecution before a naval court-martial, for an offence cognizable there; although there may not have been any *probable cauſe*, for it is not a ſubject upon which a common law judicature can exerciſe a juriſdiction. Therefore, where an action on the caſe was brought in the court of exchequer, by the captain of a ſhip of war againſt the commander in chief, and the declaration, after alleging that the plaintiff was not guilty of *wilfully or willingly diſobeying* orders, imputed to the defendant, the commander in chief, having maliciouſly, and *without probable cauſe*, charged the plaintiff with the crimes of diſobedience of orders, and the delay of the public ſervice in which the ſquadron was engaged; and upon that charge, having put him under arreſt, ſuſpended him from his command, ſent him under arreſt to the Eaſt Indies, and from thence to Great Britain, in order to be tried; and having maliciouſly, and without probable cauſe, procured him to be tried by a court-martial, upon a falſe, malicious, and injurious charge: after a verdict and judgment for the plaintiff Johnſtone *v.* Sutton in error, Mi. 27 Geo. 3. 1 *Ter. Rep.* 493.

Sutton, the defendant Johnſtone brought a writ of error in the exchequer chamber; and the principal error aſſigned was, that "the barons had decided upon a queſtion not cognizable in a court of law, inaſmuch as it appeared by the record, that the offences in the declaration mentioned, were charged to have been committed by Johnſtone the plaintiff, in error, as commander in chief of a ſquadron of his majeſty's ſhips of war, in the due courſe of diſcipline, and in the exerciſe of powers legally incident to his ſtation as ſuch commander; and while Sutton, the defendant in error, was ſerving as an officer in the ſaid ſquadron under his command." The great and important queſtion was therefore WHETHER ſuch an action could be maintained? and after ſolemn argument, it was decided that it could not; and the judgment of the barons of the exchequer was accordingly reverſed (1): for by Lords *Mansfield* and *Loughborough*, if this action is admitted, every acquittal before a court-martial will produce one. The occaſion has often ariſen at different periods of time; when men of the fleet, put upon their trials before a court-martial, have thought the charge without a probable cauſe, and have warmly felt the injury of ſuch an act of malice or oppreſſion. Yet, till this experiment, it never entered into any man's head that ſuch an action as this could be brought; conſequently, there is no uſage, precedent, or authority in ſupport of it. The wiſdom of ages hath formed a ſea military code, which, in the laſt reign, was collected and digeſted into an act of parliament (2). The great object of this code is, that the duty of every man in the fleet ſhall be preſcribed and regulated by rules and ordinances adapted to ſea military diſcipline; and that every man in the fleet, for any offence againſt his duty in that capacity or relation ſhall be tried by a court-martial. If a man be charged with an offence againſt the articles, or where the articles are ſilent againſt the uſage of the navy, his guilt or innocence can only be tried by a court-martial; a commander in chief has a diſcretionary power by this military code to arreſt, ſuſpend, and put any man of the fleet upon his trial; a court-martial alone can judge of the charge. But this military law hath foreſeen, that though it is neceſſary to give ſuperiors great diſcretionary power, it may be abuſed to oppreſſion; and therefore has provided againſt ſuch abuſe by the 33d article: by which, it is declared—that, "if any flag-officer, captain, or commander, or lieutenant belonging to the fleet, *ſhall*

(1) This judgment was afterwards affirmed in the Houſe of Lords, 22d May, 1787. 1 *Ter. Rep.* 784.

(2) Stat. 22. Geo. 2. c. 33.

"*be*

" *be convicted before a court-martial* of behaving in a ſcan-
" dalous, infamous, cruel, *oppreſſive*, or fraudulent manner,
" unbecoming the character of an officer, he ſhall be diſ-
" miſſed from his majeſty's ſervice." A commander, who arreſts, ſuſpends, and puts a man on his trial *without a probable cauſe*, is guilty within this article: but *the ſame juriſdiction which tries the original charge muſt try the probable cauſe*; which in effect is a new trial; and every reaſon which requires the original charge to be tried by a military juriſdiction, equally holds to try the probable cauſe by that juriſdiction. The perſon unjuſtly accuſed is therefore not without his remedy; he has the propereſt among military men, reparation is done to him by an acquittal; and he who accuſed him unjuſtly is blaſted for ever, and diſmiſſed the ſervice.

Beſides, the ſalvation of the country depends upon the diſcipline of the fleet; without diſcipline they would be a rabble, dangerous only to their friends, and harmleſs to the enemy. Commanders in a day of battle muſt act upon delicate ſuſpicions; upon the evidence of their own eye; they muſt give deſperate commands; they muſt require inſtantaneous obedience. In caſe of a general miſbehaviour, they may be forced to ſuſpend ſeveral officers, and put others in their places. A military tribunal is capable of feeling all theſe circumſtances; and underſtanding that the firſt, ſecond, and third part of a ſoldier is obedience. But what condition will a commander be in, if, upon the exerciſing of his authority, he is liable to be tried by a common law judicature? If this action is admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or ſuperior officer will dare to act; their inferiors will inſult and threaten them: the relaxation and decay of diſcipline in the fleet has been ſeverely felt. Upon one unſucceſsful battle there are mutual recriminations, mutual charges, and mutual trials. The whole fleet take ſides with great animoſity; party prejudices mix: if every trial is to be followed by an action, it is eaſy to ſee how endleſs the confuſion, how infinite the miſchief will be (1). Theſe conſiderations incline us to lean againſt introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other caſes, which is applicable to trials by a ſea court-martial under the marine law, confirmed, directed,

(1) The court-martial were of opinion, from the evidence laid before them, that it was impoſſible for Sutton to obey, and therefore acquitted him; but all the officers ſwore they ſhould have held themſelves bound to obey the orders given, if they had been in Sutton's ſituation.

and authorized by ſtatute. And therefore it muſt be owned, that this queſtion is doubtful; and when a judgment ſhall depend upon a deciſion of this queſtion, it is fit to be ſettled by the higheſt authorities. But, according to our opinion, it is not neceſſary to the judgment in this cauſe, becauſe ſuppoſing the action to lie, we think judgment ought to be given for the defendant, as there appears upon the record a probable cauſe in law (1).

Barwis v. Keppel, Tr. 6 Geo. 3. C.B. 2 *Wilſ.* 314.

So where an action upon the caſe was brought againſt a commanding officer *for wrongfully, unlawfully, and maliciouſly, and without any reaſonable ground or cauſe whatſoever, reducing a ſerjeant of the guards to a common ſoldier, in Germany*; it appearing, by the evidence upon the trial, that the plaintiff had been ſentenced by a regimental court-martial, to be ſuſpended from his office of a ſerjeant for one month, only for a breach of orders; and that the defendant, who was the commanding officer, thinking this ſentence not a ſufficient puniſhment for the offence, ordered him to be broke abſolutely, and appointed another ſerjeant in his place; there was a verdict for the plaintiff, ſubject to the opinion of the court, whether, under the particular circumſtances of the caſe, it being in the nature of an action for a malicious proſecution, and in which malice muſt appear, the plaintiff was intitled to recover? and the court thought they had no juriſdiction at all in this caſe: for *per curiam*, by the act of parliament to puniſh mutiny and deſertion, the king's power to make articles of war is confined to his own dominions; *when his army is out of his dominions, he acts by virtue of his prerogative, and without the ſtatute or articles of war*; and therefore you cannot argue upon either of them, for they are both to be laid out of the caſe; and, *flagrante bello*, the common law has never interfered with the army: *inter arma ſilent leges*. We think, as at preſent adviſed, we have no juriſdiction at all in this caſe; but if the plaintiff's council think proper to ſpeak more fully to this matter, we are willing to hear him.—The plaintiff, ſeeing the judgment of the court againſt him, acquieſced; and the judgment was for the defendant.

Morriſon v. Kelly, Tr. 2 Geo. 3. B.R. 1 *Black. Rep.* 358.

If an action be brought for maliciouſly indicting the plaintiff for *a felony*, on which the defendant was acquitted: to

(1) On the record, the plaintiff only averred, that *he did not wilfully and wittingly diſobey*: and it came out upon the trial, moſt clearly, that the orders were given, heard, and underſtood, and that they were not obeyed; under all which circumſtances the judges were clear, that in law, the commodore had a *probable* cauſe to bring the plaintiff to a fair and impartial trial *.

* They ſaid, that a ſubordinate officer muſt not judge of the danger, propriety, expediency, or conſequence of the order he receives, he muſt obey; nothing can excuſe him but a phyſical impoſſibility.

ſuſtain

ſuſtain ſuch action, *there muſt be produced in evidence a copy of the record and acquittal* from the court where the trial was had; to obtain which, application muſt be made to the court; and it is diſcretionary in them to grant or with-hold it: But where the indictment is only for *a miſdemeanor*, as for keeping a diſorderly houſe or the like, *no ſuch copy* of the record and acquittal need be granted by the court, to found the action; for in this caſe, where the clerk of the peace attended with the original record of the acquittal for a miſdemeanor at the ſeſſions, it was held to be good evidence.

But the bare production of the original indictment is not ſufficient, for though it is admiſſible evidence to prove the defendant the proſecutor, by ſhewing his name on the back of the bill, yet it is no evidence as to the caption, which is a material averment in the declaration, viz. that the quarter-ſeſſions were held at ſuch a place and time, and before ſuch juſtices: this cannot be ſupported by parol evidence of the minutes of the ſeſſion; but for this purpoſe a record ſhould have been made up, and the original, or a copy, produced. Edward *v.* Williams Monmouth Lent aſſ. 1764. *Eſp. Dig.* 535.

On the part of the defendant, it is adviſeable for him, if he can, to give evidence of a probable cauſe; and where the facts lie only in the knowledge of the defendant himſelf, *he muſt ſhew* a probable cauſe, though the indictment be found by the grand jury; or the plaintiff ſhall recover, without proving expreſs malice. Parrot *v.* Fiſhwick, London, ſit. after Tr. 1772. *Bull.* N.P. 14.

After a verdict in favour of a defendant, in an action for a malicious proſecution for felony, the court will not ſet aſide the verdict, though it was given againſt evidence, and the direction of the judge: for in an action for a malicious proſecution in preferring a bill of indictment againſt the plaintiff, for forging a note of hand, four witneſſes were called to prove that the hand-writing was not the plaintiff's, and the judge directed in his favour; notwithſtanding which, the jury found for the defendant: on a motion to ſet aſide the verdict as againſt evidence, the court ſaid the defendant had been ſufficiently tried once where the ſuit was of a criminal nature, and denied the motion. Norris *v.* Tyler, Ea. 14 Geo. 3. B.R. *Cowp.* 37.

So, where the jury, on the trial of an action for a malicious proſecution of the plaintiff, by two indictments for nuiſances, gave a verdict for the plaintiff with 250 l. damages; and the evidence on the trial was, that the plaintiff had only actually, and *bona fide* paid 140 l. in defending himſelf againſt the two indictments; it was moved for a new trial, upon the ground that the damages were exceſſive: and it was urged, that the plaintiff had not ſuffered any more damages than the *money out of pocket*; that there could be no injury *but to his property*, there was *none to his fame*; that he could be entitled to no compenſation for any thing elſe but pecuniary damage; and that the jury could take nothing Farmer *v.* Darling, M. 7 Geo. 3. B.R. 4 *Burr.* 1971.

further into their conſideration, as the meaſure of the damages they were to give. But by Lord *Mansfield*, Ch. J. and the court, it does not appear by the verdict how far the jury gave the damages upon the bill paid by the plaintiff; and how far, upon the whole circumſtances of the caſe taken together: the end and tendency of the indictments was to drive the plaintiff from his buſineſs of a poulterer, after having carried it on on the ſame ſpot * for many years without complaint by any one. This was ſworn to have been the proſecutor's view in preferring them, and they might affect the man's *credit: there are many circumſtances which make it reaſonable, not to indulge the preſent defendant in ſending it to a new litigation, only to abate the quantum of the damages, when he has been ſo much in the wrong.*—Rule for a new trial refuſed.

* One indictment was for keeping a poultry yard for feeding of fowls, adjoining to the defendant's houſe and premiſes.

V. *Action on the Caſe for Misfeaſance in Office.*

Rowning *v.* Goodchild, Tr. 13 Geo. 3. C.B. 5 *Burr.* 2721. 3 *Wilſ.* 454. 2 *Black.* 910.

For a misfeaſance in office, an action will lie againſt the deputy, if he is a ſubſtantive officer, as well as againſt the principal: for where an action was brought againſt *a deputy poſt-maſter*, for not delivering the letters; after a ſpecial verdict, one objection taken was, that the action did not lie, for that it ought to have been brought againſt the principal, and not againſt the deputy. But the court were of opinion, that the action will lay againſt the defendant, for that deputy poſt-maſters (who have original offices, ſubject to the control of the poſt-maſter general) are made by the act of parliament *ex neceſſitate rei, ſubſtantive* officers; and as ſuch, they are anſwerable for their own misfeaſances, and nonfeaſances: and it is fitter for the ſubject to reſort to them for ſatisfaction for injuries done by themſelves, than to their principals.

1. *Misfeaſance by Sheriffs* (1).

Cameron *v.* Reynolds, H. 16 Geo. 3. B R. *Cowp.* 403.

All actions for breach of duty in the office of ſheriff, muſt be brought againſt the *high-ſheriff*, though the default be by the under-ſheriff or bailiff: for where an action was brought againſt the *under-ſheriff*, for not executing a bill of ſale to a nominee of the plaintiffs, of certain goods taken in execution, contrary to his promiſe ſo to do, the court were of opinion, on a motion in arreſt of judgment, that the action did not lie: for *per* Lord *Mansfield*, Ch. J. it is

(1) See the titles *Arreſt*, *Eſcape*, and *Sheriff*.

an action brought againſt the under-ſheriff for a breach of duty in the office of ſheriff; and *whenever* that is the caſe, the action muſt be brought againſt the high-ſheriff, as for an act done by him: and if it proceeds from the default of the under-ſheriff or bailiff, that is a matter to be ſettled between them and the high-ſheriff.

Neither will any ſuch action lie againſt the high ſheriff in a caſe of this ſort: for it is no part of the duty of the office of ſheriff to execute a bill of ſale of goods taken in execution, at an appraiſed value: it might be very inconvenient and highly injurious to defendants if it were. The legal and proper mode of compelling a ſale by the ſheriff, when he makes delay, or refuſes, is by writ of *venditioni exponas*, upon which he muſt return the money into court. But he is not compellable to execute a bill of ſale to the plaintiff's nominee, becauſe he has promiſed to do ſo.

2. *Miſfeaſance by Juſtices of Peace.*

An action does not lie againſt the juſtices of the peace, for refuſing to grant a licence to keep an ale-houſe. This was held on a general demurrer to an action of treſpaſs on the caſe, brought againſt the juſtices for refuſing one: for by *Wilmot*, CH. J. the legiſlature hath intruſted the juſtices of peace with a diſcretionary power to grant or refuſe licences for keeping inns and alehouſes; if they abuſe that power, or miſbehave themſelves in the execution of their office or authority, they are anſwerable criminally, by way of information, in B. R. I cannot think a juſtice of peace is anſwerable in an action to every individual who aſks him for a licence to keep an inn or an ale-houſe, and he refuſes to grant one; if he were ſo, there would be an end of the commiſſion of the peace, for no man would act therein. Indeed, he is anſwerable to the public if he miſbehaves himſelf, and wilfully, knowingly, and maliciouſly injures or oppreſſes the king's ſubjects, under colour of this office, and contrary to law: but he cannot be anſwerable to every individual touching the matter in queſtion in an action. Every plaintiff in an action muſt have an antecedent right to bring it; the plaintiff here has no right to have a licence, unleſs the juſtices think proper to grant it; therefore he can have no right of action againſt the juſtices for refuſing it.

Baſſett *v.* Godſchall and others, Tr. 10 Geo. 3. C.B. 3 *Wilſ.* 121.

3. *Miſfeaſance by Attornies.*

It ſeems that an attorney is not anſwerable for any loſs his client may ſuſtain upon account of a mere involuntary undeſigned miſtake in a nice point of practice.

Ruſſel *v.* Palmer, H. 7 Geo. 3 C. B. 4 *Burr.* 2063. 2061.

Pitt v. Yalden, Ea. 7 Geo. 3. B.R. 4 *Burr.* 2061.

For that part of the profeſſion which is carried on by attornies, is liberal and reputable, as well as uſeful to the public, when they conduct themſelves with honour and integrity; and they ought to be protected, where they act to the beſt of their ſkill and knowledge. But every man is liable to error; and it muſt not be taken for granted, that an attorney is anſwerable for *every* error or miſtake, and to be puniſhed for it by being charged with the debt which he was employed to recover for his client from the perſon who ſtands indebted to him. *Per* Lord *Mansfield.*

But if the client ſuſtains any loſs in conſequence of any groſs neglect, miſmanagement, ignorance, or corruption of the attorney (what was called by Lord *Mansfield* a *lata culpa*, or *craſſa negligentia*) he ſhall recover damages in an action on the caſe.

Ruſſel v. Palmer, H. 7 Geo. 3. C.B. 2 *Wilſ.* 325.

Thus, where the defendant was attorney to the plaintiff in a cauſe wherein the plaintiff had a verdict; and the defendant in that action having been ſurrendered in diſcharge of his bail, *the attorney neglected to charge him in execution*, whereby he was diſcharged, the action was held well to lie againſt the attorney for ſuch negligence.

Ruſſel v. Palmer, H. 7 Geo. 3. C.B 2 *Wilſ.* 328. Pitt v Yalden, Ea. 7 Geo. 3. 4 *Burr.* 2062.

But as this action ſounds merely in damages, the jury ought to be left to find what damages they pleaſe, for there may be favourable circumſtances; as for inſtance, *the whole* of the debt might not be recoverable, the party not *totally* inſolvent, or the like.

Ruſſel v. Palmer, H. 7 Geo. 3. C.B. 2 *Wilſ.* 328.

Therefore, where a verdict was given for the plaintiff for 3000 l. the whole debt; by the direction of the judge, a new trial was afterwards granted: the Court being of opinion, that the judge had miſdirected the jury, in telling them they ought to find a verdict for the whole debt; and upon the laſt trial, the jury being told they might find what damages they pleaſed, accordingly found only 500 l. as it appeared to them in evidence that the party was not totally inſolvent.

Pitt v. Yalden. Ea. 7 Geo. 3 R.B. 4 *Burr.* 2060.

And although in *ſome caſes*, the court may, upon motion, proceed in a ſummary way againſt the attorney, yet unleſs it is a *very clear caſe*, the court will not interfere, but leave the party to bring his action. Therefore, where a rule had been obtained, to ſhew cauſe why the attorney for the plaintiff ſhould not pay *the debt and coſts*, for not having declared againſt the defendant within two terms, by the omiſſion whereof the defendant obtained his diſcharge; it was, on ſhewing cauſe, diſputed about the meaning of the rule, and alſo contended that the court could not in this caſe interfere in a ſummary way, but that it ought to be left to a jury to judge of the quantum of damage ſuſtained. On the other hand, it was inſiſted, that the client had a remedy either in a ſummary way, or by way of reference to the maſter, to ſee what damage he had ſuffered, as well as by an action. But

by Lord *Mansfield* and the court, this is not *a clear* caſe enough for the court to proceed in a ſummary way. In *ſome* caſes, the court may certainly do ſo; but in this caſe, the plaintiff ought to be left to his action: the attornies (1) are far from having been guilty of any groſs miſbehaviour. It does not appear that they were groſsly negligent, or groſsly ignorant, or intentionally blameable; they were country attornies, and might not, and probably did not know, that the point reſpecting the rule was ſettled; and they might act innocently: therefore we ought not to proceed againſt them in a *ſummary* way; it ought to be left to a jury as to the quantum of damages; the *whole* of the debt might not be recoverable; there may be favourable circumſtances, and theſe are ſo. The *real* debt is not aſcertained, nor the quantum of it.

4. *Miſfeaſance in the exerciſe of a public authority.*

An action may be maintained againſt the governor of any Britiſh ſettlement on his return to England, for an injury done by him under the colour of his authority: for where an action (2) was brought in the court of common pleas, by the plaintiff againſt the defendant, for an aſſault and falſe impriſonment, and baniſhing him from the iſland of Minorca, to Carthagena in Spain: the defendant put in two pleas, 1ſt, Not guilty; 2dly, That he was governor of Minorca by letters patent from the crown. That the plaintiff was raiſing a ſedition and mutiny; and that in conſequence of ſuch ſedition and mutiny, he did impriſon him, and ſend him out of the iſland, which as governor, being inveſted with all the privileges and rights of a governor, he alleged he had a right to do. The replication was, *de injuriâ ſua propriâ abſque tali cauſa*; by which he denied the truth of the fact, and put in iſſue whether the facts in the plea were true. At the trial, the jury gave a verdict for the plaintiff upon both iſſues, with 3000 l. damages and 90 l. coſts: it appearing by the evidence, that the defendant being ſuch governor as aforeſaid, cauſed the plaintiff to be ſeized, impriſoned, and baniſhed, without any reaſonable or probable cauſe, or any other matter alleged in his plea, or any other act tending thereto. The defendant tendered a bill of exceptions; upon which bill of exceptions the cauſe came before the court of King's Bench: and it was there contended, that the plea of not guilty was totally immaterial, and ſo was the plea of juſtification; becauſe, from the plaintiff's own ſhewing, it

Moſtyn *v.* Fabrijas, Mic. 15 Geo. 3. B.R. *Cowp.* 161.

(1) There were two partners.
(2) Treſpaſs *vi et armis*.

appeared,

appeared, 1ſt, That the cauſe of action aroſe in Minorca, out of the realm; 2dly, That the defendant was governor of Minorca; and by virtue of ſuch his authority, impriſoned the plaintiff: *and from thence it was argued, that the judge who tried the cauſe, ought to have refuſed any evidence whatſoever, and have directed the jury to find for the defendant.* The reaſons aſſigned for which were, 1ſt, That the defendant, as governor of Minorca, being abſolute, and veſted with both the civil and criminal juriſdiction as the *ſupreme power*; was therefore not anſwerable for any injury done by him in that capacity. 2dly, That the injury being done at Minorca, *out* of the realm, was not cognizable by the king's courts in England; but by Lord *Mansfield*, as to the firſt point (1), as to the ſacredneſs of the defendant's perſon as governor, if it were true, that the law makes him that ſacred character, he muſt plead it, and ſet forth his commiſſion as ſpecial matter of juſtification, becauſe, *prima facie*, the court has juriſdiction. If the court has not a general juriſdiction of the ſubject matter, the defendant muſt plead to the juriſdiction, and cannot take advantage of it upon the general iſſue. And in every plea to the juriſdiction, you muſt ſtate another juriſdiction: to repel the juriſdiction of the king's court, you muſt ſhew a more proper and more ſufficient juriſdiction: for if there is no other mode of trial, that alone will give the king's court's juriſdiction. Now in this caſe, no other juriſdiction is ſhewn; and if the king's courts of juſtice cannot hold plea, in ſuch caſe, no other court can do it: for a governor is in the nature of a viceroy; and therefore, *locally*, during his government, no civil or criminal action will lie againſt him; becauſe, upon proceſs, he would be ſubject to impriſonment; and when he is out of the government, and is returned with his property into this country, there are not even his effects left in the iſland to be attached. Another very ſtrong reaſon would alone be deciſive, and it is this: that though the charge brought againſt him is for a *civil* injury, yet it is likewiſe of a *criminal* nature; becauſe it is in *abuſe* of the authority delegated to him by the king's letters patent under the great ſeal. Now, if every thing committed within a dominion is tryable by the courts within that dominion, yet the effect or extent of the king's letters patent which give the authority, can only be tried in the king's courts, for no queſtion concerning the ſeignory can be tried within the ſeignory itſelf. So that *emphatically*, the governor muſt be tried in England, to ſee whether he has exerciſed the authority delegated to him by the letters patent, legally and properly, or whether he has abuſed it, in violation of the laws

(1) Which ſeems to have been the principal one relied on.

of

of England, and the truſt ſo repoſed in him. It does not follow from hence, that let the cauſe of action ariſe where it may, a man is not intitled to make uſe of every juſtification his caſe will admit of, which ought to be a defence to him. If he has acted right, according to the authority with which he is inveſted, he muſt lay it before the court by way of plea, and the court will exerciſe their judgment whether it is a ſufficient juſtification or not. *In this caſe, if the juſtification had been proved*, the court might have conſidered it as a ſufficient anſwer; and if the nature of the caſe would have allowed it, might have adjudged, that the raiſing a mutiny was a good ground for ſuch a ſummary proceeding. There may be caſes in time of war in which a governor would be juſtified, though he acted very arbitrarily, in which he could not be juſtified in time of peace; as for inſtance, if, during a ſiege, or upon an invaſion, the governor ſhould judge it proper to ſend a hundred of the inhabitants out of the iſland from motives of real and general expediency; or if, upon a general ſuſpicion, he ſhould take people up as ſpies: upon proper circumſtances laid before the court, it would be very fit to ſee, whether he had acted as the governor of a garriſon ought, according to the circumſtances of the caſe.—As to ſuggeſtions with regard to the difficulty of bringing witneſſes, the court will always *take* care that a defendant is not ſurpriſed, and that the man has a fair opportunity of bringing his evidence, if it is a caſe proper in other reſpects for the juriſdiction of the court.

There may be ſome caſes ariſing abroad, which may not be fit to be tried here; but that cannot be the caſe of a governor injuring a man contrary to the duty of his office, and in violation of the truſt repoſed in him by the king's commiſſion. If he wants the teſtimony of witneſſes, whom he cannot compel to attend, the court will oblige the party to conſent that the witneſſes may be examined upon interrogatories; and that the depoſitions therein taken ſhall be read at the trial. And unleſs the party will ſo conſent, the court will put off the trial for ever.—*In every light, therefore, in which I ſee the ſubject, I am of opinion that the action holds emphatically againſt the governor, if it did not hold in the caſe of any other perſon.* If ſo, he is accountable in this court, or he is accountable no where, for the king in council has no juriſdiction. Complaints made to the king in council tend to remove the governor, or take from him any commiſſion which he holds during the pleaſure of the crown. But if he is in England, and holds nothing at the pleaſure of the crown, they have no juriſdiction to make reparation, by giving damages, or to puniſh him in any ſhape for the injury committed. *Therefore to lay down in an Engliſh court of juſtice, ſuch a monſtrous propoſition, as that a governor, acting by virtue*

virtue of letters patent under the great ſeal, is accountable only to God, and his own conſcience; that he is abſolutely deſpotic, and can ſpoil, plunder, and affect his majeſty's ſubjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained. As to the other objection, namely, that as the cauſe of action aroſe abroad, it could not be tried here in England, his lordſhip, after a very learned and elaborate diſcrimination between *tranſitory* and *local* actions (1) declared that there was not a queſtion which could ariſe upon the ſubject, and the judgment was affirmed *per tot cur.*

Sutherland *v.* Murray, ſitt. at Weſtm. aſt. Ea. 1783. Cor. Eyre Baron cited, 1 *Ter. Rep.* 538.

So, where the declaration ſtated that the defendant was governor of Minorca, and vice-admiral of the iſland; that the plaintiff was judge of the vice-admiralty court, with all fees, emoluments, &c. and that the defendant to injure and oppreſs him, *maliciouſly, and without any reaſonable or probable cauſe, ſuſpended him from his office, per quod* he loſt his profits. On the evidence it appeared, that general Murray had legal authority to ſuſpend till the king's pleaſure was known; that he had ſo ſuſpended him, and directed the ſecretary of ſtate to take the king's pleaſure on it. The general profeſſed himſelf ready to reſtore him if he made a particular apology; the king approved of the ſuſpenſion, unleſs the terms were complied with. There the plaintiff recovered 5000 l. *The giſt of the action was,* admitting the legality of the ſuſpenſion thus confirmed, *that the defendant exerciſed his original authority maliciouſly, and without any reaſonable or probable cauſe, and by his malicious and falſe repreſentation procured the ſuſpenſion to be confirmed.*

Wall *v.* Macnamara, ſittings at Weſtm. af. M. 1779, cited 1 *Ter. Rep.* 536.

And a perſon repreſenting the king in all functions, civil and military, ſhall anſwer for an abuſe of his authority, though the act complained of was in itſelf legal, if it appears to have been aggravated by unneceſſary cruelty, malice, and oppreſſion: for where an action was brought by the plaintiff, as captain in the African corps, againſt the defendant, as lieutenant-governor of Senegambia, for impriſoning him for nine months at Gambia in Africa, the defendant pleaded the general iſſue, intending to juſtify the impriſonment under the mutiny act for diſobedience of orders. At the trial, it appeared that the impriſonment, which at firſt was legal, namely, for leaving his poſt, without leave from his ſuperior officer, though in a bad ſtate of health, was aggravated with many circumſtances of cruelty. Lord *Mansfield,* in ſumming up to the jury, ſaid, " in trying the legality of acts done by military officers in the exerciſe of their duty, particularly beyond the ſeas, where caſes may

(1) Which ſee, under head *Venue.*

occur,

occur, without the poſſibility of application for proper advice, great latitudes ought to be allowed, and they ought not to ſuffer for a ſlip of form, if their intention appears by the evidence to have been upright; it is the ſame as where complaints are brought againſt inferior civil magiſtrates, ſuch as juſtices of the peace, for actions done by them in the exerciſe of their civil duty. There the principal enquiry to be made by the court of juſtice is, how the heart ſtood? and if there appears to be nothing wrong there, great latitude will be allowed for miſapprehenſion or miſtake. But, on the other hand, if the heart is wrong, *if cruelty, malice, and oppreſſion, appear to have occaſioned or aggravated the impriſonment, or other injury complained of, they ſhall not cover themſelves with the thin veſt of legal forms, nor eſcape under the cover of a juſtification the moſt technically regular*, from that puniſhment, which it is your province and your duty to inflict on ſo ſcandalous an abuſe of public truſt. In the preſent caſe, it is admitted, that the plaintiff was to blame in leaving his poſt; but there was no enemy—no mutiny—no danger—his health was declining, and he truſted to the benevolence of the defendant to conſider the circumſtances under which he acted; but ſuppoſing it to have been the defendant's duty to call him to a military account for his miſconduct, what apology is there for *denying him the uſe of the common air in a ſultry climate, and ſhutting him up in a gloomy priſon, where there was no poſſibility of bringing him to a trial for ſeveral months*, there not being a ſufficient number of officers to form a court-martial? Theſe circumſtances, independent of the direct evidence of malice, as ſworn by one of the witneſſes, are ſufficient for you to perceive a malignant motive in the defendant, which would deſtroy his juſtification, had it even been within the power delegated to the defendant by his commiſſion.—The jury gave 1000l. damages.

So in an action of falſe impriſonment brought by the plaintiff, as purſer of the Trident man of war, againſt the defendant, who was his captain, the defendant pleaded a juſtification for a ſuppoſed breach of duty; but it appearing in evidence that the defendant had *impriſoned him for three days without enquiring into the matter*, and had then releaſed him on hearing his defence; Lord *Mansfield* ſaid, that ſuch conduct on the part of the defendant did not appear to have been a proper diſcharge of his duty, and therefore that his juſtification had failed him under the diſcipline of the navy.

Swinton *v.* Molloy, ſit. at Weſtm. aſ. M. 1783. Cor. Lord *Mansfield*, cited 1 *Ter. Rep.* 537.

5. *Misfeaſance in the diſcharge of a public duty.*

The poſt-maſter is obliged to deliver the letters ſent by the general poſt, at the reſpective habitations of the perſons reſiding

ſiding in the poſt-town, to whom ſuch letters are addreſſed, for the mere rate or prices ſettled by act of parliament; and for a refuſal or neglect ſo to do, an action will lie.

Stock *v.* Harris Ea. 11 Geo. 3. B.R. 4 *Burr.* 2153. 5 *Burr.* 2709; 3 *Wilſ.* 449.

For where the poſt-maſter of Glouceſter gave public notice to the inhabitants of Glouceſter, that they muſt either pay an halfpenny over and above the uſual poſtage, for every letter delivered to them at their reſpective houſes, or muſt ſend for their letters to the poſt-office; whereupon the plaintiff, Stock, who was well known to the poſt-maſter, gave notice to him, to deliver all letters directed to him, the plaintiff, at his lodgings, at ſuch a houſe in Glouceſter, for the common and uſual poſtage; and in his declaration aſſigned for breach, that the defendant did not deliver to him, the ſaid plaintiff, a poſt letter, directed to him, within a reaſonable time, but wrongfully and injuriouſly kept and detained the ſame; upon the trial, the jury found a ſpecial verdict, ſtating the above facts, and that *until the publication of the poſt-maſter's notice, letters directed to the inhabitants of Glouceſter were always delivered to them at their places of abode within the ſaid city by the poſt-maſter for the time being, without any gratuity or reward, over and above the common rate of poſtage.* After argument, the court of king's bench gave judgment for the plaintiff. By Lord *Mansfield*, the preſent action is brought, and the caſe ſtated in a proper manner, to bring the intended queſtion before the court, which is, *whether the poſt-maſter is obliged to deliver letters directed to the inhabitants at their known places of abode, at the rates of poſtage only, or is intitled to demand and take any thing more?* Therefore I ſhall now give my opinion upon it, and have no great difficulty which way to give it, though the acts of parliament are not profeſſedly explicit about it. There are two clauſes in them which ſhew deciſively, that *there are limits of delivery*, the ſtat. 5 Geo. III. c. 25. § 4. directs that *a penny extra* ſhall be paid for all ſhip letters directed to places *within the limits of the delivery of letters or packets* by the deputy poſt maſter. As there are therefore limits of delivery, how are thoſe limits fixed? the anſwer is, *they are fixed by uſage and practice, and the courſe that has been obſerved and followed*, in each particular place. If that be ſo, there is enough found upon this ſpecial verdict in favour of the plaintiff. It is expreſsly found, that, "until the publication of the poſt-maſter's notice, letters directed to the inhabitants of Glouceſter, were always delivered to them at their places of abode within the ſaid city by the poſt-maſter, without any gratuity over and beyond the common rate of poſtage." From whence it follows, that the limits of delivery of this poſt-office in Glouceſter, are the city of Glouceſter. This was the practice for ſixty years, and to this time for one hundred years; and there is no foundation or

pretence

pretence for raiſing this additional money, nor is it juſtified by the acts of parliament. The inconveniences that would attend this notice is very great to ſuch as would not ſubmit to this new demand. How ſhould people know of their letters? and are they to come or ſend to the poſt-office every poſt-day, to inquire after the chance of a letter? this would be exceedingly inconvenient to every body; and would be particularly hard upon ſuch of the inhabitants as ſeldom receive any letters by the poſt at all. It is raiſing a tax without any proper application of it. The public would not profit by it; on the contrary, it would immenſely hurt the public revenue, though it would raiſe a great one to the poſt-maſter or his deputy. The inconvenient conſequences would be much more viſible and more extenſive, if this attempt of the country poſt-maſters was to be exerciſed in London, where the contrary practice has prevailed, and having eſtabliſhed it, they cannot recede from it. They cannot retract what has been always uſual in London, nor even the method which they have hitherto allowed in ſuch villages near London as are now become contiguous to it. Having once eſtabliſhed it, they cannot go back from it. So in Glouceſter, there is no reaſon or pretence for their retracting the method always taken in that city. Therefore I think they have done wrong; and have attempted, without authority, to raiſe a tax upon the public, without a ſufficient foundation whereupon to ground their claim, and for their own benefit, and not the benefit of the public, or of the revenue, conſequently *this action is well brought*, and the poſtea ought to be delivered to the plaintiff. *Aſton*, J. The acts of parliament relating to this ſubject do not particularize any thing about fetching letters, or delivering them out; they are not explicit on this head: the direction of a letter informs the officer of the poſt-houſe how to deliver it; and the legiſlature meant that he ſhould deliver it accordingly. *The limits of the delivery are to be determined by the uſage of the place.* Here the delivery was uſed for a great number of years to be to the inhabitants of the city of Glouceſter, at their reſpective places of abode within the city. This notice from the poſt-maſter is directly in the teeth of the acts of parliament. There is no foundation for this demand: the poſt-office have no right to make it. The word *deliver* is likewiſe uſed in the penny-poſt acts: and there is no doubt but that penny-poſt letters are to be delivered at the habitations of the perſons to whom they are directed. The inconvenience of fetching letters may be very great, the whole town or city may be attending at the ſame time, to enquire after their letters; and the poſt-maſter may be out of the way when they do come for them: he is not obliged to attend at any fixed hour. *The eſtabliſhed uſage* has been, for the

poſt-maſter of this city of Glouceſter to deliver the letters of the inhabitants at their places of abode within the city: and *this uſage* was probably ſettled immediately upon making the act which erected the poſt-office. The poſt-maſter is bound by theſe eſtabliſhed limits; he cannot vary this eſtabliſhed practice, nor raiſe any additional rate upon the inhabitants; therefore the poſtea ought to be delivered to the plaintiff. *Willes*, J. this being *the eſtabliſhed uſage* in this place, the poſt-office cannot alter it, they might as well do it in London as in Glouceſter, which would be extremely inconvenient. In the former place, they have extended the uſage to Mary-le-bonne, and other new buildings; and they have done right; here they had no right to depart from the former eſtabliſhed uſage which had prevailed for ſuch a great length of time, nor can I ſee any pretence for attempting it. *Aſhhurſt*, J. concurred entirely, as to this particular caſe, circumſtanced as ſtated in the declaration, and found by his ſpecial verdict; *here the uſage had been ſo long eſtabliſhed*, that he held that the poſt-maſter had no right to ſet it aſide, and refuſe to deliver the letters in future, as he had been uſed to do, and had been ſo long done, at the houſes of the inhabitants within the city, which he looked upon to be *the limit of delivery* eſtabliſhed in that place; whatever may be the limits of delivery, or whatever may be fit and proper to be determined as to any other place: but he gave no opinion as to the kingdom *in general*, or as to any other caſe where the circumſtances may differ from thoſe of the preſent caſe. Poſtea delivered to the plaintiff.

Rowning v. Goodchild, Tr. 13 Geo. 3. C.B. 3 *Wiſ.* 443, 5 *Burr.* 2716. 2 *Black.* 906. *Coup.* 184.

The judgment in the above caſe was founded upon *the particular uſage* of the place; but the general queſtion was afterwards decided in the court of common pleas, in an action on the caſe brought againſt the deputy poſt-maſter of *Ipſwich* for not delivering the plaintiff's letters at his place of abode in *Ipſwich* within a reaſonable time; but, on the contrary, detaining them for a long time, viz. for the ſpace of ten days: in which action there was a verdict for the plaintiff, ſubject to the opinion of the court, on a caſe ſtated. The queſtion was, *whether the defendant was obliged to deliver the letters to the inhabitants of Ipſwich, at their reſpective places of abode? De Grey*, CH. J. delivered the opinion of the court. This is not to be conſidered in the nature of a private contract between man and man; nor is the poſt-maſter to be looked upon in the light of a common carrier. But the duty ariſes out of a great public truſt, ſince the legiſlative eſtabliſhment of the poſt-office. The preſent queſtion is now merely a queſtion of conſtruction upon the ſtat. 9 Ann. c. 10. § 2. which enacts, that the poſt-maſter and his deputies, and their ſervants and agents, and no other, ſhall have the receiving, carrying, and *delivering* of all letters

letters and packets, and the only conſideration is what is meant by the word *delivery?* that is, whether the poſt-maſter is obliged to deliver the letters to the inhabitants at their reſpective places of abode, or whether it is ſufficient if the letters are delivered to them at the poſt-office? By the act it appears, that the duty of the poſt-maſter conſiſts in three articles, viz. *receiving*, *carrying*, and *delivering* letters. So that it is not only to carry, but to do ſomething more, *deliver* —deliver as directed—that is, to another perſon. For as the term *carrying* implies a place and perſon to whom they are to be carried, the term *delivering* implies a place and perſon to whom they are to be delivered. But the mere quitting of the cuſtody does not anſwer the idea conveyed in the word *delivery:* nor indeed can the poſt-maſter general, by ſending a letter from his office in London to his office at Ipſwich, be ſaid to quit the poſſeſſion of it; it is only a continuation of the cuſtody of it; it is no more than giving them with his right hand into the left; and a detention in his cuſtody is contradictory to the idea of the word *delivery.*— He not only doth not *deliver*, but doth not quit the poſſeſſion. He ought to deliver them from the cuſtody he had of them: he muſt remove them out of his office at Ipſwich, as much as he did out of his office at London, and *muſt deliver* them to the perſons as directed. This, on comparing all the clauſes in 9 Ann, is the ſenſe in which the parliament meant the word *deliver*: for, to ſuppoſe that when the letters are brought to the town, all the inhabitants are to ſend every poſt to enquire, would be impoſſible: inſtead of facilitating, it would obſtruct correſpondence. His lordſhip compared this ſecond ſection with ſection forty, which inflicts a penalty of 20 l. on perſons in the poſt-office who ſhall open, *detain*, or delay any letter, except under a warrant from the ſecretary of ſtate; and alſo where letters are *returned* for want of true directions, and *when the party cannot be found.* Now, how can the poſt-maſter know whether it be truly directed, if the party is to ſend for it? And the poſt-maſter being to *return* letters, if the party cannot be found; he muſt enquire, or he cannot ſay *He cannot be found:* therefore he muſt look for him. By ſection thirty, all money not exceeding 5 l. due from any perſon for letters *delivered* by the deputy poſtmaſter are recoverable as ſmall tythes. This muſt mean a perſonal delivery at his houſe where directed, or it would have ſaid, *by them taken out of the office.* And his lordſhip concluded by ſaying, that from a compariſon of all the acts on the ſubject, which were uniform and conſiſtent with each other, it was clear the legiſlature meant by *delivery*, a delivery to the perſon at his place of abode. That the uſage in London, and other great commercial towns, as York and

Briſtol, was agreeable to this conſtruction, and that the ſame rule muſt take place throughout the kingdom.

Smith *v.* Powditch, M. 15 Geo. 3. B.R. *Cowp.* 187.

But there is a diſtinction between the place where the poſt-maſter ought to have the burthen thrown on him, and one beyond which he ought not to have it. The deciſion in the laſt caſe, which explains *delivery* to mean delivery at every body's place of abode, within the limits of delivery, means *all the diſtrict within a poſt-town*; juſt as if you aſked a man where he lived, and what was his poſt-town: the ſections 17 and 22 of 9 Ann, c. 10. ſeem to mark the reaſonable line beyond which the poſt-maſter is not obliged, but within which he is obliged to deliver letters. By ſection 17th, "No perſon, other than the poſt-maſter-general or his deputies, are to receive, carry, or deliver any letter or packet, or employ any foot-poſt, horſe-poſt, or other conveyance for carrying letters, under certain penalties." But the 22d ſection declares, "that nothing therein ſhall be underſtood to prohibit the carrying or recarrying any letters to or from any TOWN OR PLACE, to or from the next poſt-road, or ſtage appointed for that purpoſe, *above ſix miles* from the general poſt-office; but that every perſon ſhall have free liberty to ſend and employ ſuch perſon or perſons as they ſhall think fit to carry the ſaid letters, without any penalty." Now, there is no general poſt that goes within ſeven or eight miles of London; nevertheleſs the poſt-maſter has always delivered letters within London and the contiguous buildings at the eſtabliſhed rate of poſtage: but he never delivered them at Putney; that is a ſtrong proof, coeval with the firſt ſtatute which eſtabliſhed a rate of poſtage, that *there are boundaries*; and this ſection lays a foundation to ſay that there is ſuch a line. The legiſlature forbids all letters to be carried by any other perſons under certain circumſtances and reſtrictions; *but it appeared neceſſary, if a place was four or five miles diſtant from a poſt-town or ſtage, that letters ſhould be carried and the perſons carrying them paid for it.* I lay a ſtreſs on the terms *town or place*. The act ſays *town or place*, becauſe there are ſome ſtages where there is but a ſingle houſe, as Hartford Bridge; but the town is conſidered as one ſpot, and the whole of it is taken as *terminus ad quem*. The *poſt-town or place* is certainly a boundary within which the poſt-maſter is obliged to deliver letters at the rate of poſtage eſtabliſhed by act of parliament; *per* Lord *Mansfield*. A ſingle poſt-houſe, not in a town, like the ſingle houſe at Hartford Bridge, might poſſibly afford a queſtion: but *within a poſt-town, the poſt-maſter is bound to deliver all letters within the poſt-town*. *Per Aſhton*, J.

Barnes *v.* Foley, Hil. 8 Geo. 3. B.R. 4 *Burr.*

And if the poſt-maſter demands and receives any thing for the delivery of letters, *within the poſt-town*, beyond the legal

rate

rate of poſtage, it may be recovered back in an action for money had and received; for where the defendant, who was poſt-maſter of Bath, gave public notice to the inhabitants of the city of Bath, that one halfpenny would be demanded for every poſt-letter delivered to them at their reſpective houſes or places of abode, over and above or beſides the poſtage: the plaintiff Barnes being a houſekeeper in Bath, the defendant demanded and received of him one ſhilling for the delivering twenty-four letters to him at his houſe, over and above and beſides the uſual poſtage; whereupon the plaintiff brought his action againſt the defendant for money had and received for his uſe. Upon the trial of this action at *Niſi prius*, a ſpecial caſe was reſerved, in ſubſtance ſtating the above facts: and the principal queſtion intended to be brought before the court for their deciſion was, "Whether the poſt-maſter was or was not obliged to deliver the letters to all perſons to whom they were addreſſed, inhabiting within the city of Bath? And after ſeveral learned arguments at the bar, Lord *Mansfield* took notice, that *the principal queſtion* was put upon *the charge*; and that, therefore, unleſs the poſt-maſter could ſupport a right to impoſe ſuch a charge, there was an end of the action (1). And his lordſhip declared, he would not, upon the preſent action and ſpecial caſe, give a judicial opinion upon the principal queſtion. The counſel for the poſt-maſter ſaid, he would not pretend to argue it upon the foot of the poſt-maſter's having *a right* to demand a further price for the letters than the acts of parliament allow.—Whereupon the court only declared as follows.—Upon this caſe, as at preſent ſtated and left to us, there muſt be a rule; that the *poſtea* be delivered to the plaintiff.

2149. 5 *Burr.* 2711. 1 *Black.* 643. 3 *Wilſ.* 448.

So, where an action was brought againſt the deputy poſt-maſter of Hungerford, the jury at the trial found a ſpecial verdict, and the material fact was, that the defendant carried a letter to the plaintiff at his place of abode in *Hungerford*; but refuſed to deliver it unleſs the plaintiff would pay an additional penny over and above the poſtage, but he was willing to deliver it at the poſt-office for the poſtage only: after tender by the plaintiff of the poſtage only, and a refuſal by the defendant, the plaintiff ſubmitted to pay the penny. And the jury further found, that this demand, if legal, was a reaſonable demand: but whether it was ſo or not, they prayed the opinion of the court. After argument, Lord *Mansfield* noticed the caſe of *Rowning* v. *Goodchild*, and ſaid, it was an authority preciſely upon the general point; and then pro-

Smith v. Powditch, M. 15 Geo. 3. B.R. *Cowp.* 187.

(1) His lordſhip on the firſt argument ſaid, The whole revenue ought to go to the crown; none of it to the poſt-maſter: and the crown is to be at the whole expence. Such a practice would raiſe immenſe ſums in populous towns.

ceeded: I am ſurpriſed, that on a point of this kind, when either way there may be great inconveniences, where the acts of parliament are doubtful, and where the uſage of places is contrary, the poſt-office does not apply to parliament to ſettle this matter. Therefore we avoided *the general queſtion* in the caſes of *Bath* and *Glouceſter*: and in both thoſe caſes, there was a right ground for our not going into the general queſtion; which was this, that *there the poſt-maſter demanded the additional charge as a duty; and it would be extraordinary, if parliament meant a duty ſhould be raiſed at every poſt-town, that they did not fix it themſelves, inſtead of leaving it in the breaſt of every poſt-maſter.* Another reaſon, however, why we wiſhed to leave it open for the interference of parliament was the unanſwerable inconvenience of every body going to the poſt-office for their letters, on the one ſide; and for the other, the burthen to the poſt-maſter in not being allowed to deliver them to any perſon for gain. Now, in the preſent caſe, the poſt-office contends, that in the town there is no houſe that ſhall not pay an additional ſum for the delivery; which is in the higheſt degree unreaſonable. If there is a diſtinction, which the poſt-office itſelf ſeems to have made, as in London, viz. in reſpect of places contiguous to it, the poſt-town or place is certainly a boundary within which the poſt-maſter is obliged to deliver letters at the rate of poſtage as eſtabliſhed by act of parliament; and here the plaintiff's houſe is within the poſt-town; but in this caſe alſo the defendant has demanded the additionable charge, as a duty, which he has no right to do whatever: ſo that we might get clear of it upon that ground, as we did in the laſt caſe. But we do not avoid the general queſtion; on the contrary, our deciſion is expreſsly upon the general queſtion. *Aſton*, J. (after noticing the *Glouceſter* and *Ipſwich* caſes): A ſingle poſt-houſe, not in a town, might poſſibly afford a queſtion, but this is a poſt-town, and I am clearly of opinion, that the poſt-maſter is bound to deliver all letters within the poſt-town. *If it is neceſſary to lay an additional charge, there ought to be an application to parliament* for the purpoſe. *The poſt-maſter cannot impoſe any ſum.* I am very well ſatisfied he has no ſuch right; and with reſpect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the poſt-office; whereas this is only a private and particular inconvenience to the poſt-maſter. *Willes*, J. I am moſt clearly of the ſame opinion. The uſage in London and other great towns has been to deliver all letters at the houſes of the reſpective inhabitants to whom they are directed: in ſmaller poſt-towns, the poſt-maſter has declined to do to without an additional allowance, probably becauſe there were only a few perſons to diſpute the right. I think a poſt-town is different from

what

what the caſe of a ſingle poſt-houſe might be. The *Bath* caſe was exactly this caſe. The defendant demanded the additional ſum; and it was there clearly held he had no right to make ſuch demand. So here it is demanded. The *Glouceſter* caſe was decided upon the uſage: thoſe two caſes, therefore, did not decide the general queſtion; but the Ipſwich caſe did; and therefore I am of opinion upon both grounds, namely, upon the general ground, and likewiſe upon its being a demand, that judgment ſhould be given for the plaintiff. *Aſhhurſt*, J. of the ſame opinion. *Poſtea* delivered to plaintiff.

But an action will not lie againſt *the poſt-maſter general*, for any loſs or damage that may happen through the negligence or diſhoneſty of any perſons employed under him to conduct and carry on the buſineſs of the office: for in an action on the caſe againſt the *poſt-maſter general* for not delivering a bank-note for 100l. incloſed by the plaintiff in a letter ſealed and directed to a perſon at Lymington, and which the plaintiff had put into the poſt-office in London; there was a ſpecial verdict; and the principal among other facts ſtated were, That the plaintiff incloſed a bank-note for 100l. in a letter ſealed and directed to John Moxam of Lymington, in the county of Southampton; that the ſaid letter was delivered in to the general poſt-office at London, in order to be there ſorted and conveyed by the poſt from thence to Lymington: But the ſaid letter, with the bank-note incloſed, came to the hands of one *Michell*, at the general poſt-office in London, he being a ſorter of letters in the inland department, duly appointed by the defendants, and ſworn; and he feloniouſly ſecreted the ſaid letter, and ſtole the bank-note thereout, contrary to the form of the ſtatute. That he was tried, convicted, and executed for the ſame. The queſtion was, "Whether the defendants, by reaſon of their office as poſt-"maſters general, and by reaſon of the relation in which "Michell the ſorter ſtood to them, were *perſonally* liable "for the amount of the bank-note found by the ſpecial "verdict to have been ſecreted and ſtolen by him in the "poſt-office?" By Lord *Mansfield*. If there could be a demand on the poſt-office fund, it muſt be by a totally different form of action; for this form of action is not applicable to ſuch a demand: but this is a demand on the poſtmaſter *perſonally*, upon the ground of a neglect in him by his own act, or conſtructively ſo, by the fault of his ſervant. If the fund were in the nature of a policy of inſurance, to inſure every man who ſends bills or notes by land or ſea carriage from a loſs by robbery or neglect, ſuch contingency would be a deduction out of the fund: and no doubt, in that caſe, if a loſs were to happen, upon an action brought againſt the proper officers, they would be liable,

Whitfield *v.* Lord Le Deſpenſer, Ea. 18 Geo. 3. B R. *Coupt.* 754.

being bound by the poſitive conſtitution of the office to inſure every perſon for the fixed and eſtabliſhed rate of poſtage. *But here the act of parliament has appropriated the whole revenue*; therefore, if a loſs is paid, there muſt be an *Item* of it, and that *Item* muſt come under the appropriation. But it is manifeſt no ſuch idea was ever thought of. If it had been thought of, *the act of parliament would in terms have charged the fund for all loſſes ariſing from neglect or otherwiſe.* But this action is not founded upon the ground of the fund being liable: it is founded upon the ground that the poſt-maſter, *in conſequence of the hire he receives*, is liable for all the damage that may happen, whether owing to the negligence or diſhoneſty of the perſons employed under him to conduct and carry on the buſineſs of the office. If that poſition were founded in the extent in which it has been ſtated, it would go the length of making the defendants liable in all caſes whatſoever. Though the ſituation of the poſt-maſter has been compared to that of a *common carrier*, or the maſter of a ſhip, it ſeems to me to hold in no particular whatſoever. The poſt-maſter has *no hire*, enters into *no contract*, carries on *no merchandiſe or commerce.* But the poſt-office is a branch of revenue, and a branch of police, created by act of parliament. As a branch of revenue, there are great receipts; but there is likewiſe a great ſurplus of benefit and advantage to the public ariſing from the fund. As a branch of police, it puts the whole correſpondence of the kingdom (for the exceptions are very trifling) under government, and intruſts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy, therefore, between the caſe of the poſt-maſter and a common carrier:—the branch of revenue and the branch of police are to be governed by different officers. The ſuperior has the appointment of the inferior officers; but they give ſecurity to the crown: one requiſite is, that they ſhall take the oaths taken by all *public officers.* Another ſtrong guard is, that they are made ſubject to heavy penalties; and this is carried ſo far, that, what in the caſe of a *common carrier*, or any other perſon, would be only *a breach of truſt*, is in them declared to be a capital felony. All theſe advantages the law provides for the ſecurity of the ſubject, in conſideration of their being obliged to ſend their letters by this mode of conveyance. But the ſtatute does not make the poſt-maſter liable for any act done, except in one particular caſe, which is very remarkable, becauſe it makes him liable for his own fault only (and not for that of his deputies) in a caſe where it is hardly poſſible for the poſt-maſter himſelf to be perſonally in fault, viz. by the 20th ſection of 9 Ann. c. 10. if it be through the *default* or *neglect* of the *poſt-maſter* or his *deputy*, that any perſon fail (within half

half an hour after application, &c.) of being furniſhed with a ſufficient horſe or horſes to travel poſt, then *the poſt-maſter*, or his deputies, are to forfeit 5l. As to an action on the caſe lying againſt the party really offending, there can be no doubt of it; for whoever does an act by which another perſon receives an injury, is liable to an action for the injury ſuſtained. *If the man who receives a penny to carry the letters to the poſt-office, loſes any of them, he is anſwerable; ſo is the ſorter in the buſineſs of his department; ſo is the poſt-maſter for any fault of his own.* Here no perſonal neglect is imputed to the defendants, nor is the action brought on that ground; but for *a conſtructive negligence* only, by the act of their ſervants. In order to ſucceed, therefore, it muſt be ſhewn, that it is a loſs to be ſupported by the poſt-maſter, which it certainly is not. As to the argument, that the poſt-maſter general has an ample ſalary, ſufficient to anſwer all loſſes of the ſubject, occaſioned by the negligence or miſconduct of himſelf or ſervants, and that therefore he is liable; the anſwer is, that in a matter of revenue and police under the authority of an act of parliament, the ſalary annexed to the office is for no other conſideration than the trouble of executing it. The caſe of the poſt-maſter, therefore, is in no circumſtance whatever ſimilar to that of a common carrier; but he is like all other public officers, ſuch as the lords commiſſioners of the treaſury, the commiſſioners of the cuſtoms and exciſe, the auditors of the exchequer and others, who were never thought liable for any negligence or miſconduct of the inferior officers in their ſeveral departments. *In the caſe Lime* v. *Cotton* (1) *in the year* 1699, *a ſolemn judgment was given, that an action on the caſe would not lie againſt the poſt-maſter-general, for a loſs in the office, by the negligence or fault of his ſervants.* The nation underſtood it to be a judgment; the bar have taken notice of it as a judgment; the parliament and the people have taken notice of it; every man who has ſent a letter ſince has taken notice of it; many acts of parliament for the regulation and improvement of the poſt-office, and other purpoſes relative to it, have paſſed ſince, which by their ſilence have recognized it. The mail has been robbed a hundred times ſince, and no action whatever has been brought. What have merchants done ſince, and continue to do at this day, as a caution and ſecurity againſt a loſs? They cut their bills and notes into two or three parts, and ſend them at different times; one by this day's poſt, the other by the next. This ſhews the ſenſe of mankind as to their remedy. If there could have been any doubt, therefore, before the determina-

(1) See 1 Lord Raym. 646.

tion of *Lime* v. *Cotton*; the ſolemn judgment in that caſe *having ſtood uncontroverted ever ſince*, puts the matter beyond diſpute. Therefore, we are all clearly of opinion the action will not lie.—*Per Cur.* Judgment for the defendants.

Schinotti v. Bumſted and others, Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 646.

An action on the caſe will lie againſt the commiſſioners of the lottery for a miſfeaſance in the diſcharge of their duty, for they are mere miniſterial officers. In this caſe, the plaintiff declared againſt the defendants as commiſſioners of the lottery for not declaring the ticket, No. 5278, of which the plaintiff was the owner, to be the laſt-drawn ticket, and, as ſuch, entitled to a prize of 1000 l. The defendants pleaded the general iſſue; and on the trial there was a verdict for the plaintiff, ſubject to the opinion of the court, whether the action could be maintained under the circumſtances of the caſe, which were, that in point of fact No. 5278 was the laſt ticket that was actually drawn, but that there was a blank left, for which a correſponding number ought to have been drawn; but no ſuch number (viz. 31,000) was to be found in the wheel; nor was it ever known what became of it: *the commiſſioners declared, that No.* 5278 *was not to be conſidered as the laſt drawn ticket.* It was contended, 1ſt, That No. 31,000, and not No. 5278 ought to be conſidered as the laſt-drawn ticket. 2dly, That, at any rate, the adjudication of the commiſſioners againſt the plaintiff was final, and no action would lie againſt them, as they are appointed judges in reſpect to the ſubject matter; and no action will lie againſt a judge for what he does judicially (1); in which reſpect there is no difference between ſuperior and inferior judges. But the court were clear, that as the plaintiff's ticket was the laſt actually drawn, he was intitled to the prize; and that the owner of the ticket which never was drawn had no claim to it whatever; and they held, that the commiſſioners were mere miniſterial officers; they are directed by the act of parliament to do certain acts, all of them miniſterial, not judicial acts: and as miniſterial officers, they are liable to an action for a miſfeaſance in the diſcharge of their duty.

The King v. Lyme regis, Ea. 19 Geo. 3. B.R. *Doug.* 158, 159.

Wherever there is a ſuppreſſion of truth, in a return to a mandamus, and the party is thereby injured, he may maintain an action: and although a return be true in words, yet if it is falſe in ſubſtance, an action will lie.

The King v. The Bank of England, M. 21 Geo. 3. B.R. *Doug.* 524.

An action on the caſe will lie againſt the governor and company of the bank of England, for refuſing to permit a transfer of ſtock to be made; but the court will not grant a mandamus in the caſe.

(1) *Lutwiche*, 1561. 8 *Rep.* 121. 12 *Rep.* 25 *Hutt.* 120. 12 *Mod.* 392. 1 Lord *Raym.* 467. *Salk.* 396.

VI. *Action on the Caſe for Misfeaſance in a Truſt.*

1. *Common carriers.*] A common carrier is by the nature of his contract liable for all due care and diligence; and for any negligence he is liable on his contract. Forward *v.* Pitward, M. 26 Geo. 3 B.R. 1 *Ter. Rep.* 27.

There is alſo a further degree of reſponſibility by the cuſtom of the realm; that is, by the common law, a carrier is in the nature of an inſurer: he is liable for every accident, except by the act of God, or the king's enemies: and there is a nicety of diſtinction between the act of God and inevitable neceſſity (1). *The act of God* means ſomething in oppoſition to *the act of man*; for every thing is the act of God that happens by his permiſſion; every thing by his knowledge. But to prevent litigation, colluſion, and the neceſſity of going into circumſtances impoſſible to be unravelled, *the law preſumes againſt the carrier*, unleſs he ſhews it was done by the king's enemies, or by ſuch act as could not happen by the intervention of man, as ſtorms, lightning, and tempeſts: therefore, if an armed force come and rob the carrier of the goods, he is liable; and a reaſon is given in the books, which is a bad one, viz. that he ought to have a ſufficient force to repel it: but that would be impoſſible in ſome caſes; as for inſtance, in the riots in the year 1780. The true reaſon is, for fear it may give room to colluſion, that the carrier may contrive to be robbed on purpoſe, and ſhare the ſpoil. *Per* Lord *Mansfield.*

Therefore, where the defendant, who was a common carrier, received at Weyhill twelve pockets of hops to be carried by him to Andover, and depoſited them in a booth, for the purpoſe of keeping them till his waggon was ready to go the journey, according to the uſual courſe of buſineſs; and in the intermediate time, a fire broke out in a booth at the diſtance of about one hundred yards from the booth in which the defendant had depoſited the hops, which burnt for ſome time with unextinguiſhable violence, and during that time, communicated itſelf to the ſaid booth in which the defendant had depoſited the hops, and entirely conſumed them *without any actual negligence in the defendant*, or being occaſioned by lightning; the carrier was adjudged to be liable. For, by Lord *Mansfield*: In this caſe it does not appear, but that the fire aroſe from the act of ſome man or other. It certainly did ariſe from ſome act of man; for it is expreſsly ſtated not to have happened by lightning. *The carrier, therefore, in this caſe is liable*, inaſmuch as he is liable for inevitable accident.

(1) Which may be occaſioned by the act and intervention of man.

So

Barclay v. Heygena, E. 24 Geo 3. B R cited 1 *Ter. Rep.* 33.

So where an action was brought againſt a maſter of a ſhip to recover the value of ſome goods put on board his ſhip, in order to be carried to St. Sebaſtian; it was proved that *an irreſiſtible force* broke into the ſhip in the river Thames, and ſtole the goods; yet the defendant was held anſwerable.

Carſide v. Trent and Merſey Nav. Ea. 32 Geo. 3. 4 *Ter. Rep.* 581.

But if the goods be ſafely conveyed to the place of their deſtination, and the direction be, that they be there kept until they can be forwarded to another place, the carrier will not be anſwerable if they are deſtroyed in the intermediate time; for in keeping the goods after their arrival, according to his directions, he is no more than a warehouſe-man, and as ſuch is not anſwerable, unleſs he has been guilty of laches: therefore, where an action was brought againſt the defendants as common carriers for not forwarding four pockets of hops from Stourport to Stockport, which the plaintiff *had delivered to them, to be carried from Stourport to Mancheſter* (to which place they were carriers) *and there kept until the ſame could be forwarded from Mancheſter to Stockport:* it appeared, that, according to the courſe of buſineſs, when goods are to be forwarded beyond Mancheſter, if there is any carrier to the place of their deſtination at Mancheſter, ready to receive them, they are immediately delivered upon payment of the carriage to Mancheſter; and if not, the defendants keep them in their warehouſe till a carrier arrives, to whom they may be delivered on making the above payment, the defendants not charging any thing for lodging and keeping the goods in their warehouſe: *the goods in queſtion arrived ſafe at Mancheſter on the 30th of September, and were that evening put into the defendant's warehouſe, where, together with other goods, they were conſumed by an accidental fire that night, and before any carrier came from Stockport, to whom they could be delivered.* It was decided, that the carrier was not liable, the keeping of the goods being for the convenience of the owner, and not of the carrier. For, by Lord *Kenyon*, Ch. J. If the defendants were conſidered merely as warehouſe-men, there would be no pretence to ſay, that they were liable for ſuch an accident as the preſent. The caſe of a carrier ſtands by itſelf upon peculiar grounds: he is held reſponſible as an inſurer; and the reaſon given in the books is, to prevent fraud. But I do not ſee how we can couple the character of the carrier with that of the warehouſe-man, in which laſt the defendants are not liable here, they not having been guilty of laches. *Buller*, J. *The keeping of the goods in the warehouſe is not for the convenience of the carrier, but of the owner of the goods*; for when the voyage to Mancheſter is performed, it is the intereſt of the carrier to get rid of them directly; and it was only becauſe there was no perſon ready at Mancheſter to receive

ceive theſe goods that the defendants were obliged to keep them.

And a common carrier is bound to deliver goods, if it has been the uſual and accuſtomed courſe of his trade to do ſo; for in an action on the caſe againſt the defendants, as common carriers, for not carrying and *delivering* certain goods ſent by their ſtage-coach, and directed to one Ireland, at his houſe in London; it appeared that the defendants were common carriers from Birmingham to London, and received a box containing two pieces of ſilk, properly directed to Ireland at his houſe in London: that the box came to the defendant's warehouſe in London, *with no legible directions upon it*; and remained in their warehouſe for the ſpace of a year: that the plaintiff then diſcovering it to be there, went to the warehouſe and opened the box, and found that the goods had received very conſiderable damage, for which reaſon he, as well as Ireland the conſignee, refuſed to take them away, and the defendants alſo refuſed to make any ſatisfaction for the damages. It alſo appeared that Ireland, the conſignee's addreſs was in the printed Directory of Traders, which the defendants had in their warehouſe: that the defendants' *way-bill* contained the name of *Ireland* the conſignee, but no directions: that the defendants made no enquiry of the plaintiff at Birmingham, to know where Ireland lived, nor was any enquiry made according to the Directory; and that the defendants hired a porter at a ſtated ſalary, by the week, to carry out goods which came by their coach, and received the porterage for ſuch goods ſo ſent out by the porter. The queſtion was, whether, under the circumſtances of the caſe, the plaintiff was entitled to recover? And, BY THE COURT: There is no neceſſity for us to conſider of the laws in general reſpecting carriers. It is ſtated to us, that theſe defendants hire a porter at a ſtated ſalary by the week, to carry out goods which come by their coach, and receive the porterage of ſuch goods as are ſent out by that porter; therefore we are bound to ſay, that the defendants were obliged to ſend the goods by their porter to be delivered at the conſignee's houſe, according to the direction, and the promiſe and undertaking of the defendants. As the defendants conſtantly kept a porter for this purpoſe, they engaged, and ſpecially undertook in this particular caſe, to deliver the goods to the conſignee by their porter. *It was by the negligence of the defendants, that the direction of the box was obliterated.* The maſter of a ſtage-coach takes a greater price for the carriage of goods than any other carrier: ſo is certainly bound either to ſend out the goods from his warehouſe, to be delivered to the perſons to whom the ſame are directed, or to ſend notice of the arrival thereof within a reaſonable time.—Judgment for plaintiff.

Golden *v.* Manning and Peyton, Tr. 13 Geo. 3. C.B. 3 *Wilſ.* 429. 2 *Black.* 916.

Hyde *v.* Trent and Merſey Navig. M. 34 Geo. 3. B.R. 4 *Ter. Rep.* 389.

It alſo ſeems from what was ſaid by the judges in a more recent caſe, that a carrier who undertakes to carry goods generally to ſuch a place, *is bound to deliver them* to the reſpective individuals to whom they are directed in ſuch place, and cannot ſatisfy his engagement, merely by taking them to the inn or other place where he happens to put up. For although Lord *Kenyon*, Ch. J. inclined to a different opinion, yet the other judges did not concur therein. *Aſhburſt*, J. ſaid: The inclination of my opinion is (1), that *a carrier is bound to deliver the goods to the perſon to whom they are directed.* A contrary deciſion would be highly inconvenient, and would open a door to fraud; for, if the liability of the carrier were to ceaſe when he had brought the goods to any inn where he might chooſe to put up his coach, and a parcel containing plate or jewels brought by him were loſt before it was delivered to the owner, the latter would only have a remedy againſt a common porter. Although it is the practice of many perſons to ſend to the inn for their goods: yet that does not prove that the carrier is not bound to deliver them, if they do not ſend. If the owner chooſe to ſend for his goods, that merely diſcharges the carrier from his liability in that caſe; it only diſpenſes with the general obligation thrown by the law upon the carrier; but it does not apply to other caſes where that obligation is not diſpenſed with.—*Buller*, J. My opinion coincides with that given by my brother *Aſhhurſt*. The carrier is bound to deliver the goods, and the perſon who actually delivers them, acts as the ſervant of the carrier. Therefore, the carrier is liable in all caſes where the goods are loſt, after they get into the hands of the innkeeper or porter, becauſe they are delivered to thoſe perſons, with the conſent, and as the ſervants of the carrier, for the purpoſe of delivering them to the owners.—*Groſe*, J. The law which makes carriers anſwerable as inſurers, is indeed a hard law; but it is founded on wiſdom, and was eſtabliſhed to prevent fraud: but it ſeems to me, that it would be of little importance to determine that carriers were liable as inſurers, unleſs they were alſo bound to ſee that the goods were carried home to their place of deſtination; ſince as many frauds may be practiſed in the delivery as in the carriage of them. In general, the carrier appoints a porter, who provides a cart for the purpoſe of delivering the goods; but it would be open to an infinity of frauds, if the carrier could diſcharge himſelf of his reſponſi-

(1) This caſe was decided on its own peculiar circumſtances, and not on the general queſtion, though the judges gave their opinion thereon as above ſtated.

bilty

bility by delivering them to a common porter, a perſon of no ſubſtance, a beggar, of whoſe name the owner of the goods never heard; and againſt whom, in the event of the goods being loſt, there could be no ſubſtantial remedy.

But it ſeems, according to the opinions of *Buller*, J. and *Groſe*, J. *contra* Lord *Kenyon*, Ch. J. that, in reſpect of goods brought by water-carriage, the delivery thereof on the uſual wharf is ſuch a delivery as will diſcharge the carrier: for, *per Buller*, J. When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ſhip trading from one port to another has not the means of carrying the goods on land. And according to the eſtabliſhed courſe of trade, a delivery on the uſual wharf is ſuch a delivery as will diſcharge the carrier.—*Groſe*, J. The caſe of foreign goods brought to this country depends on the cuſtom of the trade, of which the perſons engaged in it are ſuppoſed to be cogniſant: by the general cuſtom, the liability of theſe carriers is at an end when the goods are landed at the uſual wharf. However, though the delivery of goods brought by water-carriage at the uſual wharf may in general be ſufficient to diſcharge the carrier from any loſs that may afterwards happen before they get to the hands of the owner; yet if the carrier make an expreſs charge, and receives for the conveyance of the goods from the wharf to the conſignee's houſe, he ſhall be anſwerable for any intermediate loſs, although the profits of ſuch conveyance belong to another perſon, and that circumſtance be known. Therefore, in this caſe, where an action was brought againſt the defendants as common carriers, *for not conveying and delivering to the plaintiff* certain bags of cotton, it appeared that the goods were put on board the defendant's barge, and conveyed therein, along the defendant's navigation, and the Duke of Bridgewater's canal, to Mancheſter, where they were landed upon the quay, and lodged there, in the Duke of Bridgewater's warehouſe, in which place they were conſumed by an accidental fire the ſame night. In the bills made out by the defendants, there were charges of ſo much for tonnage, ſo much for warehouſe-room for the Duke of Bridgewater; *and alſo for the cartage from the Duke of Bridgewater's warehouſe, to the plaintiff's own warehouſe in Mancheſter*; which charges were paid by the plaintiffs when the goods were put on board the defendant's barges; but the charge for warehouſe-room was merely received by the defendants as agents to the Duke of Bridgewater, and they had no ſhare of the profit: neither had they any profit from the cartage, the carts being furniſhed by one Hibbert, who was their book-keeper, who received all the profits derived from

from the cartage, which the plaintiffs knew. On the trial, there having been a verdict for the plaintiff, a rule was obtained to ſet aſide that verdict, on the ground that the defendants were not, under the circumſtances of the caſe, liable to anſwer for the loſs that had happened. On the other hand, to ſhew that they were anſwerable, it was chiefly contended, that a common carrier, who undertakes to carry goods generally to ſuch a place, is bound to deliver them to the reſpective individuals to whom they are directed in ſuch place. But the court, without expreſsly deciding that general queſtion (though they gave their opſnions thereon as above ſtated) were clearly of opinion, that, under the peculiar circumſtances of this caſe, the defendants were liable. For by Lord *Kenyon*, Ch. J.--In this caſe, there is one peculiar circumſtance, which makes it unneceſſary to decide the general queſtion; and that is, the charge made by the defendants in one of their bills for the cartage at Mancheſter: for that charge, the defendants undertook to deliver the goods. Therefore, without deciding the general queſtion, I think that the plaintiffs are entitled to the verdict which they have obtained againſt the defendants. *Aſhhurſt*, J. I am glad to find one circumſtance, which puts the caſe out of all doubt, namely, that one of the *bills contains a charge for wharfage and cartage, which is deciſive, to ſhew that in this caſe the liability of the defendants continued until the goods were delivered. Buller*, J. in this caſe I have not the leaſt doubt. *I rely on the charge which the defendants compelled the plaintiff to pay before they would engage to deliver the goods.* Hibbert was originally a ſervant to the defendants; and though he has ſince, by agreement with them, undertaken the cartage on his own account, and received the whole profits of it himſelf, that cannot affect third perſons. The different proprietors may divide the profits among themſelves, in any way they chooſe, but they cannot, by their own agreement with each other, exonerate themſelves from their liability to the owner of the goods, and are reſponſible for them, until they are delivered to the owner. And *here the defendants inſiſted on receiving a certain ſum of money, for the whole expence of carrying and delivering*, including *the identical charge of cartage*, before they would take the goods into their veſſel. If the carrier and porter were to make a ſeparate contract with the owner of the goods, the owner would at leaſt have the option of ſending his own carts to bring away his goods; whereas here the defendants put the goods into the Duke of Bridgewater's warehouſe at once, in order to ſend them afterwards to the plaintiffs by a particular cart of their own. *The defendants ſay, however, that they are warehouſe-men*, as well as carriers: that *they may fill theſe two different characters at different times*, I am ready to admit: but *I deny that they can be both warehouſe-*

men

men and carriers at the ſame inſtant. In this caſe, they received the goods in the capacity of carriers; and *as the engagement was to carry and deliver them*, the goods remained in their cuſtody as carriers the whole time. In this caſe, *the contract was not only to carry, but to deliver*, the goods at Mancheſter; and the plaintiffs had not the option of taking them from the quay before they were put into the warehouſe by the ſide of the canal. The preference given by the defendants to Hibbert reſpecting the cartage, is alſo a material circumſtance: it is like the caſe of an inn-keeper, who agrees with his head hoſtler, that the latter ſhall ſupply the cuſtomers with poſt-horſes; in which caſe, if goods be loſt, the inn-keeper is liable, becauſe he holds himſelf out to the public as the reſponſible perſon: and his engagement with his ſervant cannot vary the contract betwixt him and the public: ſo in this caſe, Hibbert was the ſervant of the defendants, and the goods were ſtill in the cuſtody of the defendants as carriers, at the time when the fire happened. *Groſe*, J. The queſtion in this caſe is, whether the plaintiff's goods, when they were conſumed by fire, were or were not in the cuſtody of the defendants *as common carriers?* Undoubtedly *they were ſo, unleſs the defendants had, according to their undertaking, delivered them* to the plaintiff; and then ariſes the queſtion, whether the delivery of the goods at the warehouſe at Mancheſter, were a delivery to the plaintiffs? and in the preſent caſe, the particular tranſaction is deciſive againſt the defendants, for the cartage was demanded of, and paid by the plaintiffs, before the goods were put aboard the defendant's veſſel; and from that circumſtance, the defendants undertook to deliver the goods at the place to which the carts were to carry them; they did not deliver them at that place; the delivery at the warehouſe was not a delivery to the plaintiffs, according to this contract. In this caſe, the carriers fixed on the particular warehouſe, at which the goods were depoſited on their arrival at Mancheſter, and made an agreement with their own ſervant Hibbert, reſpecting the cartage. The defendants, therefore, ought to be anſwerable for the acts of thoſe perſons whom they nominate.

But if a carrier accepts the goods ſpecially, he ſhall be anſwerable no further than he undertakes: for where an action was brought againſt the proprietors of a ſtage-coach for not ſafely carrying 100 l. delivered to their book-keeper in a bag, from Birmingham to London; on the trial, it appeared that the money was hid in hay, in an old nail-bag, and was carried by the plaintiff's ſervant to the defendant's houſe, and there delivered to their book-keeper, who aſked no queſtions about the contents of the bag, but took it as a common parcel, and was paid for it as ſuch by the ſervant, who

Gibbon *v.* Paynton, *& al.* Ea. 9 Geo. 3. B.R. 4 *Burr.* 2298. *Bull.* N.P. 71.

who gave no information about it. The money was loſt: and the ſervant on his croſs examination on the trial ſwore, that he received no particular inſtructions from his maſter about the carriage, but only to deliver the ſame to the book-keeper, and pay what he demanded of him for the carriage. The defendants proved that an advertiſement had been put into the country newſpapers once every month for two years together, concerning the carriage of parcels by this ſtage-coach, with a N. B. at the bottom of it, that *the proprietors would not be anſwerable for any money, plate, jewels, writings, or other valuable goods, unleſs they were entered as ſuch, and paid for accordingly*; and that this paper was taken in at the houſe where the plaintiff lodged, who was frequently ſeen with it in his hand, and appeared to be reading of it, though it could not be proved that he had ever actually read or ſeen the individual paper wherein it was inſerted. A letter of the plaintiff's was alſo produced, from whence it manifeſtly appeared that he knew the courſe of this trade, and that money was not carried from Birmingham to London at the common and ordinary price of the carriage of other goods. And it likewiſe appeared from this letter, that he was conſcious that he could not recover by reaſon of this concealment. The jury found a verdict for the defendant; and on a motion for a new trial, THE COURT held, that the defendants were not liable to anſwer for this money. Lord *Mansfield*: There is a diſtinction between the caſe of a common carrier and that of a bailee; the latter is only obliged to keep the goods with as much diligence and caution as he would keep his own: but *a common carrier, in reſpect of the premium he is to receive, runs the riſque of them, and muſt make good the loſs, though it happen without any fault in him*; the reward making him anſwerable for their ſafe delivery. This action is brought againſt the defendants, upon the foot of being common carriers; their warranty and inſurance is in reſpect of the reward they are to receive, and *the reward ought to be proportioned to the riſque*. If they make a greater warranty and inſurance, they will take greater care, uſe more caution, and be at the expence of more guards, or other methods of ſecurity; and therefore they ought in reaſon and juſtice to have a greater reward. Conſequently, *if the owner of the goods has been guilty of a fraud upon the carrier, ſuch fraud ought to excuſe the carrier*. And here, the owner was guilty of a fraud upon them; the proof of it is abundant. Beſides, his own letter ſtrongly infers the conſciouſneſs of his own fraud, and that he meant to cheat the carriers of their hire. Therefore I entirely agree with the jury in their verdict. And *if he has been guilty of a fraud, how can he recover? Ex dolo malo non oritur actio*. His lordſhip then noticed the caſe of *Ramſay* v. *Eggleſton*, in *Aleyn* 93. where a carrier was held

held liable for 100l. loſt out of a box delivered to him, though the party at the time ſaid that *there was only a book and tobacco in the box:*—which his lordſhip ſaid, he ſhould have thought a fraud. His lordſhip alſo noticed the caſe cited by Hale, in 1 *Vent.* 238. where a carrier was held to be liable for a box containing a great ſum of money, though he was told, upon demanding of the bearer what was in it, that *it was only filled with ſilks and ſuch-like goods, of mean value.* In which caſe, his lordſhip ſaid, he ſhould have thought the carrier excuſed although he had not propoſed a caution againſt being anſwerable for money; becauſe it was artfully concealed from him that there was money in the box. *Yates*, J. held, that *a carrier may make a ſpecial acceptance*; and that this was a ſpecial acceptance. By the general cuſtom of the realm, a common carrier inſures the goods at all events; and it is right and reaſonable that he ſhould do ſo: but he may make a ſpecial contract, or he may refuſe to contract in ordinary caſes, but upon extraordinary terms; and certainly the party undertaking ought to be apprized what it is that he undertakes, and then he will, or at leaſt may, take proper care, but *he ought not to be anſwerable where he is deceived*; here he was deceived. The money was hid in an old nail-bag; and it was concealed from him that it was money. The plaintiff's own letter ſhews that he knew the courſe of this trade, and that money was not in that place carried at the common ordinary price of carrying other things. And if he was apprized of the defendant's advertiſement, that was equivalent to a perſonal communication: for it is not neceſſary that there ſhould be a perſonal communication, in order to make a ſpecial acceptance. The reaſon of a perſonal communication is, that each party may know the other's mind; and, therefore, if they know each other's minds in any other manner, that is ſufficient; and this was left to the jury. *Aſhton*, J. (who tried the cauſe) ſaid he had no doubt about the juſtice of the caſe, and concurred in opinion with the other judges, as alſo did *Willes*, J.

Clay v. Willan, and others, C.B. M. 30 Geo. 3. 1 Hen. *Black.* 298.

And if a common carrier gives notice, that caſh, plate, jewels, writings, or any ſuch kind of valuable articles will not be accounted for if loſt, *of more than the value of a ſpecified ſum*, unleſs they be entered as ſuch, and paid for accordingly; he will not, on a loſs of goods of that deſcription, delivered to him by one who knows his terms, but conceals the value, and pays no more than the ordinary price of carriage and booking, be liable either to the extent of the ſum ſpecified, nor to repay the price actually paid for the carriage or booking: for where an action was brought againſt the defendants, who were proprietors of a ſtage-coach, for not ſafely conveying a quantity of light guineas from Wakefield to London; it appeared that, by the

printed propoſals, under which the defendants performed their buſineſs, they gave notice, that *caſh, plate, jewels, writings, or any ſuch kind of valuable articles could not be accounted for, if loſt, of more than* 5l. *value, unleſs entered as ſuch, and a penny inſurance paid for each pound value*, when delivered to the book-keeper. On the trial of the action, the plaintiff was nonſuited, it being proved, that the perſon by whom he ſent the parcel to the inn, knew of the above terms, but had not diſcovered the contents of the parcel to the book-keeper, nor paid for them as valuables, having only paid 2s. for the carriage, and 2d. for the booking. Afterwards it was moved, that the nonſuit might be ſet aſide, and a verdict entered for the plaintiff, on the ground that he was intitled to recover as far as 5l. by the printed conditions, or at leaſt the 2s. 2d. paid for carriage and booking. THE COURT, after conſideration, declared, that the ſenſe of the printed conditions ſeemed to be, that the defendants were not liable to any extent, unleſs the parcel had been entered and paid for as valuable, and therefore the rule for ſetting aſide the nonſuit was diſcharged (1).

Davis and Jordan *v.* James, M. 11 Geo. 3. B.R. 5 *Burr.* 2680.

An action againſt a common carrier, for not delivering goods ſent by him may be brought in the name of the conſignor; for where a new trial was moved for after a verdict for the plaintiff in an action againſt the defendant as a common carrier, upon an objection, that the action ought to have been brought in the name of the *conſignee* of the goods, and not in the name of the *conſignors*, for that the conſignors parted with their property, upon their delivering the goods to the carrier; and that no property remained in them after ſuch delivery, lord *Mansfield* ſaid there was neither law nor conſcience in the objection. This is an action upon the agreement between the plaintiffs and the carrier: the plaintiffs were to pay him, therefore the action is properly brought by the perſons who agreed with him, and were to pay him. The other judges concurred.

Moore and others *v.* Wilſon, Ea 27 Geo. 3. B.R. 1 *Ter. Rep.* 659.

And though the declaration ſtate, that the carrier undertook to carry the goods for a certain hire and reward, *to be paid by the conſignor*, and it be proved at the trial that the *conſignee* agreed with the conſignor to pay the carriage, it will be no variance; for where the declaration was, that the defendant undertook to carry the goods "for a certain hire and reward *to be paid by the plaintiffs:* and it was proved at the trial, that *the conſignee had agreed with the*

(1) The counſel for the defendant in their argument, cited the caſe of Turner *v.* Gray, Sitt. af. Tr. Ter. 1785, Weſt. where the plaintiff having ſent money and deeds, by the Nottingham coach, and being aſked by the book-keeper as to the value, had denied it to be a parcel of value, was nonſuited, and not permitted to recover the money paid for the carriage.

plaintiffs,

plaintiffs, to pay the carriage; the plaintiffs, on an objection taken by the defendant's counſel, that this did not prove the declaration, were nonſuited: but it being afterwards moved to ſet aſide this nonſuit, *Buller*, J. before whom the cauſe was tried, ſaid, that on conſidering the queſtion, he found he had been miſtaken in point of law; for that *whatever might be the contract between the vendor and the vendee*, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable. The other judges concurred.

2. *Innkeepers.*] Innkeepers are chargeable for all loſſes that may happen to their gueſts, while they remain as ſuch in their inns.—The plaintiff brought his action againſt the defendant, who was an innkeeper, for the value of goods ſtolen out of the inn. At the trial, it appeared that the plaintiff's ſervant came to an inn, and deſired to have the liberty of leaving the goods which he could not diſpoſe of in the market, till the week following, meaning the next market day. The innkeeper's wife ſaid ſhe could not tell whether he could, for they were very full of parcels. The plaintiff's ſervant then ſat down in the inn, and had ſome liquor, and put the goods on the floor immediately behind him; after ſitting there a little while the goods were miſſing: a verdict was found for the plaintiff; and in reporting the caſe, upon a motion for a new trial, *Buller*, J. obſerved that he was of opinion, that if the defendant's wife had accepted the charge of the goods upon the ſpecial requeſt made to her, he ſhould have conſidered her as a ſpecial bailee, and not anſwerable in this caſe, having been guilty of no actual negligence; but that not being the caſe, he conſidered this to be *the common caſe of goods brought into an inn by a gueſt, and ſtolen from thence; in which caſe the innkeeper was liable to make good the loſs.* AND THE COURT were clearly of opinion, that the innkeeper was liable to anſwer for the loſs, for there was no refuſal to receive the plaintiff's ſervant as a gueſt. The innkeeper merely refuſed to take care of the goods until the next week; and when the plaintiff's ſervant was ſitting in the inn, with the conſent of the innkeeper (for the latter did not object to receive him) he was in the ſame ſituation as any other gueſt, and entitled to the ſame protection for his goods: if it had appeared that the goods were loſt through the mere negligence of the plaintiff's ſervant, the caſe might have deſerved greater conſideration; but nothing of that kind appeared on the judge's report.

Bennet v. Mellor, Ea. 33 Geo. 3. B.R. 5 *Ter. Rep.* 273.

VII. *Action upon the Caſe for Miſfeaſance in a Duty.*

In all caſes where a damage accrues to another by the negligence, ignorance, or miſbehaviour of a perſon in the duty of his trade or calling, an action on the caſe will lie. *Bull.* N.P. 73.

Slater v. Baker and Stappleton, M. 8 Geo. 3. C. B. 2 *Wilſ.* 359.

Therefore, if a ſurgeon tries an experiment on a ſubject, and therein acts contrary to the uſual and common courſe of practice among ſurgeons; if the perſon be damnified by ſuch act, he may maintain an action on the caſe. For, where an action was brought againſt the defendants *Baker*, who was a ſurgeon, and *Stapleton*, who was an apothecary, and who had jointly undertaken to cure the plaintiff's leg, which had been broken and ſet, and the callous of the fracture formed, *for ignorantly and unſkilfully breaking and diſuniting the callous of the plaintiff's* leg after it was ſo ſet, and the callous formed; the jury, upon the trial, upon the general iſſue pleaded, found a verdict for the plaintiff for 500 l. damages. The ſubſtance of the evidence was, that the plaintiff having broken both the bones of one of his legs, they were ſet by a ſurgeon: that in a month's time after the leg was ſet, his leg was healing, and in a good way; the callous was formed, and there was not more than the uſual protuberance; that in nine weeks time he left the ſurgeon's houſe, and went home, being able to walk on crutches; that, after he went home, Stapleton, the apothecary, was ſent for to take off the bandage from the leg, which he declined to do himſelf, and deſired that the other defendant, Baker, might be called in to aſſiſt; that Baker put on to the plaintiff's leg a heavy ſteel, which had teeth, and would ſtretch or lengthen the leg; that Baker took up the plaintiff's foot in both his hands, and nodded to Stapleton; then Stapleton took the leg upon his knee, and it gave a crack, upon which the plaintiff cried out to them, and ſaid, *You have broke what nature had formed*; to which Baker anſwered, *You muſt go through the operation of extenſion*; and Stapleton ſaid, *We have conſulted, and done for the beſt.* One ſurgeon proved, that in caſes of crooked legs, after they have been ſet, *the way of making them ſtraight is by compreſſion, and not by extenſion*; and had no idea of the inſtrument ſpoken of for extenſion. Another ſurgeon proved, that when the callous is formed to any degree, it is difficult to break it; and that the callous in this caſe muſt have been formed, or it would not have given a crack; and he ſaid *extenſion was improper*; and if the patient himſelf had aſked him to do it, he would have declined it; and if the callous had not been hard, he would not have done it without the conſent of the plaintiff; that compreſſion was the proper way, and the inſtrument improper. It was afterwards moved to ſet aſide the verdict; firſt, becauſe the action was upon a joint-contract, and there was no evidence of a joint-undertaking by both the defendants, which ought to have been proved: but the court, upon the ſtate of the evidence, were of opinion that the joint-contract was fully proved (as it moſt clearly was). The ſecond objection was, that it ought to have been *treſpaſs vi et armis*, for breaking the plaintiff's leg, without his conſent; as all the ſurgeons

ſaid

ſaid they never do any thing of this kind, without conſent; and if the plaintiff ſhould bring another action of *treſpaſs vi et armis*, this verdict could not be pleaded in bar. But by the court, It appears by the evidence of the ſurgeons, that it was improper to diſunite the callous without conſent: this is the uſage and law of ſurgeons; then *it was ignorance and unſkilfulneſs in that very particular*, to do contrary to the rule of the profeſſion; what no ſurgeon ought to have done: and indeed it is reaſonable that a patient ſhould be told what is about to be done to him, that he may take courage, and put himſelf in ſuch a ſituation as to enable him to undergo the operation. It was objected, that this verdict and recovery cannot be pleaded in bar to an action of treſpaſs *vi et armis* to be brought for the ſame damage; but we are clearly of opinion it may be pleaded in bar. That the plaintiff ought to receive a ſatisfaction for the injury, ſeems to be admitted; but then it is ſaid, that the defendants ought to have been charged as treſpaſſers *vi et armis*. The court will not look with eagles' eyes, to ſee whether the evidence applies exactly to the caſe, when they can ſee the plaintiff has obtained a verdict for ſuch damages as he deſerves: they will eſtabliſh ſuch verdict if it be poſſible. For any thing that appears to the court, this was the firſt experiment made with this new inſtrument; and if it was, it was a raſh action, and *he who acts raſhly, acts ignorantly:* and although the defendants in general may be as ſkilful in their reſpective profeſſions as any two gentlemen in England, yet the court cannot help ſaying, that in this particular caſe, they have acted ignorantly and unſkilfully, contrary to the known rule and uſage of ſurgeons. Judgment for plaintiff.

But, where an action on the caſe is brought for a *nonfeaſance*, it muſt appear on the face of the declaration, that there was a conſideration, or a promiſe and contract on the behalf of the defendant to do the particular thing, for the nonperformance of which the action is brought. For, where the declaration ſtated, that "the plaintiffs, at the ſpecial inſtance and requeſt of the defendant, who was a builder, retained and employed the defendant to do and perform certain bricklayer's and carpenter's works before a certain day; and although the defendant afterwards accepted of ſuch retainer and employment, and could and ought to have completed all ſuch works within the time; yet, contriving to injure the plaintiff, did not, nor would complete the repairs on or before the ſaid *day*; but, on the contrary, permitted the premiſes to remain untiled, &c. in conſequence of which ſaid neglect of the defendant, the walls of the ſaid premiſes were greatly ſapped and rotted, and the ceilings damaged and ſpoiled, and the plaintiffs obliged to continue tenants of other premiſes, and thereby put to additional expence," &c. The ſecond count ſtated, that "the plaintiff's

Elſee & *al. v.* Gatward, Hil. 33 Geo. 3. B.R. 5 *Ter. Rep.* 643.

" plaintiffs being poſſeſſed of old materials, retained and " employed the defendant at his inſtance and requeſt to do " and perform certain bricklayer's and carpenter's works, and " to uſe and apply in and about thoſe works all ſuch parts " of the old materials as were fit and proper: and that al- " though divers parts were fit and proper, yet the defendants, " contriving to injure the plaintiffs, and enhance the expence, " did not, nor would uſe and apply ſuch old materials, but " refuſed ſo to do; and wrongfully and injuriouſly uſed and " applied in and about the ſame works, other new and ex- " penſive materials, whereby the plaintiffs were put to an " unneceſſary expence, and the old materials became wholly " uſeleſs," &c. The third count was in trover for the old materials. The defendant demurred to the two firſt counts, alleging for cauſe, that " notwithſtanding the ſup- " poſed cauſe of action were in the nature of a nonfea- " ſance, and conſiſted in the nonperformance of certain mat- " ters; it did not appear that the defendant, by any pro- " miſe, undertaking, contract, or agreement, was bound to " the performance of thoſe ſeveral matters or things; and " that although the ſuppoſed cauſes of action were founded " upon implied contracts in law, no ſufficient ground or con- " ſideration to raiſe ſuch implied contracts was ſtated," &c. " That it did not appear that there was any promiſe " or contract on the part of the defendant, upon which the " breaches in thoſe counts could operate; and that thoſe " counts did not contain any cauſe of action." The parties went to trial, when a verdict was given for the defendant on the count in trover, and *conditional* damages aſſeſſed for the plaintiffs on the two counts demurred to.—By Lord *Kenyon*, Ch. J. *If both the counts be not good, the defendant is entitled to judgment.* Now, I do not think that the firſt count in the declaration is good in law; it ſtates, that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houſes; but *it is not ſtated that he was to receive any conſideration, or that he entered upon his work.* No conſideration reſults from his ſituation as a carpenter, nor from the undertaking. Nor is he bound to perform all the work that is tendered to him; and therefore the amount of this is, that the defendant has merely told a falſehood, and has not performed his promiſe; but for his nonperformance of it, no action can be ſupported. This is warranted by Lord *Holt*'s opinion in *Coggs* v. *Bernard*, 2 Lord *Raym.* 919. where recognizing the caſe in the Year Book, 11 *H.* 4. 33. he ſaid, " there the action was brought " againſt a carpenter, for that he had undertaken to build " the plaintiff a houſe within ſuch a time, and had not done " it, and it was adjudged the action would not lie." This caſe is very diſtinguiſhable from thoſe of common carriers, and porters from whoſe ſituations certain duties reſult; they

are

are bound by law to carry goods delivered to them, and are by law entitled to a recompence; but no ſuch duty reſults from the ſituation of a carpenter; he is not bound, as ſuch, to perform all the work that is brought to him: it appears to me, therefore, that *the firſt count cannot be ſupported*, there being no conſideration expreſsly ſtated, nor any conſideration reſulting from the defendant's employment as a carpenter; though had the defendant performed the work, he might have recovered a ſatisfaction on a *quantum meruit*. Upon the authority of *Coggs* v. *Bernard*, and the caſes there noticed, not contradicted by any other deciſion, I think that the firſt count for nonfeaſance is bad, but that *the ſecond count may be ſupported*. It is there ſtated, that *the defendant entered upon his employment*, and that he did not do that which he ought to have performed according to his retainer. In that count it is ſtated, that he undertook to uſe the old materials, but in fact he did not uſe them, but ſubſtituted new ones in their ſtead, thereby enhancing the expence to the plaintiffs. This comes within the caſe mentioned by *Holt* in *Coggs* v. *Bernard*, ſpeaking of the ſame caſe in the Year Books, "but then the queſtion is put to the court, what if "he had built the houſe unſkilfully? and it was agreed in "that caſe, an action would have lain;" for though the defendant could not have been compelled to build this houſe, and to uſe the old materials, yet having entered upon the contract, he was bound to perform it, and not having performed it in the manner propoſed, an action lies againſt him. *Aſhhurſt*, J. the ſecond count may be maintained, inaſmuch as it appears that the defendant was retained by the plaintiff, that he entered upon the work in conſequence of that retainer, and that he did not perform it according to the terms of the retainer, by uſing new materials inſtead of the old, which ſubjected the plaintiffs to a conſiderable expence. This amounts to a *miſfeaſance* on the part of the defendant, and may be the foundation of an action: but the firſt count cannot, I think, be ſupported. The diſtinction is this: *if a party undertake to perform work, and proceed on the employment, he makes himſelf liable for any miſfeaſance* in the courſe of that work: but *if he undertake, and do not proceed on the work, no action will lie againſt him for the nonfeaſance.* In this caſe, the defendant's undertaking was merely voluntary, no conſideration for it being ſtated. There was no cuſtom of the realm, or any legal obligation, to compel him to perform this work; and that diſtinguiſhes this caſe from thoſe of a common carrier, porter, and ferryman, who are bound, from their ſituations in life, to perform the work tendered to them; but a carpenter, as ſuch, is not bound by any ſuch obligation. This count is merely for nonfeaſance, and it does not ſtate that the defendant entered upon the employment: it is indeed alleged, that *he did not finiſh* the work,

from whence the plaintiffs wiſh the court to infer, that he had begun upon it, but that is the giſt of the action, it ſhould have been ſtated expreſsly. Nor is it a neceſſary inference to be drawn from the facts ſtated; for, conſiſtently with every thing alleged, the defendant may not have begun the work at all; but *it has been contended, that it was not neceſſary to allege that the defendant was employed to perform this work for hire and reward*, it being ſtated, that he was retained: and that indebitatus aſſumpſit would have lain by the defendant if he had performed it. I admit, that the defendant might have recovered a ſatisfaction in ſuch an action, if he had executed the work; but in order *to compel him to perform it, it ſhould appear that there was an expreſs conſideration for it*; the word *retain* does not neceſſarily ſhew that there was a conſideration. *Groſe*, J. the jury having given damages on both the counts jointly, it becomes neceſſary to conſider them both; becauſe, if either be bad, the defendant will be entitled to judgment; and it appears to me they fall under different conſiderations. The firſt count is for *nonfeaſance*; and it alleges *a promiſe without ſhewing any conſideration for it:* and it is not ſtated that the defendant entered upon the work, or undertook it for any reward; the firſt count, therefore cannot be ſupported, but the ſecond may, for it is for a *misfeaſance*. The defendant is bound in conſequence of having entered upon the work; and whether the work were or were not to be performed for hire, the defendant was not to injure the plaintiffs, and here conſiderable expences were incurred, in conſequence of his uſing the new inſtead of the old materials. Judgment for defendant.

Shiells, aſſignees of Goodwin, *v.* Blackburne, H. 29 Geo 3. C.B. 1 *Hen. Black.* 158.

And if a perſon undertake to perform an act gratuitouſly, not being in a buſineſs in which he is particularly ſkilled, he ſhall not be anſwerable for any damage that may happen if he acted *bona fide*, according to the beſt of his knowledge; for, where the defendant, who was a general merchant, being about to export to a correſpondent at Madeira a quantity of leather *cut out for ſhoes and boots*, which he had procured of Goodwin the bankrupt, for that purpoſe, was applied to by Goodwin to ſend to the ſame correſpondent another parcel of the ſame kind of leather on his (Goodwin's) own account on a venture; and the defendant having received both packages, in order to ſave the trouble and expence of a ſeparate entry at the cuſtom-houſe, *voluntarily and without any compenſation*, by *agreement with Goodwin*, made one entry of both caſes, but did it under the denomination of *wrought leather*, inſtead of *dreſſed leather*, which it ought to have been; in conſequence of which, they were both ſeized. An action on the caſe being brought by the aſſignees of Goodwin, to recover the value of the leather, which he had prepared to export on his own account, the declaration ſtated, *that the defendant, in conſideration that Goodwin would*

would permit him to enter the ſaid leather at the cuſtom-houſe, undertook to enter it under a right denomination; that Goodwin, confiding in the undertaking, did permit him to enter it at the cuſtom-houſe for exportation; that the defendant did not enter it under a right denomination; but, on the contrary, made an entry of it under a wrong denomination of wrought leather, by which it was liable to be ſeized, and was ſeized and forfeited to the king. On the trial, there was a verdict for the plaintiff; but on a motion to ſet aſide that verdict, and for a new trial, THE COURT held, that the action could not be maintained. For, by *Heath*, J. the defendant, in this caſe, has not been guilty either of groſs negligence or fraud; he acted *bona fide*. If a man applies to a ſurgeon to attend him in a diſorder for a reward, and the ſurgeon treats him improperly, there is groſs negligence, and the ſurgeon is liable to an action: the ſurgeon would alſo be liable for ſuch negligence, if he undertook gratis to attend a ſick perſon, becauſe his ſituation implies ſkill in ſurgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous aſſiſtance, who either does not exert all his ſkill, or adminiſters improper remedies to the beſt of his ability, ſuch perſon is not liable: it would be attended with injurious conſequences if a gratuitous undertaking of this ſort ſhould ſubject the perſon who made it, and who acted to the beſt of his knowledge, to an action. *Wilſon*, J. where money has been paid for the performance of certain acts, the perſon receiving it is by law anſwerable for any degree of neglect on his part; the payment of money being a ſort of inſurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted *bona fide*, it is not conſiſtent either with the ſpirit or policy of the laws to make him liable to an action. Here Goodwin wanted to diſpoſe of his goods, which the defendant entered, together with his own, without any reward. Could he be underſtood to be anſwerable for more care than he took of his own goods? There was no ſuſpicion of any fraudulent deſign; a wrong entry at the cuſtom-houſe cannot be conſidered as groſs negligence, when, from the variety of laws relating to the cuſtoms, reliance muſt be placed on the clerks in the office. Lord *Loughborough*, Ch. J. where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for groſs negligence; but *if a man gratuitouſly undertakes to do a thing to the beſt of his ſkill, where his ſituation or profeſſion is ſuch as to imply ſkill*, an omiſſion of that ſkill is imputable to him as groſs negligence. If, in this caſe, a ſhip-broker, or a clerk in the cuſtom-houſe, had undertaken to enter the goods, a wrong entry in them would be groſs negligence, becauſe their ſituation and employ neceſſarily imply a competent degree of knowledge

knowledge in making ſuch entries: but when an application, under the circumſtances of this caſe, is made to a general merchant to make an entry at the cuſtom-houſe, ſuch a miſtake as this is not to be imputed to him as groſs negligence.

VIII. *Action on the Caſe for conſequential Damages.*

Leader v. Moxon, and others, M. 14 Geo. 3. C.B. 2 *Black.* 924 3 *Wilſ.* 461.

1. *By injuries done to real property.*] An action on the caſe will lie for an injury done to premiſes, by raiſing the pavement of a ſtreet, though done under the authority of the commiſſioners for paving, if the commiſſioners have therein exceeded their juriſdiction. For where a ſpecial action on the caſe was brought againſt the defendants, "for wrongfully and "injuriouſly raiſing the ſtreet called Old Gravel-lane, and "the ſoil and pavement thereof, before and in front of ſix "of the plaintiff's meſſuages, or dwelling-houſes; and ſo "near and ſo cloſe to and againſt the fronts of the ſaid meſ-"ſuages, that the doors and paſſages from the ground-floor "into the ſtreet, and alſo the lights and windows on the "ſaid ground-floor became totally blocked up and obſtruct-"ed, cloſed and darkened;" on the general iſſue pleaded, there was a verdict for the plaintiff, with 170l. damages, ſubject to a caſe, in which the material facts ſtated were, that the plaintiff was owner for life of the premiſes ſituated in Old Gravel-lane; that the commiſſioners, under the ſtatute 11 Geo. 3. c. 21, for paving Wapping, were empowered, at the requeſt of two-thirds of the houſeholders and owners of any lane opening into Wapping-ſtreet, *to have the ſame paved and cleared of incroachments, nuiſances, obſtructions, and annoyances*, to order the ſame to be done; and afterwards the ſame were to be ſubject to the general powers of the act, viz. *to be paved, repaired, ſunk, or altered* in ſuch manner as the commiſſioners ſhould think fit. In conſequence of a petition from two-thirds and upwards of the houſeholders and inhabitants, Old Gravel-lane was ordered to be paved and cleared of all incroachments; and the commiſſioners contracted with the defendants to pave the ſame, who accordingly proceeded ſo to do; *and did, purſuant to the orders of the ſaid commiſſioners, raiſe the foot-way contiguous to the plaintiff's houſes, to the height of ſix feet, but in a regular deſcent* [from one end of the ſtreet to the other]; and, by ſo raiſing the foot-way in manner aforeſaid, *obſtructed the doors and windows in the ground-floors of the plaintiff's houſes*, and occaſioned the injuries laid in the declaration. It was contended, that the defendants had done nothing but what the commiſſioners ordered, and the commiſſioners have power *to pave, repair, ſink, or alter:* and if to *alter*, then they have power to raiſe the pavement; if to raiſe it an inch, they may lawfully raiſe it a foot or ſix feet; for that the legiſlature intended that private property ſhould give way

way to the public good. But THE COURT (abſente *De Grey*, Ch. J.) were clearly of opinion, that this action was well brought againſt the defendants. *Per Gould*, J. This act of parliament ought to be carried into execution without doing ſuch enormous injury to individuals, as hath been manifeſtly done to the plaintiff in this caſe; wherever a truſt is put in commiſſioners by act of parliament, if they miſdemean themſelves in that truſt, they are anſwerable criminally in the King's Bench; if they aggrieve and damnify the ſubject, as they have done in the preſent caſe, they are anſwerable in this court *civiliter* in damages to the party injured. *Per Cur.* (1) Here the commiſſioners have *groſsly exceeded their powers*, which muſt have a reaſonable conſtruction. Their diſcretion is not arbitrary, but muſt be limited by reaſon and law. The act could never intend that any of the houſe-holders ſhould pay a rate of 1s. 6d. in the pound, in order to have their houſes buried under-ground, and their windows and doors obſtructed. This was not removing annoyances, but creating them. Had parliament intended to demoliſh or render uſeleſs ſome houſes, for the benefit or ornament of the reſt, it would have given expreſs powers for that purpoſe, and given an equivalent for the loſs that individuals might have ſuſtained thereby.

But, without an actual exceſs of juriſdiction, no action can be maintained for any damages occaſioned by the acts of the commiſſioners of paving, or the paviours acting under them. This was an action upon the caſe for wrongfully and injuriouſly raiſing the ſtreet before a certain entrance or gateway, leading from the ſtreet to the premiſes of the plaintiffs; and ſo cloſe and near thereto, that it was greatly blocked up and obſtructed, inſomuch that the carts, &c. employed in the ſervice of the plaintiffs could not paſs and repaſs through the ſaid entrance. The defendant pleaded the general iſſue; and on the trial, there was a verdict for the plaintiffs, with 150l. damages, ſubject to the opinion of the court on the following caſe. The gateway in queſtion before the committing of the grievance, was of the height of twelve feet one inch from the old pavement, and the gateway was uſed for the purpoſe of admitting waggons into the yard loaded with plate-glaſs, that they might be unloaded at the door of the plaintiff's warehouſes. The defendants, who acted as paviours, under the authority of the commiſſioners named in the act 31 Geo. 3. c. 61. for paving Upper-Ground-Street, in the pariſh of Chriſt-Church, in Surrey, raiſed (1) the pavement two feet one inch higher than the old pavement, whereby the height of the gateway in the centre of the arch was reduced from twelve

British Caſt Plate-glaſs Manufacturers *v.* Meredith, Tr. 32. Geo. 3. 4 Ter. Rep. 794.

(1) The commiſſioners were by the 13th ſection of the act, impowered to cauſe the ſaid ſtreet *to be paved, repaired, raiſed, ſunk, or altered, &c.*

feet

feet one inch to ten feet one inch. The defendants, ſoon after the act paſſed, proceeded to take the level of the ſtreet, in order to its being paved; and, for that purpoſe, they cauſed a ſtraight and halt line to be drawn in the front of the houſes in the ſtreet, ſhewing the level and height of the new intended pavement, and about three months afterwards the defendants laid the ground according to ſuch level, and agreeably to the line ſo marked out, and paved the ſame, which now makes a regular inclined plane, with a declination of only one foot of perpendicular height in ſeventeen feet of length; *and it would not be effectual if done in any other way:* whereas, in the original ſtate, the declination was about one foot in twelve, which was a very unſafe declivity for horſes and carriages going up or down. *The line ſo made was neceſſary and proper; and every alteration of the inclined ſurface of the ſtreet leſs material was not ſufficient to render the ſtreet ſafe for carriages paſſing through.* In order to admit carriages, as heretofore, it will be neceſſary to take down the arch, and heighten the ſame. The caſe then ſtated, that by theſe means the plaintiffs are deprived of the uſe of the gateway as they had it before; and waggons and other carriages are prevented paſſing to their warehouſes and are obliged to be unloaded in the ſtreet. To ſhew that the action would lie, the caſe of *Leader* v. *Moxon*, was mentioned and relied on. But, by Lord *Kenyon*, CH. J. if this action could be maintained, every turnpike act, paving act, and navigation act, would give riſe to an infinity of actions. If the legiſlature think it neceſſary, as they do in many caſes, they enable the commiſſioners to award ſatisfaction to the individuals who happen to ſuffer. But if there be no ſuch power, the parties are without remedy, provided the commiſſioners do not exceed their juriſdiction. But *it does not ſeem to me, that the commiſſioners acting under this act have been guilty of any exceſs of juriſdiction.* Some individuals ſuffer an inconvenience under all theſe acts of parliaments; but the intereſts of individuals muſt give way to the accommodation of the public. The caſe of Leader and Moxon, depended on the queſtion, whether or not the commiſſioners exceeded their juriſdiction. *Buller*, J. This action cannot be maintained, becauſe a particular remedy is pointed out by the act (1). If there had been no clauſe in the act, empowering the commiſſioners to give ſatisfaction to the party aggrieved, I

(1) The 46th ſection authorized the commiſſioners to make any allowance, or pay any part of the expences incurred by the proprietors of any houſe or building, in removing any of the obſtructions, nuiſances, or annoyances as aforeſaid, in ſuch caſes where the proprietors ſhould or might be materially injured, on account of the pavement being *neceſſarily raiſed* or lowered, and whereby ſuch caſes might be particularly entitled to ſome compenſation.

am

am by no means ſatisfied that any action could be maintained: there are many caſes in which individuals ſuſtain an injury, for which the law gives no action. For inſtance, pulling down houſes, or raiſing bulwarks, for the preſervation and defence of the kingdom againſt the king's enemies. This is one of thoſe caſes to which the maxim applies, *ſalus populi ſuprema eſt lex.* If the thing complained of were lawful at the time, no action can be ſuſtained againſt the party doing the act. In this caſe, expreſs power was given to the commiſſioners *to raiſe* the pavement; and, *not having exceeded their power*, they are not liable to an action for having done it. *Groſe* J. the clauſe in the act which empowers the commiſſioners to award ſatisfaction, is deciſive againſt this action. *Poſtea* to the defendants.

An action on the caſe, in the nature of waſte will lie againſt a tenant for years after the expiration of his term, for dilapidations committed during the term. This was an action upon the caſe, in nature of waſte; and it appeared that the plaintiff had demiſed certain premiſes to one Fuller, for a term of years, expiring on 24th June 1775; that the defendants became aſſignees of Fuller; and before the expiration of the term, viz. on June 1, pulled down and demoliſhed the ſeveral fixtures mentioned in the declaration, but yielded up poſſeſſion of the premiſſes on the 24th of June. It was objected, on the part of the defendant, at the trial, that Fuller having executed a counterpart of the leaſe, and covenanted for himſelf and his aſſigns, quietly to yield up the premiſes, *with their appurtenances*, at the end of the term, the action ſhould have been covenant, and not caſe, and ſubject to the opinion of the court on that queſtion, the plaintiff had a verdict. By the court: there is no difficulty. Tenant for years commits waſte, and delivers up the place waſted to the landlord. Had there been no deed of covenant, the action of waſte, or caſe in nature of waſte, would have lain. Although the landlord by the ſpecial covenant, acquires a new remedy, he does not loſe his old: and it is clear, that an action of waſte lies againſt a tenant for years after the term is expired, only the writ muſt be in the *tenuit*, and not in the tenet (1).

Kinlyſide *v.* Thornton and others, M. 17. Geo. 3. C.B. 2 Black, 1111.

In an action for ſtopping and obſtructing the plaintiff's lights, *Wilmot*, J. ſaid, that *where a houſe has been built forty years*, and has had lights at *the end of it*; if the owner of the adjoining ground builds againſt them, ſo as to obſtruct them, an action lies, and this is founded on the ſame reaſon as where they have been immemorial, for this is long enough to induce a preſumption that there was originally ſome agreement between the parties: and he ſaid, that as twenty years was ſufficient to give a title in ejectment, in

Lewis *v.* Price, Worc. Sum. Aſſ. 1761. *Eſpin. Dig.* 636.

(1) 2 Roll. Abr. 830.

which

which he might recover the houſe itſelf; he ſaw no reaſon why it ſhould not be ſufficient to entitle him to any eaſement belonging to the houſe.

Jeſſer *v.* Gifford, M. 8 Geo. 3. B.R. 4 *Burr.* 2141.

And a reverſioner, as well as the party in poſſeſſion, may bring an action for an injury done to the value of the inheritance: for in an action for erecting a wall, whereby the plaintiff's lights were obſtructed, the declaration contained two counts. In the ſecond, the plaintiff counted as the reverſioner; and after verdict, it was moved in arreſt of judgment, that the action did not lie by the reverſioner, being only an injury to the perſon in poſſeſſion; to which it was anſwered, that it was a damage done to the inheritance: and if the reverſioner wanted to ſell the reverſion, this obſtruction would certainly leſſen the value of it. THE COURT were of opinion, that an action might be brought by one in reſpect of his poſſeſſion, and by the other in reſpect of his inheritance, for the injury done to the value of it.

Stone and another *v.* Cartwright, Mic. 36 Geo. 3. B.R. 6 *Ter. Rep.* 411.

But no action will lie againſt a ſteward, manager, or agent, for damages done by the negligence of thoſe employed by him in the ſervice of his principal; but the principal, or thoſe actually employed, are only liable. In this caſe, the declaration ſtated, that the plaintiffs were poſſeſſed of a certain cloſe, and alſo of a dwelling-houſe; that the defendant was poſſeſſed of a certain coal-mine, under the ſurface of the ſaid cloſe and houſe, and worked his ſaid mine in a negligent, incautious, and unſkilful manner, &c. by reaſon whereof the ſurface of the cloſe ſunk and gave way, &c. and the buildings were rent and rendered dangerous. It appeared at the trial, that the colliery belonged to an infant, and that the defendant had been appointed agent and manager thereof by the court of chancery; that he employed a bailiff under him, who ſuperintended the work; that he hired and diſmiſſed the colliers at his pleaſure; but that he took no perſonal concern in the buſineſs; was not preſent when the injury complained of was done, nor had given any particular orders for working the mine in the manner which had occaſioned it. Upon this evidence, Lord *Kenyon* was of opinion, that the action could not be maintained againſt the defendant, who was the middle man, but that it ought to have been brought either againſt the perſon who actually committed the treſpaſs, or concurred therein; or againſt the ſuperior, the owner of the colliery, for whoſe benefit the work was carried on: and he therefore nonſuited the plaintiff: of this opinion were the court, upon its being afterwards moved to ſet the nonſuit aſide; for, *per* Lord *Kenyon*, it was never heard of, that a ſervant who hires labourers for his maſter, was anſwerable for all their acts. *Aſhhurſt*, J. agreed. *Groſe*, J. it frequently happens that a perſon's gardener employs labourers under him; yet it never could

could be contended, that on that account he would be anſwerable for damages done by them in the courſe of their employment. *Lawrence*, J. If the plaintiffs had given evidence that the defendant had particularly ordered theſe acts to be done, from whence the damage had enſued, that would have varied the caſe, but no ſuch evidence being adduced, the opinion delivered at the trial was perfectly right.

2. *By the diſturbance of another in a right.*] An action on the caſe will lie for diſturbing another in a right, which is annexed to a right of common. Thus, in a ſpecial action on the caſe, the declaration ſtated, that "the plaintiff was *poſſeſſed* of a meſſuage and ten acres of land in the pariſh of Ludham in the county of Norfolk, and by reaſon thereof had *common of paſture* in and upon Ludham waſte, for all his commonable cattle, levant and couchant on the ſaid meſſuage and land, as belonging and appertaining thereto; and that time out of mind there was *an ancient and laudable cuſtom*, that every *occupier* of lands and tenements in Ludham, intitled to ſuch common of paſture, may *mow and cut down ruſhes* upon the ſaid waſte, during the ſummer quarter, *and place them in heaps* to be cured and dried; and then *take and carry them away* for litter for his cattle, ſo levant and couchant. But that *the defendant had wrongfully and injuriouſly ſpoiled, mowed, and cut down ten acres of the graſs and ruſhes there growing, and took away the ſame*; whereby the plaintiff could not enjoy the ſaid common of paſture, and *right of mowing, cutting down, taking and carrying away ruſhes* in ſo ample a manner, &c. There was a ſecond count in trover, for two waggon-loads of ruſhes. Plea not guilty. On the trial, there was a general verdict for the plaintiff; and afterwards it was moved in arreſt of judgment, on the following grounds, 1ſt, that *a cuſtom to take a profit in the ſoil of another is bad:* to which it was anſwered for the plaintiff, that a cuſtom to take a profit in the ſoil of another is good, as in 3 Lev. 160, where it was reſolved, that a cuſtom for the freemen of Lynn, being owners or maſters of ſhips, to dig for ballaſt in the ſoil, of the mayor and burgeſſes is good, though not members of the corporation: ſo, a cuſtom to dry nets upon another's ſoil is good; alſo a cuſtom of the hundred of Wirkſworth, in Derbyſhire, to dig for lead in another's ſoil is good, which is certainly to take a profit in another's ſoil. It is a good cuſtom, that when a man hath agiſted his cattle in any park, in the time of a great ſnow, for neceſſity, to cut the branches of the oaks for them, 1 Rol. Abr. 560. pl. 12.—THE COURT agreed herein, and over-ruled the objection.—The 2d objection was, that *the title to the common was ill ſet out in the declaration*, It only alleged, that the plaintiff was *poſſeſſed* of a meſſuage and lands; and, by

Beau v. Bloom, M. 14 Geo 3. C.B. 2 *Black.* 926. 3 *Wilſ.* 456.

reaſon thereof, he of right had, and ought to have, common: to which it was anſwered for the plaintiff, that this is an action for a tort againſt a ſtranger, a mere wrong doer; and it is ſufficient for the plaintiff to allege that he is *poſſeſſed*; he need not ſet out any title whatſoever; and this hath been the conſtant and uniform way of declaring in actions for diſturbances of common and ſimilar wrongs ever ſince the caſe of *Strode* v. *Byrt*, 4 Mod. 418. where a declaration, ſtating that the plaintiff was *poſſeſſed*, &c. and ought to have *common*, was adjudged to be good: 1ſt, Becauſe it was *an action grounded upon the poſſeſſion againſt a wrong doer*; to which action a title would be only an inducement. 2dly, That it was not neceſſary to ſet out any title whatſoever, becauſe (as to the defendant who did the injury) it ſtood indifferent, whether the plaintiff was the owner of the ſoil or not; the defendant's buſineſs was to anſwer the wrong alleged to be done by him; but that a right of common muſt be proved, and given in evidence, otherwiſe the plaintiff could not maintain his action, but what right was immaterial. The court agreed herein, and over-ruled the objection.—The 3d objection was, that it appeared by the declaration, that the plaintiff claimed the right to cut and take the ruſhes on the waſte for litter for his cattle as a right appendant to his right of common, which could not be in their nature and quality; as a thing *incorporeal cannot be appendant to a thing incorporeal*, and both theſe rights were incorporeal. To which it was anſwered, that *the right to cut and take ruſhes* was not claimed, or alleged to be appendant to the right of common; but was alleged to be a part of, or as a circumſtance of the plaintiff's right of common, and was a very reaſonable and uſeful part thereof: and of that opinion were the whole court.—The fourth objection was to duplicity in the firſt count, which, it was ſaid, conſiſted of a claim of two diſtinct and ſeveral rights, viz. *a right of common*, which doth not lie in *prendre*, for the plaintiff could not cut and take away the graſs from off the common, but could only feed and take it by the mouths of his cattle; and a right to cut and take away ruſhes, which lies wholly in *prendre*, could not be joined in the ſame count with the right of common, which did not lie in *prendre*. To which the like anſwer was given as to the 3d objection, viz. that the right to cut and take the ruſhes was only a circumſtance attending, or part of, the right of common; and that both together might be reaſonably taken and conſidered as one united right; for the cuſtom is, that whoever occupies land in the pariſh of Ludham, and has a right of common in the waſte, has alſo a right to cut and take ruſhes there: he cannot have one without the other, according

ing to the cuſtom laid in the declaration, and found to be true by the verdict: and of that opinion was the whole court. Judgment for plaintiff, *per tot. cur.*

In an action on the caſe, brought by one commoner againſt another, for a diſturbance of his right of common, the plaintiff in his declaration ſhewed his own particular right of common, and charged, in general, that the defendant, intending to injure him, and deprive him of the benefit of his common on the 1ſt day of June, 1768, and on divers days and times between that day and the day of ſuing forth the original writ, *wrongfully and injuriouſly eat up, depaſtured, and ſpoiled*, the grais then growing, and being in the common, with divers ſheep and lambs, to wit, 200 ſheep, and 200 lambs; whereby the plaintiff could not for a long time (to wit, during all the time aforeſaid) have, uſe, or enjoy his common of paſture in and upon the ſaid common, in ſo ample and beneficial a manner as he ought to have had and enjoyed the ſame; but during all that time was deprived of great part of the benefit and profit thereof, to his damage, &c. The defendant pleaded the general iſſue; and, on the trial at the aſſizes, a verdict was found for the plaintiff, ſubject to the opinion of the court on this ſhort caſe, viz. *The plaintiff at the trial proved his right of common, as laid in the declaration; and that the defendant was alſo a commoner, and had ſurcharged the common by putting on more than his ſtint.*— And the objection was, that the plaintiff could not recover under this general form of declaring, becauſe the declaration did not ſtate the defendant's right; and how, in particular, he had exceeded ſuch his limited right.—By *De Grey*, Ch. J. and *Gould*, J. (after the caſe had been twice argued). Formerly, if one of the commoners had ſurcharged the common, by putting more cattle into the common than he ought to have common for there; then that commoner who was aggrieved, ſued out a writ of admeaſurement of paſture, and by that ſuit all the commoners were admeaſured, as well thoſe who had not ſurcharged the common, as he who had ſurcharged it; and he who brought the action was alſo to be admeaſured. This writ of admeaſurement was an excellent remedy, whereby the ſeveral rights of all the commoners were fairly ſettled and aſcertained by a jury. Inſtead of this writ of admeaſurement againſt a commoner for a ſurcharge, an action upon the caſe has been introduced, and uſed as a more eaſy and ſpeedy remedy for one commoner againſt another. I am of opinion, as at preſent adviſed, that *this general way* of declaring is well enough: the declaration ſtates the plaintiff's right of common, and that the defendant has *wrongfully and injuriouſly* eat up, depaſtured, and ſpoiled the grais on the common with divers ſheep

Atkinſon *v.* Teaſdale, Ea. 12 Geo. 3. C. B. 3 *Wilſ.* 278. 2 *Black.* 817.

and lambs: and the caſe ſtates, that this is true; for it ſtates, that *he ſurcharged the common, by putting in more than his ſtint.* The defendant certainly knows his own right, and might either have pleaded it ſpecially, or given it in evidence upon the general iſſue; and there is no prejudice to either ſide by this general way of declaring. *Nares*, J. doubting, the court adjourned the caſe, to be argued again at the bar; after which *De Grey*, Ch. J. delivered the judgment of the whole court for the plaintiff, in ſubſtance as follows:—Two material things are to be ſhewn in a declaration of this ſort, 1ſt, The plaintiff's right of common: and, 2dly, The diſturbance of that right by the defendant. The plaintiff has well and ſufficiently ſhewn the firſt; and the queſtion now is, whether he has well and ſufficiently alleged and pointed out the latter, viz. the diſturbance of his right by the defendant; whether he (the plaintiff) ought not to have pointed out the particular ſpecific injury, by ſhewing how, and by what ways and means, the defendant ſurcharged the common. The declaration ſtates the plaintiff's right of common fully, and the diſturbance by the defendant in general terms. The defendant might have pleaded his right of common to put in a certain number, and ſuch plea would have been good. Then the plaintiff muſt either have denied the defendant's right of common abſolutely, or have taken it by *proteſtando*, and replied that the defendant had ſurcharged, and put on 200 ſheep, when he had only a right to put on 100. This replication would not have been a departure, but would have fortified the declaration; for the plaintiff cannot divine what defence the defendant will ſet up. This alſo being an action upon the caſe, the pliantiff might have given his whole right in evidence upon the general iſſue. It is not at all material one way or other that the whole of this caſe ariſes out of the plaintiff's own evidence: it appears he has a good cauſe of action, and is injured. So, upon the whole, we are all of opinion that the declaration is right, and judgment muſt be entered for the plaintiff.

Hobſon v. *Tidd*, M. 31 Geo. 3. B. R. 4 *Term Rep.* 71.

And one commoner may maintain an action againſt another for ſurcharging the common, notwithſtanding he may himſelf have ſurcharged it.—This was an action on the caſe by one commoner againſt another for ſurcharging the common. At the trial at the aſſizes, the plaintiff proved the fact of the defendant's having ſurcharged; but, it appearing that the plaintiff had alſo ſurcharged to a greater amount than the defendant, the plaintiff was nonſuited. A rule was obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted; becauſe one tort could not

be

be ſet off againſt another. *Buller*, J. (1). The only queſtion is, whether any injury has been done by the defendant to the plaintiff? If the defendant had turned the ſupernumerary cattle on the common by the licence of the lord, the plaintiff could not have maintained this action, becauſe the defendant would not have been a wrong doer: but here he is a wrong doer, and the plaintiff is entitled to an action without proving any ſpecific damages. And the plaintiff having alſo ſurcharged, makes no difference in this action; for one tort cannot be ſet off againſt another. Here the plaintiff has proved the whole of his declaration, by proving his right to the common, and that the defendant put on it more cattle than he had a right to do; and whether the plaintiff exceeded his right or not, makes no part of the iſſue, which the jury were to try. The iſſue is, whether the defendant has been guilty of any wrong, and whether the plaintiff has been injured by it in the ſmalleſt degree? and I am clearly of opinion that he has. *Groſe*, J. was of the ſame opinion. Rule abſolute.

Alſo, if a perſon hath a right to ſit in a particular pew in a church, and is diſturbed therein, he may have an action of treſpaſs on the caſe; but he muſt ſet forth his title to be either by preſcription, as appurtenant to a meſſuage, or by a faculty from the ordinary, and bare poſſeſſion will not give a right, becauſe every pariſhioner has a right to go into the church. Thus, in an action on the caſe for diſturbing the plaintiff in his pew, the declaration ſtated, that the plaintiff had a right to this pew, *without laying it to be appurtenant to a meſſuage* in the pariſh. At the trial of this cauſe at the aſſizes, the plaintiff did not ſet up any claim under a faculty from the biſhop, or ſhew any enjoyment in reſpect of any houſe, but offered evidence of poſſeſſion for above 60 years, and would have derived a regular title from one *Chappel*, to whom the miniſter and church-wardens, in the year 1718, gave their conſent, in writing, to build the pew in queſtion. The judge was of opinion that this did not entitle the plaintiff to recover, and directed a nonſuit, which was afterwards moved to be ſet aſide, on three grounds: 1ſt, That no faculty was neceſſary in this caſe to ſupport the plaintiff's action. 2dly, That if a faculty were neceſſary, it might be preſumed after ſuch a length of poſſeſſion. 3dly, This being a poſſeſſory action, mere poſſeſſion was ſufficient to maintain it againſt a wrong doer. To which it was anſwered, that no title to a pew can be derived but by preſcription, or by a faculty: that there was no pretence for the firſt, as the pew was built only in 1718, and no title was claimed under a

Stocks *v.* Booth, M. 27 Geo. 3. B.R. 1 *Ter. Rep.* 428.

(1) Abſent Lord *Kenyon*, Ch. J. and *Aſhhurſt*, J.

faculty; but that even if there had been one to the perſon who built the pew, the action could not be maintained, becauſe that perſon could not have conveyed his right under that faculty: for a faculty to a man and his heirs (1) is not good in point of law, as a ſeat in the church does not belong to the perſon but to the houſe. And that as to the poſſeſſion, on which the plaintiff relied, there could be no poſſeſſion to ſupport ſuch an action as the preſent, but as belonging to the houſe. *Aſhhurſt*, J. A bare poſſeſſion can never give a right, becauſe every pariſhioner has a right to go into the church; and therefore it is the plaintiff's own fault if he do not gain to himſelf a complete title to a pew, which he may do, either by applying to the ordinary for a faculty, or to the miniſter or church-wardens to allot him a ſeat in the church. But if the plaintiff will not take the trouble of applying to the ordinary for a faculty, or to the miniſter or church-wardens to allot him a ſeat, he cannot maintain this action, though againſt a wrong-doer; becauſe he has not ſet forth that the pew is appurtenant to a meſſuage in the pariſh: if bare poſſeſſion were allowed to be a ſufficient title, it would be an encouragement to commit diſorders in the church; for diſputes would frequently ariſe reſpecting the poſſeſſion. *Buller*, J. This is an action on the caſe, and not an action of treſpaſs. *Treſpaſs* will not lie for entering into a pew, becauſe the plaintiff has not the excluſive poſſeſſion, the poſſeſſion of the church being in the parſon. The word poſſeſſion muſt always be underſtood *ſecundum ſubjectam materiam.* Therefore, in an action on the caſe for diſturbing the plaintiff in his pew, for which treſpaſs will not lie, *the plaintiff muſt prove a right either by preſcription, or by a faculty.* If a faculty be annexed to a meſſuage, it may be transferred with the meſſuage to another perſon. And, therefore, if the plaintiff had declared for diſturbance in a pew, as annexed to a meſſuage in the pariſh, ſuch a right would have been colourable, and againſt a wrong-doer would have been ſufficient. A pew may be annexed to a houſe by a faculty, as well as by preſcription, for the latter ſuppoſes a faculty. I have lately ſeen a faculty for exchanging ſeats in a church. After ſtating, that *A.* in right of a particular houſe in the pariſh, had immemorially a right to a certain pew in the church, the ordinary gave his conſent to exchange it for another, but ſtill each was annexed to the houſe. There cannot be a gift of a pew to a man without a faculty. It muſt alſo be laid as appurtenant to a meſſuage: and there never exiſted a caſe before the preſent, where the plaintiff attempted to make out a title to a pew, without laying it to be ap-

(1) Poph. 140.

purtenant

purtenant to a meſſuage. A faculty of a pew to a man and his heirs is not good; ſo of an aiſle in the church. I am therefore of opinion that this nonſuit is right. Rule diſcharged.

But where the plaintiff claims by *preſcription*, evidence of an uninterrupted poſſeſſion for a ſeries of years, under a gift from the rector and church-wardens, after the rebuilding of the church, will be ſufficient to maintain the action; for it will be preſumed that the poſſeſſion was given under *an old immemorial right*. In an action on the caſe for diſturbing the plaintiff in his pew, the declaration ſtated that the plaintiff was poſſeſſed of an ancient meſſuage, and that he had, *as appurtenant to that meſſuage*, the uſe and occupation of a certain pew, and that the wife of the defendant ſat in the pew, and prevented him from enjoying it. On the trial at the aſſizes, the jury found a verdict for the plaintiff; and the moſt material evidence given was as follows: ſeveral witneſſes ſwore that above forty years ago this was an open pew; that about that time the church was pulled down; and that the rector and church-wardens, after the church was rebuilt, put the *Blinch* family (under whom the plaintiff claimed) into poſſeſſion of the pew, which they had enjoyed uninterruptedly ever ſince, till about two years ago, when the defendant, who claimed under another eſtate, called the *Winxford* eſtate, began to moleſt them. A new trial was moved for, on the ground that the evidence deſtroyed the plaintiff's title, which he claimed by *preſcription*. But by lord *Mansfield*, CH. J. The plaintiff's title to this pew is, that it has immemorially belonged to the houſe which he poſſeſſed. The plaintiff, in ſupport of his claim, proved that he was put in poſſeſſion of this pew by the rector and church-wardens thirty-ſix years ago. The queſtion is, Whether this act of the rector was to give poſſeſſion under *an old immemorial right*, or in conſequence of *a new gift*. There are ſtrong reaſons to induce us to ſuppoſe it was not a gift: they would not make a gift of that which other people claimed. *A gift cannot be made without a faculty*; and there is none in this caſe. The Winxford family have acquieſced for thirty-ſix years, which is almoſt double the time which the ſtatute of limitations requires as a bar in certain caſes. *Willes*, J. it is very common, when a church is rebuilt, to leave the adjuſtment of the pews to the rector and church-wardens; and thus I ſuppoſe the plaintiff got his pew at the adjuſtment, in right of his meſſuage: but after ſo long a poſſeſſion, I would preſume any thing in favour of the plaintiff.

Rogers *v.* Brooks *et ux.* M. 24 Geo. 3. B.R. 1 *Ter. Rep.* 431. (a. *a.*)

But though a preſcriptive right to a pew may be preſumed, from evidence of an uninterrupted poſſeſſion for a ſeries of years, yet that preſumption may be deſtroyed by proof of its origin being only of a modern date, and for accom-

Griffiths *v.* Matthews, Tr. 33 Geo. 3. B.R. 5 *Ter. Rep.* 296.

modation. This was an action on the caſe for diſturbing the plaintiff in a pew in the chancel of Llanover church; and the plaintiff ſtated, that he was poſſeſſed of a certain ancient meſſuage, &c. with the appurtenances, in the pariſh of Llanover, and claimed the uſe and benefit of this pew for himſelf and his family inhabiting in the ſaid meſſuage, as belonging and appertaining to the ſaid meſſuage. At the trial at Monmouth aſſizes, it appeared, that in 1758, in conſequence of a diſpute between the wife of T. Matthews, under whom the plaintiff claimed, and another perſon, both tenants of Hanbury, reſpecting a ſeat in the body of the church; the vicar, by way of accommodation, offered to give up a place for a ſeat in the chancel, for the uſe of Matthews, and to provide the materials, if Hanbury would defray the expence of erecting a pew there; the offer was accepted, and a new pew was made in the chancel. The place where the new pew was made, was before that time an open ſeat, an old pariſh cheſt being there, and two or three indifferent perſons, neither connected with Hanbury or Matthews, uſually ſitting there, as well as Matthews; after the building of this pew in 1758, T. Matthews continued in poſſeſſion till the time of his death, about ſeven years ago; and ſince that time, it was conſtantly occupied by the family of the Matthews, until this action was brought. T. Matthews deviſed his eſtate to his ſon W. Matthews, who conveyed to the plaintiff; but no mention was made of the pew in the conveyance. *Groſe*, J. who tried the cauſe, left it to the jury, to conſider whether or not, under all the circumſtances of the caſe, this pew, ſo erected in 1758, was appurtenant to the plaintiff's ancient meſſuage; who found that it was not, and gave a verdict for the defendant. A rule having afterwards been obtained for a new trial, the caſe of Rogers *v.* Brookes was mentioned, and relied on in ſupport of the rule. But THE COURT concurred in ſupporting the verdict: and *Buller*, J. delivered himſelf to the following effect: A ſeat in a church may be annexed to a houſe, either by a faculty, or by preſcription; and from long uninterrupted uſage, a faculty may be preſumed: it is impoſſible to determine, *à priori*, what evidence will or will not be ſufficient to ſupport ſuch a right: it muſt vary in each particular caſe. *Evidence of continued poſſeſſion ſince the year* 1758, *unanſwered and unexplained, would have been ſufficient to ſupport the plaintiff's claim*; that the caſe ſtood thus; there was evidence, whether weighty or not, it is not neceſſary for us to decide, that tho e under whom the plaintiff claims had a ſeat belonging to their houſe in the body of the church; there was alſo ſome evidence that they uſed a ſeat in the chancel. If the caſe had reſted on this only, it would have been a queſtion of evidence for the determination of the jury: but it alſo appears, that prior to 1758, when this

pew

pew was erected, there was no pew at all in the chancel; and that the old open ſeat was occupied by different perſons. *If it had not appeared, when or at whoſe expence this pew was built, or that it had not been a pew at all before* 1758, poſſeſſion from that time would have been ſufficient evidence to have warranted the jury in preſuming, that a faculty had been granted to the plaintiff's anceſtor to build this pew in the chancel; but thoſe circumſtances were proved, and they deſtroyed the preſumption.

And the ſentence of the eccleſiaſtical court, admoniſhing a party not to diſturb another in the enjoyment of a pew, is not concluſive evidence as to the right upon a trial at common law. This was an action on the caſe brought by the plaintiff, who was poſſeſſed of a meſſuage, by virtue whereof he claimed a pew in the pariſh church, as appertaining to the ſaid meſſuage, and complaining that the defendant interrupted him in the enjoyment of it. At the trial of the cauſe at the aſſizes, the plaintiff called witneſſes, who proved, that he and thoſe whoſe eſtate he claimed, had ſat in the pew between fifty and ſixty years paſt, from the time that it was firſt built for one Richard Croſs; and that before that time there were very long benches on the ſpot, on which the ſingers uſed to ſit. He alſo produced a ſentence of the conſiſtorial court upon a libel againſt the preſent defendant and his wife for diſturbing him in the right to this pew, by which the conſiſtorial court decreed, that *the pew in queſtion did belong to the plaintiff*; and admoniſhed the defendants not to diſturb the plaintiff in his right. *Upon appeal to the court of arches* from this ſentence, that court *reverſed the former ſentence, and retained the principal cauſe*; and by an interlocutory decree, *admoniſhed the defendants not to ſit in the ſaid pew:* from the ſecond ſentence the defendant appealed to the delegates, on the ground that the court of arches had done wrong in retaining the principal cauſe, and in admoniſhing them not to ſit in the pew, but that court diſmiſſed the appeal, with coſts, and remitted the cauſe to the arches. The defendant's counſel reſted the defence upon the ground that *the ſentence of reverſal* in the court of arches, confirmed by the ſentence of the court of delegates, was concluſive againſt *the claim of right*, ſet up by the plaintiff, on which the action was founded; and the judge being of that opinion, nonſuited the plaintiff. Afterwards it was moved that the nonſuit might be ſet aſide, and it was urged that the libel in the eccleſiaſtical court was for a diſturbance (1); and in that ſuit it was not neceſſary to go into the queſtion of *right* to the pew in diſpute: that, however, having *improvidently* given a judgment on *the*

Croſs v. Salter, Ea. 30 Geo 3. B R. 3 *Ter. Rep.* 639.

(1) In reſpect whereof they have a concurrent juriſdiction with the courts of common law.

right, it was afterwards reverſed by the court of arches, probably on the ground that it was immaterial to conſider in that ſuit, in whom the right to the ſeat was veſted. But the judgment of reverſal did not decide that the plaintiff had no right to the pew, neither did it give any right to the defendant; that the ſubſtance of the three ſentences in the different courts only amounted to this, that *the plaintiff proved his allegation, that the defendant had diſturbed him; but the queſtion of right remained undetermined.* THE COURT were of opinion, that the proceedings of the eccleſiaſtical courts were not concluſive evidence; but ſaid, what weight they would have on another trial, was not for their conſideration. Rule for a new trial abſolute.

Cort v. Birkbeck, Tr. 19 Geo. 3. B.R. *Doug.* 218.

If, by an ancient cuſtom, "the tenants, inhabitants, and reſiants of and in a manor, are bound to grind all their corn, grain, and malt, which ſhall be by them uſed, or ſpent, *ground*, within the manor, at a particular mill; an action on the caſe will lie for uſing and ſpending, *ground*, within the manor, any corn, grain, or malt, *ground elſewhere*, than at the particular mill; and if ſuch a cuſtom has been eſtabliſhed and confirmed by a decree of the court of exchequer, its reaſonableneſs cannot be afterwards controverted, nor the exiſtence of the cuſtom litigated any further before a jury. This was an action on the caſe, and the declaration ſtated, "That the plaintiff was poſſeſſed of certain corn-mills, within "the manor of Settle, and entitled to toll: That during all the "time of his poſſeſſion (1), *all the tenants, inhabitants, and "reſiants, within the manor ought to have ground all their corn, "grain, and malt, which by them ſhould be uſed or ſpent,* "ground, *within the manor, at the plaintiff's mills, and not "elſewhere*; but that the defendant did, knowingly, &c. *uſe "and ſpend*, ground, *within the ſaid manor*, divers large "quantities of corn, grain, and malt of the defendant, *which "had been ground elſewhere* than at the plaintiff's mills." The defendant pleaded the general iſſue; and the cauſe coming on to be heard at the aſſizes, the plaintiff, to prove the cuſtom, produced, beſides ſeveral witneſſes, 1ſt, The proceedings in a ſuit in the exchequer, M. 5 Geo. 1. wherein the then occupier of the mills was plaintiff, and ſome of the tenants and reſiants in the manor defendants; and in which an iſſue was directed to try the validity of the cuſtom. 2dly, The record of the verdict, Hil. 8 Geo. 1. whereby the jury found the cuſtom in the ſame words as ſet forth in the declaration. 3dly, A decree of the court of exchequer, of 28th June 1722, eſtabliſhing and confirming the cuſtom. 4thly, The proceedings in 1756 and 1757, on a *ſcire facias*, to re-

(1) It is not neceſſary in the declaration in this action, to ſay, that the inhabitants had and ought *immemorially*, nor is it neceſſary to lay the mills to be ancient mills.

vive

vive the decree againſt ſome of the inhabitants (1). To ſhew the breach, the plaintiff's miller proved an acknowledgment by the defendant, *that he had uſed American flour.* The defendant demurred to the evidence; and, on the argument, it was contended, 1ſt, That the cuſtom was not proved. 2dly, That it was void. 3dly, That the breach by the defendant was not proved. By Lord *Mansfield* (who delivered the opinion of the court) This is an action on the caſe, in which the plaintiff ſtates, preciſely and ſpecially, his ground of action, which is, that he is poſſeſſed of certain mills at Settle; and that no tenant, inhabitant, and reſiant within the manor, can ſpend or uſe corn, ground, which has not been ground at the plaintiff's mills. The breach aſſigned is, that the defendant uſed, ground, within the ſaid manor, ſeveral quantities of corn, which the defendant well knew to be ground elſewhere than at the plaintiff's mills. To this the defendant has pleaded not guilty. The iſſue is—on the cuſtom—the defendant being ſubject to it—and the breach. *The plaintiff muſt prove all the three points.* The defendant does enough if he diſprove any of them. The parties go to trial by the authority of the court, to enquire into the truth of theſe facts. This is not like an ejectment, or an action for money had and received, where concluſions only are ſtated in the declaration, and the premiſes appear in the evidence. Every thing to be proved is here ſet forth; and they have nothing to do at the trial with the queſtion, whether the facts, as alleged in the declaration, are or are not ſufficient to entitle the plaintiff to recover? If that had been intended to be diſputed, it might have been done in *limine*, by a demurrer to the declaration. As to the evidence, it ſeems to me, that the cuſtom eſtabliſhed by the decree by the court of exchequer, is the ſame in ſubſtance with that on which this action is brought. It is admitted on the record that the mills are the ſame; and that the defendant is reſiant in the

(1) In the caſe of the *Manchester mills*, in the duchy court, 21ſt May, 1757, there was an application to revive by *ſcire facias*, a decree of 5 Jac. 1. againſt the defendants. The decree had eſtabliſhed a cuſtom, that all the inhabitants of Mancheſter ſhould ſend their corn which was to be ſpent in their houſes, to be ground at the plaintiff's mills. The defendants had brought bread made of flour, which the bakers had bought from ſome places in the neighbourhood, and which had not been ground at the plaintiff's mills. Lord *Mansfield* in a ſolemn argument, which he delivered on the occaſion, laid it down, 1ſt, That the decree eſtabliſhing the cuſtom, and which had been confirmed by others, both of a prior and ſubſequent date, ought not to be controverted, nor the exiſtence of the cuſtom litigated any further before a jury. 2dly, That ſuch a decree binds all perſons under the ſame deſcription with the original defendants. But, 3dly, That it is only in the caſe of *a direct* breach, that ſuch a decree can be revived by *ſcire facias*, and *if it is evaded*, the method of proceeding is by a ſupplemental bill. *Doug.* 222. (n. 13.)

manor.

manor. His Lordſhip then ſtated all the material parts of the evidence; and ſaid—*to this evidence the defendant has demurred*; and THE ONLY QUESTION is, Whether, if the jury believed the evidence, it is competent to maintain the iſſue. As to that queſtion, there is no doubt but the proceedings in the exchequer are evidence to prove the cuſtom; and that the parol teſtimony of the plaintiff's miller is evidence to ſhew, that the defendant uſed flour not ground at the plaintiff's mills. The demurrer ſeems to be founded on a miſtake, concerning the nature of this proceeding. It was argued as if it had been a demurrer to the declaration, or a motion in arreſt of judgment: on the objection, that the cuſtom could not be ſupported in law beyond the caſe of corn in a grindable ſtate, and could not extend to the uſing of flour imported or given to the inhabitants, and ground before it came to their poſſeſſion. But that is not now before the court, nor was it under the cognizance of the jury. Nothing can be ſtronger to ſhew this than the judgment which we muſt give, viz. that *the evidence was ſufficient to maintain the iſſue*. This will not be final; the conſequence will be the ſame as if a verdict had been given for the plaintiff. But there is one defect which would not have been if there had been a verdict, namely, that no damages have been aſſeſſed; and therefore there muſt be a writ of enquiry. After that, the defendant may take advantage of any objection to the declaration, by moving in arreſt of judgment, or bringing a writ of error. We are all of opinion, that the evidence was ſufficient,—a writ of enquiry having afterwards been executed, and damages taken for the plaintiff. The defendant moved in arreſt of judgment, and objected to the validity of the cuſtom to the extent inſiſted upon, contending, that the words in which the cuſtom was ſtated, meant only that all the corn which the inhabitants ſhould uſe ground, *and which ſhould be ground within the manor*, muſt be ground at the plaintiff's mills; and if ſo, the defendant could not be charged with a direct breach, and there was no fraudulent evaſion laid. But, by Lord *Mansfield*, When we heard this argued, a doubt aroſe on the extent of the cuſtom, whether it goes only to corn growing in the manor, and ground there, or to all ground corn, wherever it may grow, which is conſumed within the manor. But it appears from the anſwers in the ſuit in the exchequer, which his Lordſhip read, that the defendants there inſiſted on the reſtrained ſenſe, and that they were not bound to grind corn which grew out of the manor; and the decree eſtabliſhed the cuſtom to the extent now inſiſted upon, and proves it to be reaſonable. Judgment for plaintiff.

Tripp v. Frank, Tr. 32 Geo. 3. B R. 4 *Ter. Rep.* 666.

An action on the caſe will lie for diſturbing another in his right to an excluſive ferry, but not if the alleged diſturbance ariſe from the conveyance of perſons to a place either above

above or below the eſtabliſhed ferry, to which the ferryman is not compellable to provide boats. This was an action on the caſe, wherein the plaintiff declared, That he was poſſeſſed of Southferry over the Humber, and that the defendant wrongfully carried perſons and cattle from Kingſton upon Hull, to Barton and other parts of the coaſt; whereby the plaintiff was injured in his right to his ferry, and loſt his tolls. It was proved at the trial, that the plaintiff was leſſee of the corporation of Kingſton upon Hull; and he proved a preſcription in them to an excluſive ferry, between that place and Barton, on the oppoſite coaſt of Lincolnſhire: and it appeared that the defendant, who was the owner of a market-boat at *Barrow*, had carried over perſons at different times, from Kingſton upon Hull to Barrow, to which place they were going, and which was two miles lower down the Humber than Barton, upon the ſame coaſt. It was ſhewn that there was a daily ferry between Kingſton and Barton, but none to any other part of the Lincolnſhire coaſt. A verdict was taken for the plaintiff of 1s. with liberty for the defendant to enter a nonſuit, if the court ſhould be of opinion the plaintiff was not entitled to recover. A rule to ſhew cauſe having been granted for that purpoſe, cauſe was ſhewn; but it was admitted, that the ferryman was not compellable to provide boats to any other place on the Lincolnſhire coaſt beſides Barton. By *Lord Kenyon*, Ch. J. the evidence does not ſupport this action. If certain perſons wanting to go to Barton, had applied to the defendant, and he had carried them a little diſtance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here, theſe perſons were ſubſtantially, and not colourably merely, carried over to a different place; and, it is abſurd to ſay, that no perſon ſhall be permitted to go to any other place on the Humber, than that to which the plaintiff chuſes to carry them: it is admitted that the ferryman cannot be compelled to carry paſſengers to any other place than Barton: then his right muſt be commenſurate with his duty. *Aſhhurſt*, J. the plaintiff's claim is ſo unreaſonable, that it cannot be ſupported: according to his argument, if a paſſenger wiſhed to croſs over from Kingſton to the Lincolnſhire coaſt, three miles eaſtward, he muſt neceſſarily be firſt carried to Barton, where he would be many miles diſtant from his place of deſtination; whereas if it were not for this ferry he might go over directly. *Buller*, J. The right the plaintiff has eſtabliſhed by evidence, extends only from Hull to Barton, and back again. The queſtion of fraud might ariſe in this way, by ſaying, that though the defendant really meant to go to Barton, he went in fraud of the plaintiff's claim, a little above or below the ferry. But in this caſe, the defendant

dant had no intention of going to Barton; his place of deſtination was Barrow, at the diſtance of two miles from Barton, to which place the plaintiff's right does not extend, and to which he ſays, he is not compellable to go. *Groſe*, J. of ſame opinion.—Rule diſcharged.

Keymer *v.* Sommers, Hereford Sum. Aſſ. 1769. *Buller*, N.P. 74.

In an action for obſtructing a way, if the plaintiff prove a long and uninterrupted uſe of it, it will be ſufficient to afford a preſumption of a grant or licence from the plaintiff; for where in an action for obſtructing a way, the plaintiff proved, that Fowler was ſeized of the plaintiff's tenement, and the defendant's cloſe; and, in 1753, conveyed the tenement to the plaintiff, with all ways therewith uſed, and that this way had been uſed with the tenement, as far back as memory could go; the defendant produced a ſubſiſting leaſe from Fowler, for three lives, made in 1723; by which Fowler demiſed the field in queſtion in as ample manner as one Rock, a former tenant, held it; and in this leaſe, there was no exception of a way over the cloſe. *Yates*, J. held that *by the leaſe, without any reſervation, the way was gone*, and, therefore, could not paſs under the general words, *all ways*: but as there were thirty years intervening between the defendant's leaſe, and the plaintiff's conveyance, and the way had been uſed all the time, that was ſufficient to afford a preſumption of a grant or licence from the defendant, ſo as to make it a way lawfully uſed at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would paſs.

Bull. N.P. [75]

If the king grant a patent for the ſole uſe of a new invention, and the patent is good in law, an action lies againſt any perſon who infringes upon it.

Millar *v.* Taylor, Ea. 5 Geo. 3. B R. 4 *Burr.* 2323.

For patentees for new inventions are left by the ſtat. 21 Jac. 1. c. 3. to the common law, and the remedies which follow the nature of their right, but to render the letters patent valid, all the conditions required by the above ſtatute muſt be obſerved.

Liardet *v.* Johnſon, ſitt. at Weſtm. af. Hil. 1771, cor Lord *Mansfield*, *Bull.* N.P. [76].

The general queſtions on patents are, 1ſt, Whether the invention were known and in uſe before the patent? 2dly, Whether the ſpecification is ſufficient to enable others to make it up?

The meaning of the ſpecification is, that others may be taught to do the thing for which the patent is granted; and if the ſpecification is falſe, the patent is void; for the meaning of the ſpecification is, that after the term the public ſhall have the benefit of the diſcovery.

Therefore in a patent for truſſes for ruptures, the patentee omitted what was very material for tempering ſteel, which was rubbing it with tallow, and for want of that, Lord Mansfield held it void.

So

So on a *ſcire facias* to repeal a patent, four iſſues were joined on the record. 1ſt, That the patent was inconvenient to his majeſty's ſubjects in general. 2dly, That the invention at the time of granting the patent, was not a new invention, as to the public uſe and exerciſe of it in England. 3dly, That it was not invented and found out by the defendant. 4thly, That the defendant had not, by ſpecification, particularly deſcribed and aſcertained the nature of the invention, and in what manner it was to be performed. *Buller*, J. held, that the firſt iſſue was merely a conſequential one, it ſtated no fact which could be tried by a jury, or which the defendant could come prepared to anſwer, and therefore, refuſed to hear any evidence, but what applied to the three laſt iſſues; and he laid down the following rules: 1ſt, A man to entitle himſelf to the benefit of a patent of monopoly, muſt diſcloſe his ſecret and ſpecify his invention, in ſuch a way, that others of the ſame trade, who are artiſts, may be taught to do the thing for which the patent is granted, by following the directions of the ſpecification, without any new invention or addition of their own. 2dly, He muſt ſo deſcribe it that the public may, after the expiration of the term, have the uſe of the invention in as cheap and beneficial a way as the patentee himſelf uſes it; and, therefore, if the ſpecification deſcribes many parts of an inſtrument or machine, and the patentee himſelf uſes only a few of them, or does not ſtate how they are to be put together or uſed, the patent is void. 3dly. If the ſpecification be in any part of it materially falſe or defective, the patent is againſt law, and cannot be ſupported.

The king *v.* Arkwright, ſitt. at Weſtm. after Tr. 1785. *Bull.* N.P. [77].

So in an action on the caſe, brought againſt the defendant for infringing the plaintiff's patent, which was granted to him *for producing yellow colour*, for painting in oil or water, and *making white lead, and ſeparating the mineral alkali from common ſalt*, all by one proceſs: on the trial before *Buller*, J. a verdict was found for the plaintiff, and on a motion to ſet aſide that verdict and grant a new trial, *Buller*, J. ſtated the facts; and obſerved, that at the trial three objections had been taken to the ſpecification: 1ſt, That after directing that lead ſhould be calcined, it directed another ingredient, namely, minium to be taken, which would not anſwer the purpoſe; as it was not ſaid, whether the minium ſhould be calcined or fuſed: for if it had any reference to the preceding words, then it ſhould be calcined, and ſo it would not produce the effect, fuſion being neceſſary. 2dly, That it directed any kind of foſil ſalt to be taken, whereas only one kind of foſil ſalt, namely, *ſal gem*, would anſwer the purpoſe, becauſe it muſt be a marine ſalt. 3dly, That all theſe things put together, did not produce the thing intended; and that the patent was for an invention to do three things in

Turner *v.* Winter, Hil. 27 Geo. 3. B.R. 1 *Ter. Rep.* 602.

one proceſs, whereas one of them, namely, *white lead*, could not be produced at all, for that a white ſubſtance *merely like lead* remained, applicable only to ſome of the purpoſes of common white lead. The learned judge then ſaid, that at the trial he had told the jury, that if either of theſe objections were well founded, it would avoid the patent. After cauſe had been ſhewn againſt the rule, the counſel on the other ſide were ſtopped by the court. *Aſhhurſt*, J. As every patent is calculated to give a monopoly to the patentee, it is ſo far againſt the principles of law, and would be a reaſon againſt it, were it not for the advantages which the public derive from the communication of the invention, after the expiration of the time for which the patent is granted; *it is therefore incumbent on the patentee, to give a ſpecification of the invention, in the cleareſt and moſt unequivocal terms of which the ſubject is capable; and if it appear, that there is an unneceſſary ambiguity, affectedly introduced into the ſpecification, or any thing which tends to miſlead the public, in that caſe, the patent is void.* Three objections having been made to this ſpecification, the firſt is, that in the ſpecification, the public are directed "to take any quantity of lead, and "calcine it, or minium or red lead," from whence it is to be inferred, that calcining is only to be applied to lead; if the objection had reſted here, I ſhould have entertained ſome doubt. The next objection is, that in the ſubſequent mixture to be added, the public are directed, "to add half the weight of "ſea ſalt, or ſal gem, or foſil ſalt, or any marine ſalt:" now foſil ſalt, is a generic term, including ſal gem, as well as other ſpecies of foſil ſalt, and ſal gem is the only one that can be applied to this purpoſe; ſo that throwing in foſil ſalt, can only be calculated to raiſe doubts, and miſlead the public. That word could not have been added with any good view, it muſt produce many unneceſſary experiments; therefore, in that reſpect, the ſpecification is not ſo accurate as it ought to have been: another objection was taken as to the white lead, to which it was anſwered, that the invention did not profeſs to make common white lead. But that is no anſwer, for if the patentee had intended to produce ſomething *only like white lead*, or anſwering ſome of the purpoſes of common white lead, it ſhould have been ſo expreſſed in the ſpecification. But, in truth, *the patent is for making white lead, and two other things by one proceſs*. therefore, *if the proceſs, as directed by the ſpecification, does not produce that which the patent propoſes to do, the patent itſelf is void.* It is certainly of conſequence, that *the terms of a ſpecification ſhould expreſs the invention in the cleareſt and moſt explicit manner, ſo that a man of ſcience may be able to produce the thing intended, without the neceſſity of trying experiments*. *Buller*, J. many caſes upon patents have ariſen within our

memory, moſt of which have been decided againſt the patentee, upon the ground of their not having made a full and fair diſcovery of their inventions: wherever it appears that the patentee has made a full and fair diſcloſure, he is entitled to the protection which the law gives him. But where the diſcovery is not fully made, the court ought to look with a very watchful eye, to prevent any impoſition on the public; then the queſtion is, whether the plaintiff has made a fair diſcovery? a plaintiff muſt give ſome evidence to ſhew what his invention was, unleſs the other ſide admit that it has been tried and ſucceeds; but wherever the patentee brings an action on his patent, if the novelty or effect of the invention be diſputed, he muſt ſhew in what his invention conſiſts, and that he produced the effect propoſed by the patent, in the manner ſpecified; ſlight evidence of this on his part is ſufficient, and it is incumbent on the defendant to falſify the ſpecification. Now in this caſe, no evidence was offered by the plaintiff, to ſhew that he had ever made uſe of the ſeveral different ingredients mentioned in the ſpecification; as, for inſtance, minium, which he had nevertheleſs inſerted in the patent, nor did he give any evidence to ſhew *how* the yellow colour was produced. If he could only make it with two or three of the ingredients ſpecified, and he has inſerted others which will not anſwer the purpoſe, that will avoid the patent. So if he makes the article for which the patent is granted with cheaper materials than thoſe which he has enumerated, although the latter will anſwer the purpoſe equally well, the patent is void, becauſe he does not put the public in poſſeſſion of his invention, or enable them to derive the ſame benefit which he himſelf does. As to the firſt objection, which has been taken with reſpect to the minium; it was not pretended by any of the plaintiff's witneſſes, that he ever made uſe of minium; and it was proved by the defendant's witneſſes, that from the ſpecification they ſhould be led to uſe minium, becauſe minium is lead already calcined, which is what the ſpecification directs in the firſt inſtance, but minium will not anſwer the purpoſe: then as to fuſion, it is ſaid, that the public are directed by the ſpecification, to continue the heat till the effect is produced, which muſt neceſſarily lead to fuſion, *though fuſion is not expreſsly mentioned*; but that is no anſwer to the objection, for the ſpecification ſhould have ſhewn by what degree of heat the effect was to be produced: now it does not mention *fuſion*, and as one of the witneſſes ſaid, in order to produce the effect, *you muſt go out of the patent*, for fuſion is beyond calcination, and in ſome ſenſe contrary to it, and by mentioning *calcination*, it ſhould ſeem, that fuſion was to be avoided. The next objection was to the ſalts: *foſil ſalt* is mentioned as a diſtinct

ſpecies

ſpecies of ſalt, and many other ſalts are alſo mentioned as indifferent whether one or the other be uſed. But it was proved that foſil ſalt was a generic term including ſeveral ſpecies, and that *ſal gem* was the only ſpecies of it, which would anſwer the purpoſe, becauſe none of the others contained a marine acid, which was eſſential. There was no contradiction on the third objection, for the moſt that the plaintiff's witneſſes ſaid, was, that following the ſpecification, the experiment only produced a white ſubſtance *like lead*. Now on each of theſe grounds the patent is void; becauſe if the patentee ſays, that by one proceſs he can produce three things, and he fails in any one, the conſideration of his merit, and for which the patent was granted, fails, and the crown has been deceived in the grant; ſlight defects in the ſpecification will be ſufficient to vacate the patent; and he inſtanced the caſe of the patent for ſteel truſſes.--Rule for a new trial abſolute.

The king *v.* Arkwright, ſitt. at Weſtm. af. Tr. term, 1783. *Bull.* N.P. [77].

As to the *invention*, the rule of law is very different from what it is on the *ſpecification*, for on the ſpecification if any one part of the invention be not ſufficiently deſcribed, the patent is void; but on the invention, if any one part of it be new and uſeful, that is ſufficient to ſuſtain a patent for the particular object of the invention (1).

The king *v.* Elſe. ſitt. at Weſt. af. Mic. 1785. *Bull.* N.P. [76].

But the patent muſt not be more extenſive than the invention, therefore if the invention conſiſt in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void.

Boulton & Watt *v.* Bull, Ea. 35 Geo. C.B. 2 Hen. *Black.* 463.

And whether a patent for *a new invented method* of uſing an old engine in a more beneficial manner than heretofore, by the mechanical employment of certain principles, is valid or not, has not been decided. This was an action on the caſe for infringing a patent, by which the plaintiff was ſecured in "the ſole benefit and advantage of making, uſing, "exerciſing and vending *a certain invention* of him the ſaid "plaintiff, being *a method* by him *invented* of leſſening the

(1) In *Morris v. Branſon*, ſittings at Weſtm. after Eaſter, 1776, the queſtion was, whether *an addition* to an old ſtocking frame was the ſubject of a patent? Lord Mansfield ſaid, if the general queſtion of law, viz. that there can be no patent for an addition, be with the defendant, that is upon the record, and he may move in arreſt of judgment; but *that objection would go to repeal almoſt every patent that was ever granted:* there was a verdict for the plaintiff, and 500l. damages, which was acquieſced in. *Bull.* N.P. [77].

Though Lord Mansfield did not give any direct opinion in the above caſe, yet it may be ſafely collected that he thought, on great conſideration, the patent was good, and ſince that time, it has been the general received opinion in Weſtm. Hall, that *a patent for an addition is good, but then it muſt be for the addition only, and not for the old machine too. Per Buller*, J. in Boulton *v.* Bull, Ea. 35 Geo. 3 C.B. 2 Hen. Black. 489.

"conſumption,

conſumption of ſteam and fuel in fire-engines, which patent was by a private act of parliament (15 Geo. 3. c. 61) continued to the plaintiff for twenty-five years. The general iſſue being pleaded, the cauſe came on to be tried at the ſittings after Trinity term, 1793, when a caſe was reſerved for the opinion of the court, which ſtated, that by letters patent of 5 Jan. 1769, the king granted to the plaintiff Watt, who had duly aſſigned two-thirds of the patent-right to the plaintiff Bolton, that he might for fourteen years make, uſe, exerciſe, and vend *his new-invented method* of leſſening the conſumption of ſteam and fuel in fire-engines, under the uſual condition of inrolling a ſpecification. That Watt, by his ſpecification, declared, that *his method of leſſening the conſumption of ſteam, and conſequently fuel, in fire-engines, conſiſted of certain principles*; ſetting them forth particularly; by which it appeared, that the object of the patentee, was "to condenſe the ſteam, without cooling the cylinder, or ſteam-veſſel; and that the "means adopted to effectuate this, were, in ſubſtance, to "incloſe the cylinder or ſteam-veſſel in a caſe of wood, or "any other material, which will confine the heat, or tranſmit it ſlowly; to ſurround it with ſteam, or other heated "bodies, and to ſuffer neither water, nor any other ſubſtance colder than the ſteam, to enter or touch it during "that time." The caſe then deſcribed the old engine, and ſtated, that the plaintiff's was *a new* and *an uſeful invention*; and that the ſpecification was of *itſelf* ſufficient to enable a mechanic, acquainted with the fire-engines previouſly in uſe to conſtruct fire-engines producing the effect of leſſening the conſumption of fire and ſteam in fire-engines. And the queſtions for the opinion of the court, were, 1ſt, Whether the ſaid patent was good in law, and continued by the act of parliament above-mentioned? 2dly, Whether the ſpecification was ſufficient to ſupport the above patent?—On the part of the defendant, it was argued on three grounds, 1ſt, On the patent itſelf. 2dly, Upon the act of parliament. 3dly, Upon the act and patent taken together. 1ſt, Upon the patent itſelf, it was objected that it was for a formed inſtrument or machine, and as ſuch void; becauſe it was admitted, that there was *no ſpecification* deſcriptive of any formed inſtrument whatever, nor any drawing or model; but that ſuppoſing it to be a patent for mere principles (as the ſpecification ſtated the invention to conſiſt of principles) it was neither originally good in law, nor continued by the act 15 Geo. 3. c. 61. Not good in law, becauſe it did not fall within the conſtruction of the ſtatute 21 Jac. 1. c. 3. againſt monopolies, which in excepting letters patent, ſpeaks of them as patents for the ſole *working or making* of any manner of *new manufactures*, which is deſcriptive either of the

practice of making a thing by art, or of the thing when made; and that therefore for a mere principle, without having carried it into effect, and produced ſome new-formed matter or ſubſtance, a patent cannot be good: that the patent was not continued by the act 15 Geo. 3. c. 61. it was ſhewn, that the title of the act was for veſting in the plaintiff Watt the ſole property of certain *ſteam-engines, called fire-engines, of his invention*; which after reciting and taking notice, among other things, that the king had, by his letters patent, granted to Watt the ſole benefit and advantage of *making and vending* certain engines; enacts that the ſole principle of *making, conſtructing*, and ſelling *the engines*, therein before particularly deſcribed, ſhall be veſted in Watt for twenty-five years. It was therefore contended, that if the patent was really for principles, it was not continued by the act; or ſuppoſing it to be well continued, as being deſcribed according to its import, it would not be within the protection of the ſtatute againſt monopolies, for the foregoing reaſons. 2dly, Upon the act itſelf it was argued, that the recital that the king had granted a patent for *making and vending certain engines*, was falſe; and it has been adjudged, that if a private act of parliament, like the preſent, be founded upon a falſe recital, the act is void. 3dly, That if the ſubject was viewed as ariſing from the patent and act taken together, the arguments uſed reſpecting theſe inſtruments ſeparately, applied more ſtrongly, inaſmuch as if the act was to be conſidered as explanatory of the patent, or as a part of it, there could not be a doubt, but that it meant to grant a monopoly for a formed engine or machine. That, *upon the whole of the caſe, it appeared, either that the patent was for an entire formed machine, when it ought to have been for an improvement only; and in which caſe, the ſpecification did not correſpond with it: or it was for mere principles, which according to the ſtatute* 21 *Jac.* 1. *c.* 3. *againſt monopolies, could not be the ſubject of a patent.*—The caſe was very elaborately argued on both ſides; and after full conſideration, the judges delivered their reſpective opinions.—*Rooke*, J. The objections are merely formal; they do not affect the ſubſtantial merits of the patentee, nor the meritorious conſideration which the public have a right to receive, in return for the protection which the patentee claims. With regard to the firſt objection, it is, that the patent is not for a fire-engine of a particular conſtruction, but for a new-invented method. It preſuppoſes the exiſtence of the fire-engine, and gives a monopoly to the patentee of his new-invented method of leſſening the conſumption of ſteam and fuel in fire-engines. The obvious meaning of theſe words is, that he has made *an improvement in the conſtruction of fire-engines*, for what doth method mean, but mode or manner of effecting? What method can there be of

of ſaving ſteam or fuel in engines, but by ſome variation in the conſtruction of them? *A new-invented method*, therefore, conveys to my underſtanding the idea of *a new mode of conſtruction*. I think theſe words are tantamount to *fire-engines of a newly-invented conſtruction*; at leaſt I think they will bear this meaning, if they do not neceſſarily exclude every other. If they will bear this interpretation, then I think this objection, which is merely verbal, is anſwered: to which I add, that patents for a method or art of doing particular things, have been ſo numerous, that *method* may be conſidered as a common expreſſion in inſtruments of this kind. It would therefore be extremely injurious to the intereſts of patentees to allow this verbal objection to prevail. As to the ſecond objection, that no particular engine is deſcribed; that no model or drawing is ſet forth; I hold this not to be neceſſary, provided the patentee ſo deſcribes the improvement, as to enable artiſts to adopt it when his monopoly expires. The jury find he has ſo deſcribed it. It is objected, that he profeſſes to ſet forth principles only; but we are not bound by what he profeſſes to do, but what he has really done. If he had profeſſed to ſet forth a full ſpecification of his improvement, and had not ſet it forth intelligibly, his ſpecification would have been inſufficient, and his patent void. It ſeems, therefore, but reaſonable, that if he ſets forth his improvement intelligibly, his ſpecification ſhould be ſupported, though he profeſſes only to ſet forth the principle. The term *principle* is equivocal, it may denote either the radical elementary truths of a ſcience, or thoſe conſequential axioms which are founded on radical truths, but which are uſed as fundamental truths by thoſe who do not find it expedient to have recourſe to firſt principles. The radical principles on which all ſteam-engines are formed, are the natural properties of ſteam, its expanſiveneſs and condenſibility, whether the machines are formed in one ſhape or another; whether the cylinder is kept hot, or ſuffered to cool; whether the ſteam is condenſed in one veſſel or another, ſtill the radical principles are the ſame. When the preſent patentee ſet his inventive faculties to work, he found fire-engines already in exiſtence, and the natural qualities of ſteam already known, and mechanically uſed. He only invented an improvement in the mechaniſm, by which they might be employed to greater advantage. There is no newly-diſcovered natural principle as to ſteam, nor any new mechanical principle in his machine. The only invention is a new mechanical employment of principles already known. The ſpecification deſcribes a practical uſe of improved mechaniſm, the baſis on which the improvement is founded. The object of the patentee was to condenſe the ſteam without cooling the cylin-

der: the means adopted to effectuate this were to incloſe the cylinder in a caſe which will confine the heat, or tranſmit it ſlowly, to ſurround it with ſteam or other heated bodies, and to ſuffer neither water nor any other ſubſtance colder than the ſteam, to enter or touch it during that time. Theſe means are ſet forth. The objection is, that there is no drawing or model of a particular engine; and where is the neceſſity of ſuch drawing or model, if the ſpecification is intelligible without it? Had a drawing or model been made, and any man copied the improvement, and made a machine in a different form, no doubt this would have been an infringement of the patent: Why? becauſe the mechanical improvement would have been introduced into the machine, though the form was varied. It follows from thence, that *the mechanical improvement*, and *not the form* of the machine, is the object of the patent; and if this *mechanical improvement* is intelligibly ſpecified, of which a jury muſt be the judges, whether the patentee calls it *a principle*, invention, or *method*, or by whatever other appellation, we are not bound to conſider his terms, but the real nature of his improvement, and the deſcription he has given of it; and we may, I think, protect him, without violating any rule of law. The patent is for a method already adopted, and the two firſt and moſt material articles are ſet forth as already accompliſhed, and the caſe ſtates it was new and uſeful, at the time of making the patent. I therefore conſider the moſt eſſential part of the patent, the keeping the cylinder hot, incloſing it in a caſe, and ſurrounding it with ſteam, as carried into practical effect at the time of granting the patent; this the defendant has infringed. As to the objection of the want of a drawing or model, that at firſt ſtruck me as of great weight. I thought it would be difficult to aſcertain what was an infringement of a method, if there was no additional repreſentation of the improvement, or thing methodized. But I have ſatisfied my mind thus: infringement or not is a queſtion for the jury: in order to decide this caſe, they muſt underſtand the nature of the improvement, or thing infringed; if they can underſtand it without a model, I am not aware of any rule of law which requires a model or drawing to be ſet forth, or which makes void an intelligible ſpecification of *a mechanical improvement*, merely becauſe no drawing or model is annexed. In the preſent caſe, the want of a drawing or a model did not occaſion any difficulty to the jury; they have expreſsly decided, that Mr. Watt has the merit of a new and an uſeful invention: and that this invention was infringed by the defendant. How then can I ſay that they could not underſtand it for the want of a drawing? eſpecially when they have added, that the

the ſpecification is ſufficient to enable a mechanic acquainted with the fire-engines previouſly in uſe, to conſtruct fire-engines producing the effect of leſſening the conſumption of fuel and ſteam, upon the principle invented by the plaintiff. For theſe reaſons, I think the ſecond objection, that no particular engine is ſet forth, is not of ſufficient weight to deſtroy the effect of the patent. *Heath*, J. This patent is expreſsly for a new-invented method for leſſening the conſumption of ſteam and fuel in fire-engines. It appears that the invention of the patentee is original, and may be the ſubject of a patent; but the queſtion is, inaſmuch as his invention is to be put in practice by means of machinery, whether the patent ought not to have been for one or more machines; and whether this is ſuch a ſpecification as entitles him to the monopoly of *a method?* If method and machinery had been uſed by the patentee as convertible terms, and the ſame conſequences would reſult from both, it might be too ſtrong to ſay, that the inventor ſhould loſe the benefit of his patent, by the miſapplication of his term. In truth, it is not ſo. His counſel have contended for the excluſive monopoly of *a method* of leſſening the conſumption of ſteam and fuel in fire-engines, and that therefore would better anſwer the purpoſes of the patentee, for the method is a principle reduced to practice; it is in the preſent inſtance the general application of a principle to an old machine. There is no doubt that the patentee might have obtained a patent for his machinery, becauſe the act of parliament he obtained acknowledged his patent, and he himſelf, in 1782, procured a patent for his invention of certain new improvements upon ſteam and fire-engines for raiſing water, &c. which contained new pieces of mechaniſm, applicable to the ſame. Upon this ſtatement, the following objections ariſe to the patent, which I cannot anſwer, namely, that if there may be two different ſpecies of patents, the one for an application of a principle to an old machine, and the other for a ſpecific machine, one muſt be good, and the other bad. The patent that admits the moſt lax interpretation ſhould be bad, and the other alone conformable to the rules and principles of common law, and to the ſtatute on which patents are founded. The ſtatute 21 Jac. 1. prohibits all monopolies, reſerving to the king, by an expreſs proviſo, ſo much of his ancient prerogative as ſhall enable him to grant letters patent and grants of privilege, for the term of fourteen years, or under, of the ſole working or making of any manner of *new manufactures* within this realm, to the true and firſt inventor and inventors of ſuch *manufactures*. What then falls within the ſcope of the proviſo? Such manufactures as are reducible to two claſſes. The firſt claſs includes machinery, the ſecond ſubſtances, ſuch as medicines, formed by

chemical and other proceſſes, where the viſible ſubſtance is the thing produced, and that which operates preſerves no permanent form. In the firſt claſs the machine, and in the ſecond the ſubſtance produced, is the ſubject of the patent. I approve of the term *manufacture* in the ſtatute, becauſe it precludes all nice refinement, it gives us to underſtand the reaſon of the proviſo, that it was introduced for the benefit of trade. That which is the ſubject of a patent ought to be ſpecified; and it ought to be that which is vendible, otherwiſe it cannot be a manufacture; this is a new ſpecies of manufacture, and the novelty of the language is ſufficient to excite alarm. It has been urged, that other patents have been litigated and eſtabliſhed; for inſtance *Dollond*'s, which was for a refracting teleſcope. I conſider that as ſubſtantially an improved machine. A patent for an improvement of a refracting teleſcope, and a patent for an improved refracting teleſcope, are in ſubſtance the ſame, the ſame ſpecification would ſerve for both patents; the new organization of parts is the ſame in both. I aſked in the argument for an inſtance of a patent for *a method*, and none ſuch could be produced; I was then preſſed with patents for chemical proceſſes, many of which are for *a method*, but that is from an inaccuracy of expreſſion, becauſe the patent is in truth for a vendible ſubſtance. To purſue this train of reaſoning ſtill further, I ſhall conſider how far the arguments in ſupport of this patent will apply to the invention of original machinery, founded on a new principle. The ſteam-engine furniſhes an inſtance. The Marquis of Worceſter diſcovered in the laſt century the expanſive force of *ſteam*, and firſt applied it to machinery. As the original inventor, he was clearly entitled to a patent. Would the patent have been good applied to all machinery, or to the machines which he had diſcovered? the patent decides the queſtion. *It muſt be for the vendible matter, and not for the principle.* Another objection may be urged againſt the patent, upon the application of the principle to an old machine; which is, that whatever machinery may be hereafter invented, would be an infringement of the patent, if it be founded on the ſame principle. If this were ſo, *it would reverſe the cleareſt poſitions of law reſpecting patents for machinery, by which it has been always holden, that the organization of a machine may be the ſubject of a patent*, but *principles cannot.* If the argument for the patentee were correct, it would follow, that where a patent was obtained for the principle, the organization would be of no conſequence. Therefore *the patent for the application of the principle muſt be as bad as the patent for the principle itſelf.* It has been urged by the patentee, that he could not ſpecify all the caſes to which his machinery could be applied. The anſwer ſeems obvious, that what he cannot ſpecify he has not invented. The finding of the jury, that

ſteam

ſteam-engines may be made upon the principles ſtated by the patentee, by a mechanic acquainted with the fire-engines previouſly in uſe, is not concluſive. This patent extends to all machinery that may be made on this principle; ſo that he has taken a patent for more than he has ſpecified; and as the ſubject of his patent is an entire thing, the want of a full ſpecification is a breach of the conditions, and avoids the patent. Indeed it ſeems impoſſible to ſpecify a principle, and its application to all caſes, which furniſhes an argument that it cannot be the ſubject of a patent. It has been uſual to examine the ſpecification as a condition on which the patent was granted; I ſhall now conſider it in another point of view. It is a clear principle of law, that the ſubject of every grant muſt be certain. The uſual mode has been for the patentee to deſcribe the ſubject of it by the ſpecification; the patent and the ſpecification muſt contain a full deſcription. Then in this, as in moſt other caſes, the patent would be void for the uncertain deſcription of the thing granted, if it were not aided by the ſtatute. The grant of a method is not good, becauſe uncertain: the ſpecification of a method, or the application of a principle is equally ſo, for the reaſons I have alleged. *Buller*, J. It was expreſsly admitted in the argument, that there were no new particulars in the mechaniſm, that it was not a machine or inſtrument which the plaintiffs had invented; that mechaniſm was not pretended to be invented in any of its parts; that this engine conſiſts of all the ſame parts as the old engine; and that the particular mechaniſm is not neceſſary to be conſidered. The fact of there being nothing new in the engine, drove the counſel to argue on very wide grounds, and to touch on the poſſibility of maintaining a patent for an idea or principle, though I think it was admitted, that a patent could not be ſuſtained for an idea or principle alone. *The very ſtatement of what a principle is, proves it not to be a ground for a patent.* It is the firſt ground and rule for arts and ſciences, or, in other words, the elements and rudiments of them. *A patent muſt be for ſome new production* from thoſe elements, and not for the elements themſelves. The arguments which have been adduced were very much calculated to keep clear of difficulties which it was foreſeen might be introduced into the caſe: as, 1ſt, That unleſs the principle can be ſupported as the ground of the patent, there may be ſome danger of confirming the defendant's objection to it: 2dly, That unleſs the principle can be ſupported, it may open a fatal objection to the ſpecification, becauſe that does not ſtate in what manner the new machine is to be conſtructed, how it varies from the old one, or in what way the improvements are to be added: or, 3dly, Becauſe the patent embraces the whole principle, and is founded on that alone; but the invention is taken to conſiſt of an improvement or addition only. Another objection may ariſe both

to the patent and ſpecification, viz. that the patent is granted for the whole engine, and not for the addition or improvement only. Perhaps it may be convenient and judicious to keep thoſe objections as much as poſſible in the back ground, and out of the view of the court: but it is our duty to ſift and dive into the facts and circumſtances of the caſe, and the bearings and conſequences of them, as far as our abilities or knowledge of the ſubject will admit. There is one ſhort obſervation ariſing on this part of the caſe, which ſeems to me to be unanſwerable; and that is, that if the principle alone be the foundation of the patent, it cannot poſſibly ſtand, with that knowledge and diſcovery which the world were in poſſeſſion of before. The effect, the power, and the operation of ſteam were known long before the date of this patent; all machines which are worked by ſteam, are worked on the ſame principle; the principle was known before; and therefore, if the principle alone be the foundation of the patent, though the addition may be a great improvement, as it certainly is, yet the patent muſt be void *ab initio*; but then it was ſaid, that though an idea or a principle alone would not ſupport the patent, yet that an idea reduced into practice, or a practical application of a principle, was a good foundation for a patent, and was the preſent caſe. The mere application or mode of uſing a thing, was admitted not to be a ſufficient ground; for on the court putting the queſtion, whether if a man, by ſcience, were to deviſe the means of making a double uſe of a thing known before, he could have a patent for that? it was rightly and candidly admitted that he could not. *The method* and the mode of doing a thing are the ſame; and I think it impoſſible to ſupport a patent for a method only, without having carried it into effect, and produced ſome new ſubſtance. But here it is neceſſary to enquire, what is meant by a principle reduced into practice. It can only mean a practice founded on principle, and that practice is the thing done or made, or, in other words, the manufacture which is invented. This brings us to the true foundation of all patents, which muſt be the manufacture itſelf; and ſo ſays the ſtatute, 21 Jac. 1. c. 3. All monopolies, except thoſe which are allowed by that ſtatute, are declared to be illegal and void; they were ſo at common law: and the ſixth ſection excepts only thoſe of the ſole *working*, or *making*, any manner of *new manufacture:* and whether the manufacture be with or without principle, produced by accident or by art, is immaterial. *Unleſs this patent can be ſupported for the manufacture, it cannot be ſupported at all.* I am of opinion that the patent is granted for the manufacture; and I agree that verbal criticiſms ought not to avail, but that *principle* in the patent, and *engine* in the act of parliament, mean and are the ſame thing. Beſides, the declaration is founded on a right

to

to the engine; and therefore, unleſs the plaintiffs can make out their right to that extent, they muſt fail. In moſt of the inſtances of the different patents mentioned, the patents were for the manufacture, and the ſpecification rightly ſtated the method by which the manufacture was made: but none of them go the length of proving that a method of doing a thing without the thing being done, or actually reduced into practice, is a good foundation for a patent. When the thing is done or produced, then it becomes the manufacture, which is the proper ſubject of a patent. Dollond's patent was for object-glaſſes; and the ſpecification properly ſtated the method of making thoſe glaſſes. And, as I mentioned, in the courſe of the argument, the point conteſted in that caſe was, whether *Dollond* or *Hall* was the firſt and true inventor within the meaning of the ſtatute, Hall having firſt made the diſcovery in his own cloſet, but never made it public; and on that ground Dollond's patent was confirmed. Mechanical and chemical diſcoveries all come within the deſcription of manufactures: and it is no objection to either of them, that the articles of which they are compoſed were known, and were in uſe before, provided *the compound article*, which is the object of the invention, is new. But then the patent muſt be for the ſpecific compound, and not for all the articles or ingredients of which it is made. The firſt inventor of a fire-engine could never have ſupported a patent for the method and principle of uſing iron. Nor could Dr. James, ſuppoſing his patent had been clear of other objections, have ſuſtained a patent for the method and principle of uſing antimony. In the firſt caſe, the patent muſt have been for the fire-engine *eo nomine*; and in the ſecond, for the ſpecific compound powder. Suppoſe the world were better informed than it is how to prepare Dr. James's fever-powder, and an ingenious phyſician ſhould find out that it was a ſpecific cure for a conſumption if given in particular quantities; could he have a patent for the ſole uſe of James's powders in conſumptions, or to be given in particular quantities? I think it muſt be conceived that ſuch a patent would be void; and yet the uſe of the medicine would be new, and the effect of it as materially different from what is known, as life is from death. So, in the caſe of a late diſcovery, which as far as experience has hitherto gone, is ſaid to have proved efficacious, that of the medicinal properties of arſenic in curing agues, could a patent be ſupported for the ſole uſe of arſenic in aguiſh complaints? the medicine is the manufacture, and the only object of a patent; and as the medicine is not new, any patent for it, or for the uſe of it, would be void. The caſe of water-tabbies, which has often been mentioned in Weſtminſter Hall, may afford ſome illuſtration of the ſubject. That invention firſt owed its riſe to the accident of a man's ſpitting on a floor-cloth, which

which changed its colour; from whence he reaſoned on the effect of intermixing water with oils or colours, and found out how to make water-tabbies, and had his patent for water-tabbies only: but if he could have had a patent for the principle of intermixing water with oils or colours, no man could have had a patent for any diſtinct manufacture produced on the ſame principle, yet as the floor cloth and the tabby are diſtinct ſubſtances, calculated for diſtinct purpoſes, and were unknown to the world before, a patent for one would be no objection to a patent for another.—*The true queſtion in this caſe is, whether the plaintiff's patent can be ſupported for the engine?* I have already ſaid, I conſider it as granted for the engine; and if that be the right conſtruction of the patent, that alone lays all the arguments about ideas and principles out of the caſe. The objection to this patent, as a patent for the engine, are two, 1ſt, That the fire-engine was known before: and, 2dly, Though the plaintiff's invention conſiſted only of an improvement of the old machine, he has taken the patent for the whole machine, and not for the improvement alone. As to the firſt, the fact which the plaintiff's counſel were forced repeatedly to admit, viz. that there was nothing new in the machine, is deciſive againſt the patent. And the ſecond objection is equally fatal: that *a patent for an addition or improvement may be maintained, is a point which has never been diſtinctly decided.* For of late times, whenever the point has ariſen, the inclination of the court has been in favour of the patent for the improvement; and the parties have acquieſced, when the objection might have been brought directly before the court. "In Morris *v.* Branſon, which was tried at the ſitting after "Eaſter term, 1776, the queſtion was, Whether a patent "for making oilet holes, or net-work, in ſilk, thread, cot-"ton, or worſted, and which was done only by an addition "to the old ſtocking-frame, was valid? Lord *Mansfield* ſaid, "that he had paid great attention to it, and mentioned it to "all the judges. And that if the general point of law, viz. "that there can be no patent for an addition only, was with "the defendant, it was open upon the record, and he might "move in arreſt of judgment; but that the objection would "go to repeal almoſt every patent that was ever granted." There was a verdict for the plaintiff, with 500l. damages, and no motion was made in arreſt of judgment. Though his lordſhip did not mention what were the opinions of the judges, or give any direct opinion himſelf, yet we may ſafely collect, that he thought, on great conſideration, that the patent was good; and though the objection was taken at the trial, it was not afterwards perſiſted in: *ſince that time, it has been the generally-received opinion in Weſtminſter-hall, that a patent for an addition only is good; but then it muſt be for the addition only, and not for the old machine*

too.

too. In Jeſſop's caſe, for an improved movement in watches, the patent was held to be void, becauſe it extended to the whole watch, and the invention was of a particular movement only. It was admitted, that the patent ſhould be applied to the invention itſelf; but it was contended, that if in conſequence the patent gave a right to the whole engine, that would be no objection. To this I anſwer, that if the patent be confined to *the invention*, it can give no right to the *engine*, or to any thing beyond the invention itſelf. When a patent is taken for an improvement only, the public have a right to purchaſe that improvement by itſelf, without being incumbered with other things. A fire-engine of any conſiderable ſize will coſt about 1200l, and ſuppoſe the alteration made by the plaintiff, with a fair allowance of profit, would coſt 50l. or 100l. is it to be maintained, that all the perſons who already have fire-engines muſt be at the expence of buying new ones from the plaintiffs, or be excluded from the uſe of the improvement? So in the caſe of the watch, may not other perſons in the trade buy the new movement, and work it up in watches made by themſelves? Where men have neither fire-engines nor watches, it is highly probable that they will go to the inventor of the laſt and beſt improvement for the whole machine: and if they do, it is an advantage which the inventor gets from the option of mankind, and not from any excluſive right or monopoly veſted in him. But here the plaintiffs claim the right to the whole machine. To that extent their right cannot be ſuſtained; and therefore I am of opinion that there ought to be judgment for the defendant. *Eyre*. CH. J. Upon this caſe, two queſtions are reſerved for the opinion of the court; the firſt, Whether the patent is good in law, and continued by the act of parliament mentioned in the caſe? the ſecond, Whether the ſpecification ſtated in the caſe is, in point of law, ſufficient to ſupport the patent? As theſe two queſtions are framed, there are three points for the conſideration of the court: 1ſt, Whether the patent was, in its original creation, good or bad? 2dly, Taking it to be good, whether it was continued by the act of parliament? And, 3dly, taking it to be good in its original creation, and to have been continued by the act of parliament, ſubject to an objection for the want of a ſpecification, whether there has been a ſufficient ſpecification? Though we have had many caſes upon patents, yet I think we are here upon ground which is yet untrodden, at leaſt was untrodden till this cauſe was inſtituted; and till the diſcuſſions were entered into which we have heard at the bar, and now from the court. Patent rights are no where, that I can find, accurately diſcuſſed in our books; we muſt, therefore, reſort to the ſtatute, 21 Jac. 1. c. 3. we there find a *monopoly* defined to be "the privilege

" privilege of the ſole buying, ſelling, making, working, or " uſing *any thing* within this realm:" and this is generally condemned, as contrary to the fundamental law of the land; but the 5th and 6th ſections of that ſtatute ſave letters patent, and grants of privileges of the ſole working or making of any manner of *new manufacture* within this realm, to the firſt and true inventor or inventors of ſuch *manufactures*; with this qualification, " ſo they be not contrary to the law, " nor miſchievous to the ſtate;" in theſe three reſpects, firſt, " by raiſing the prices of commodities at home:" ſecondly, " by being hurtful to trade:" or, 3dly, " by being " generally inconvenient." According to the letter of the ſtatute, the ſaving goes only to the *ſole working and making: the ſole buying and uſing* remain under the general prohibition, and with apparent good reaſon for ſo remaining, for the excluſive privilege of buying, ſelling, and uſing, could hardly be brought within the qualification of not being contrary to law, and miſchievous to the ſtate, in the reſpects which I have mentioned. I obſerve alſo, that according to the letter of the ſtatute, the words, " any manner of *new* " *manufacture*," in the ſaving, fall very ſhort of the words, *any thing*, in the firſt ſection. It was admitted in the argument at the bar, that the word *manufacture*, in the ſtatute, was of extenſive ſignification, that it applied not only to things made, but to *the practice of making*, to principles carried into practice in a new manner, to new reſults of principles carried into practice. Let us purſue this admiſſion. Under *things made*, we may claſs, in the firſt place, new compoſitions of things, ſuch as manufactures, in the moſt ordinary ſenſe of the word: ſecondly, all mechanical inventions, whether made to produce old or new effects, for a new piece of mechaniſm is certainly a thing made. Under *the practice of making*, we may claſs all new artificial manners of operating with the hand, or with inſtruments in common uſe, new proceſſes in any art, producing effects uſeful to the public. When the effect produced is ſome new ſubſtance or compoſition of things, it ſhould ſeem that the privilege of the ſole making or working, ought to be for ſuch new ſubſtance or compoſition, without regard to the mechaniſm or proceſs by which it has been produced, which, though perhaps alſo new, will be only uſeful, as producing the new ſubſtance. Upon this ground, Dollond's patent was perhaps exceptionable, for that was for *a method* of producing a new object-glaſs, inſtead of being for the object-glaſs produced. If Dr. James's patent had been for his *method* of preparing his powders, inſtead of *the powders themſelves*, this patent would have been objectionable on the ſame ground. When the effect produced is no ſubſtance or compoſition of things, the patent can only be for the mechaniſm,

chaniſm, if new mechaniſm is uſed, or for the proceſs, if it be a new method of operating, with or without old mechaniſm, by which the effect is produced. To illuſtrate this, the effect produced by Mr. David Hartley's invention, for ſecuring buildings from fire, is no ſubſtance or compoſition of things. It is a mere negative quality, the abſence of fire. The effect is produced, by a new method of diſpoſing iron-plates in buildings. In the nature of things, the patent could not be for the effect produced. I think, it could not be for the making the plates of iron, which, when diſpoſed in a particular manner, produced the effect; for theſe are things in common uſe. But the invention conſiſting in *the method of diſpoſing thoſe plates of iron*, ſo as to produce their effect, and that effect being an uſeful and meritorious one, the patent ſeems to have been very properly granted to him *for his method of ſecuring* buildings from fire. And this compendious analyſis of *new manufactures* mentioned in the ſtatute, ſatisfies my doubt, whether any thing could be the ſubject of a patent, but ſomething organized, and capable of preciſe ſpecification? But for the mere ſatisfactory ſolution of the other points, which are made in this caſe, I ſhall purſue this ſubject a little further. In Mr. Hartley's method, plates of iron are the means which he employs, but he did not invent thoſe means, the invention wholly conſiſted in the *new manner of uſing*, or I would rather ſay of *diſpoſing a thing in common uſe*; and which thing every man might make at his pleaſure; and which, therefore, I repeat, could not, in my judgment, be the ſubject of the patent. In the nature of things, it muſt be that in the carrying into execution any new invention, uſe muſt be made of certain means proper for the operation. Manual labour, to a certain degree, muſt always be employed; the tools of artiſts frequently; often things manufactured, but not newly invented, ſuch as Hartley's iron-plates; all the common utenſils uſed in conducting any proceſs; and ſo up to the moſt complicated machinery that the art of man ever deviſed. Now, let the merit of the invention be what it may, it is evident, that the patent, in almoſt all theſe caſes, cannot be granted for *the means* by which it acts; for in them there is nothing new, and in ſome of them nothing capable of appropriation Even where the moſt complicated machinery is uſed, if the machinery itſelf is not newly invented, but only conducted by the ſkill of the inventor, ſo as to produce a new effect, the patent cannot be for the machinery. In Hartley's caſe, it could not be for *the effect* produced, becauſe the effect, as I have already obſerved, is merely negative, though it was meritorious. In the liſt of patents with which I have been furniſhed, there are ſeveral for

for *new methods* of manufacturing articles in common uſe, where the ſole merit and the whole effect produced, are the ſaving of time and expence, and thereby lowering the price of the article, and introducing it into more general uſe. Now I think *theſe methods* may be ſaid to be *new manufactures*, in one of the common acceptations of the word, as we ſpeak of the manufactory of glaſs, or any other thing of that kind. The advantages to the public from improvements of this kind are beyond all calculation important to a commercial country; and the ingenuity of artiſts, who turn their thoughts towards ſuch improvements, is in itſelf deſerving of encouragement; and, in my apprehenſion, it is ſtrictly agreeable to the ſpirit and meaning of the ſtat. Jac. 1. that it ſhould be encouraged. And yet the validity of theſe patents, in point of law, muſt reſt upon the ſame foundation as that of Mr. Hartley's. The patent cannot be for the effect produced, for it is either no ſubſtance at all, or, what is exactly the ſame thing as to the queſtion upon a patent, no new ſubſtance, but an old one, produced advantageouſly for the public. It cannot be for the mechaniſm, for there is no new mechaniſm employed. It muſt then be for *the method*; and I would ſay, in the very ſignificant words of Lord *Manſfield* (1) in the great caſe of the copy-right, it muſt be for *method*, detached *from all phyſical exiſtence whatever*. And I think we ſhould well conſider what we do in this caſe, that we may not ſhake the foundation upon which theſe patents ſtand. Probably, I do not over-rate it, when I ſtate that two-thirds, I believe I might ſay three-fourths of all patents granted ſince the ſtatute paſſed, are for *methods of operating*, and of manufacturing, producing no new ſubſtances, and employing no new machinery. If the liſt were examined, I dare ſay there might be found fifty patents for methods of producing all the known ſalts, either the ſimple ſalt, or the old compounds. The different ſorts of aſhes uſed in manufactures are many of them inventions of great merit; many of them probably mere ſpeculations of wild projectors: the latter ought to fall, the former to ſtand. If we wanted an illuſtration of the poſſible merit of a new method of operating with old machinery, we might look to the identical caſe now in judgment before the court. If we conſider into what general uſe fire-engines are come, that our mines cannot be worked without them, that they are eſſentially neceſſary to the carrying on many of our principal manufactures; that theſe engines are worked at an enormous expence in coals, which in ſome parts of the kingdom can with

(1) 4 Burr. 2397.

difficulty

difficulty be procured at all in large quantities, it is moſt manifeſt, that any method found out for leſſening the conſumption of ſteam in the engines, which, by neceſſary conſequence, leſſens the conſumption of coals expended in working them, will be of great benefit to the public, as well as to the individual who thinks fit to adopt it. And ſhall it now be ſaid, after we have been in the habit of ſeeing patents granted, in the immenſe number in which they have been granted, for *methods of uſing old machinery*, to produce ſubſtances that were old, but in a more beneficial manner, and alſo for producing negative qualities, by which benefits reſult to the public; by a narrow conſtruction of the word *manufacture* in this ſtatute, that there can be no patent for *methods* producing this new and ſalutary effect, connected, and intimately connected as it is with the trade and manufactures of the country? this I confeſs I am not prepared to ſay. An improper uſe of the word principle in the ſpecification ſet forth in this caſe, has, I think, ſerved to puzzle it. Undoubtedly, *there can be no patent for a mere principle; but for a principle ſo far embodied and connected with corporeal ſubſtances, as to be in a condition to act, and to produce effects in any art, trade, myſtery, or manual occupation, I think there may be a patent.* Now this is, in my judgment, the thing for which the patent ſtated in the caſe was granted; and this is what the ſpecification deſcribes, though it miſcalls it a principle. It is not that the patentee has conceived an abſtract notion, that the conſumption of ſteam in fire-engines may be leſſened, but he has diſcovered a practical manner of doing it; and for that *practical manner* of doing it he has taken the patent. Surely this is a very different thing from taking a patent for a principle, *it is not for a principle, but for a proceſs.* I have dwelt more largely upon this part of the caſe, becauſe, in my apprehenſion, this is the foundation upon which the whole argument will be found to reſt. If upon the true conſtruction of the ſtatute, there may be a patent for *a new method* of manufacturing or conducting chemical proceſſes, or of working machinery, ſo as to produce new and uſeful effects, then I am warranted to conclude, that this patent was in its original creation good.—I will next conſider the ſpecification, before I proceed to the conſideration of the queſtion ariſing upon the ſtatute for continuing this patent. The ſpecification has reference to the patent, and not to the ſtatute, and therefore it will be proper to conſider it in this ſtage of the argument. I diſtinctly admit, that if this patent is to be taken to be a patent for a fire-engine, the ſpecification is not ſufficient; it is not a ſpecification of mechaniſm of any determinate form, having component parts capable of preciſe arrangement, and of particular deſcription. On the other hand, if the patent is not for a fire-engine, but in effect, *for a manner*

a manner of working a fire-engine, ſo as to leſſen the conſumption of ſteam, which, as I conceive, the words of the patent import, let us ſee whether the ſpecification does not ſufficiently deſcribe a manner of working fire-engines, ſo as to produce the effect expreſſed in the patent; and whether the only objection to the ſpecification is not, that it is loaded with a redundancy of ſuperfluous matter. The ſubſtance of the invention is a diſcovery, that the condenſing the ſteam out of the cylinder, the protecting the cylinder from the external air, and keeping it hot to the degree of ſteam-heat, will leſſen the conſumption of ſteam. This is no abſtract principle, it is, in its very ſtatement, clothed with practical application; it points out what is to be done, in order to leſſen the conſumption of ſteam. Now, the ſpecification of ſuch a diſcovery ſeems to conſiſt in nothing more than ſaying to the conſtructor of a fire-engine: "For the "future, condenſe your ſteam out of the body of the cylin-"der, inſtead of condenſing it within it; put ſomething "round the cylinder to protect it from the external air, and "to preſerve the heat within it, and keep your piſton air-"tight without water." Any particular manner of doing this, one ſhould think would hardly need to be pointed out, for it can ſcarcely be ſuppoſed, that a workman, capable of conſtructing a fire-engine, would not be capable of making ſuch additions to it as ſhould be neceſſary to enable him to execute that which the ſpecification requires him to do. But if a very ſtupid workman ſhould not know how to go about this improvement, and in anſwer to his queſtion was directed to conduct the ſteam which was to be condenſed, from the cylinder into a cloſe veſſel, by means of a pipe and a valve, communicating with the cylinder and the cloſe veſſel, to keep the cloſe veſſel in a ſtate of coldneſs, ſufficient to produce condenſation, and to extract from it any part of the ſteam which might not be condenſed by the pump, and was alſo told to incloſe the cylinder in a wooden caſe, and to uſe a reſinous ſubſtance inſtead of water, to keep the piſton air-tight; can it be imagined that he would be ſo ſtupid as not to be able to execute this improvement, with the aſſiſtance of theſe plain directions? If any man could for a moment imagine that this was poſſible, I obſerve that this difficulty is put an end to, becauſe the jury have found that a workman can execute this improvement in conſequence of the ſpecification. Some machinery, it is true, muſt be employed, but the machinery is not of the eſſence of the invention, but incidental to it. The ſteam muſt paſs from the cylinder to the condenſing veſſel; for which purpoſe there muſt be a valve to open a pipe to convey, and a veſſel to receive the ſteam: but this cannot be called new-invented machinery, whether conſidered in the parts, or in the whole; and therefore there

can be no patent for this addition to the fire-engines. Suppoſe a new-invented chemical proceſs, and the ſpecification ſhould direct that ſome particular chemical ſubſtance ſhould be poured upon gold in a ſtate of fuſion, it would be neceſſary in order to this operation, that the gold ſhould be put into a crucible, and ſhould be melted in that crucible; but it would be hardly neceſſary to ſtate in the ſpecification, the manner in which, or the utenſils with which, the operation of putting gold into a ſtate of fuſion was to be performed. They are mere incidents, with which every man acquainted with the ſubject is familiar. Some obſervations were made in the courſe of the argument, on its being left unaſcertained both in the ſpecification and caſe, to what extent the conſumption of ſteam would be leſſened by the invention; but the method does not profeſs to aſcertain this. It profeſſes to leſſen the conſumption; and to make the patent good, the method muſt be capable of leſſening the conſumption to ſuch an extent as to make *the invention uſeful*, more preciſion is not neceſſary, and abſolute preciſion is not practicable; the quantity of ſteam which will be ſaved in each machine muſt depend upon a great variety of circumſtances reſpecting each individual fire-engine, ſuch as the caſting or boring the cylinder, or the dimenſions of it, the accuracy of the workman in putting his apparatus together, the care in keeping the cylinder in a proper degree of heat, and the more or leſs perfect order for working, in which the engine is kept. All theſe circumſtances will affect the quantity of ſteam to be leſſened. The difficulty which ſtrikes me, as it did my brother *Buller*, with reſpect to the declaration, is applied to the patent as it originally ſtood, not as it now ſtands, continued by the act of parliament. If we were at liberty to go into it, that difficulty might perhaps produce a nonſuit, and that nonſuit a new action, in which the difficulty would be removed. But this cauſe was inſtituted to try the merits of the patent. I thought, therefore, that a formal objection was wiſely overlooked.—Suppoſing then the difficulty upon the patent itſelf, and the ſpecification, to be got over, the act of parliament remains to be conſidered. The objection, ſtated in the ſtrongeſt manner, would amount to this, that the act continues a patent for *a machine*, when, in fact, the patent is for *a proceſs*. It is to be obſerved, that there is nothing technical in the compoſition or the language of an act of parliament. In the expoſition of ſtatutes, the intent of parliament is the guide. It is expreſsly laid down in our books, I do not here ſpeak of penal ſtatutes, that every ſtatute ought to be expounded not according to the letter, but the intent (1). This doctrine has been carried into

(1) 2 Roll. Abr. 118. Plowd. 350. 363.

effect by caſes. Though a corporation be miſnamed in an act of parliament, if it appears that the corporation was intended, it is ſufficient, 10 Co. 576. So the ſtatute of *quia emptores terrarum* has ſaid, that every one ſhould hold of the lord paramount, *ſecundum quantitatem terræ*, but this ſhall be conſtrued to be *ſecundum valorem terræ*; for ſo was the intent, *Plowd.* 10. 57. We all know, that an act of parliament may be extended by equity. No authority has been cited, which amounts to proof, that a miſtake in point of deſcription in an act of parliament of this nature, where the true meaning can be diſcovered, and where there is a foundation on which this act can be ſupported, ſhall vitiate it. The caſe cited from *Plowden* (1), to ſhew that if a private act of parliament be founded upon a falſe recital, the act is void, differs eſſentially from this caſe. The act of parliament, which was adjudged void, in that caſe recited, that *A.* had been attainted of treaſon, and confirmed the attainder in the forfeiture of lands; whereas A. never was attainted; there, if the ground-work fell, and there was no legal attainder, nothing remained. The ſuppoſed attainder did in that caſe fail, and conſequently all fell. Now the difference between that caſe and the preſent is this: here the true patent meant to be deſcribed exiſts, and may therefore be the ground-work to ſupport the act. This caſe was compared to the caſe of the king being deceived in his grant. But I am not ſatisfied that the king, proceeding by and with the advice of parliament, is in that ſituation in reſpect of which he is under this ſpecial protection of the law; and that he could on that ground be conſidered as deceived in his grant. No caſe was cited to prove that poſition. The objection on the act of parliament is of the ſame nature as one of the objections to the ſpecification: the ſpecification calls *a method* of laſſening the conſumption of ſteam in fire-engines *a principle*, which it is not; the act calls it *an engine*, which perhaps alſo it is not; but both the ſpecification and ſtatute are referable to the ſame thing, and when they are taken with their correlative, are perfectly intelligible. Upon the wider ground, I am therefore of opinion, that the act has continued this patent. A narrower ground was taken in the argument, which was to expound the word engine in the body of this act, in oppoſition to the title of it, to mean *a method*; and I am ready to ſay, I would reſort to that ground, if neceſſary, in order to ſupport the patent, *ut res magis valeat quam pereat*; but it is not neceſſary: for, let it be remembered, that though monopolies in the eye of the law, are odious; the conſideration of the

(1) Plowden, 390.

privilege

privilege created by this patent, is meritorious; becauſe, to uſe the words of lord Coke, "the inventor bringeth to and "for the commonwealth a new manufacture by his inven- "tion, coſts, and charges." I conclude, therefore, that the judgment of the court ought to be for the plaintiff. THE COURT *being thus equally divided*, NO JUDGMENT *was given*; but the parties ſeemed diſpoſed to put the caſe upon the record in the form of a ſpecial verdict, in order that it might be carried on to a court of error.

Hayne, & *al.* v. Maltby, M. 30 Geo. 3. B.R. 3 *Ter. Rep.* 438.

And if the patent is void, the patentee cannot enforce the performance of a covenant, for the obſervance of the excluſive right, entered into by another, in contemplation of its being good.—This was an action of covenant; and the declaration was on articles of agreement, which, after reciting that the plaintiffs were aſſignees of a patent for an engine or machine, to be fixed to a common ſtocking-frame, for making a ſort of net or open work, called point-net, contained a covenant, whereby the defendant, in conſideration of being permitted by the plaintiff to uſe one ſtocking-frame with the patent engine annexed thereto in a particular way, covenanted that he would not uſe any of the patent-engines, or any engines reſembling the ſame, except that allowed by the articles. The declaration then averred enjoyment by the defendant, without interruption by the plaintiffs; and aſſigned two breaches, one for uſing other patent engines beſides the one allowed by the plaintiff; the other for uſing engines reſembling the patent machines. To this there were ſeveral pleas: the three laſt of which only were material here, viz. the third plea was, that the patentee did not enrol the ſpecification; the fourth, that the invention was not a new invention; the fifth, that the invention was not diſcovered by the patentee. The plaintiff demurred to the third, fourth, and fifth pleas, becauſe the defendant attempted to put in iſſue matters foreign to the merits of the cauſe, inaſmuch as he was eſtopped by his deed from putting thoſe matters in iſſue here.—By lord *Kenyon*, CH. J. the facts of this caſe are ſhortly theſe; *the plaintiffs, pretending to derive a right under a patent, aſſigned to the defendant part of that right, on certain terms; and notwithſtanding the facts now diſcloſed ſhew that they have no ſuch privilege, they ſtill inſiſt that the defendant ſhall be bound by his covenant, though the conſideration of it is fraudulent and void.* This is not to be conſidered as a covenant to pay a certain ſum in groſs at all events; but to uſe a machine in a particular way, in conſideration of the plaintiff's having conferred that intereſt on the defendant, which they profeſſed to conſer by the agreement. Now in point of conſcience, it is impoſſible that two perſons can entertain different ideas upon the ſubject. But it is ſaid, that though conſcience fails, the defendant is eſtop-

ped in point of law from ſaying that the plaintiffs had no privilege to confer. *But the doctrine of eſtoppel is not applicable here.* Where indeed an heir apparent, having only the hope of ſucceſſion, conveys, during the life of his anceſtor, an eſtate which afterwards deſcends upon him, although nothing paſſes at that time, yet when the inheritance deſcends upon him, he is eſtopped to ſay, that he had no intereſt at the time of the grant. There an eſtoppel is founded on law, conſcience, and juſtice. But what is the caſe here? who is eſtopped? The perſon ſuppoſed to be eſtopped, is the very perſon who has been cheated and impoſed upon. In the caſe of landlord and tenant, the tenant is not *at all events* eſtopped to deny the landlord's title, the eſtoppel only exiſts *during the continuation of his occupation.* And if he be ouſted by a title paramount, he may plead it. *Aſhhurſt*, J. This is a good plea; and the defendant is not eſtopped from diſcloſing any of the matters contained in it. In the caſe of landlord and tenant, as long as the latter enjoys the eſtate, he ſhall not be permitted to deny his landlord's title, for he has a meritorious conſideration; but when it is applied to a perſon having a ſuperior title, he may plead it. The plaintiffs uſe this patent as a fraud on all mankind, and they ſtate it to be an invention of the patentee, when in truth it was no invention of his. The only right conferred on the defendant by this agreement was that of uſing this machine, which was no more than that which he, in common with every other ſubject, has, without any grant from the plaintiffs. *Buller*, J. The plaintiffs had no excluſive right, and therefore the defendant has not the conſideration for which he entered into that covenant. The caſe of landlord and tenant is not unlike this, for the facts in this caſe diſcloſed by the plea are equal to an eviction of the tenant: as long as the tenant holds under the leaſe, he is eſtopped from denying his landlord's title; but when he is evicted, he has a right to ſhew that he does not enjoy that which was the conſideration for his covenant to pay the rent, notwithſtanding he has bound himſelf by the covenant. *Groſe*, J. declared himſelf of the ſame opinion.—Judgment for defendant.

Oldham *v.* Langmead, Sitt. af. Tr. 1789, cited 3 *Ter. Rep.* 439, 441.

But the patentee, after an aſſignment of his intereſt, cannot himſelf ſet up that the patent is void: for where an action was brought againſt a patentee who had conveyed his intereſt in a patent to the plaintiff, and yet, in violation of his aſſignment, infringed the plaintiff's right; the defence ſet up was, that it was not a new invention. But lord *Kenyon* was of opinion that the defendant was eſtopped by his own deed from making that defence.

Millar *v.* Taylor, Ea. 9 Geo. 3. B. R. 4 *Burr.* 2354. 1 *Black.* 675.

The author of any book, or literary compoſition, cannot, after printing and publiſhing the ſame, maintain an action againſt

againſt any perſon who may reprint and ſell the ſame, without his conſent, except ſuch action be founded on the ſtatute 8 Ann. c. 19. and on the terms and conditions preſcribed thereby. This was an action of treſpaſs on the caſe: and the ſhort ſubſtance of the caſe was this. The declaration charged that "the plaintiff, Millar, was the true and "only proprietor of the copy of a book of poems, entitled "*the Seaſons, by James Thomſon*, and whilſt he was ſo proprietor of the ſaid copy, cauſed 2000 books of it to be printed for ſale, at his own expence; and had a great number "of the ſaid 2000 books remaining in his hands for ſale. "That the defendant, Taylor, publiſhed and expoſed to ſale "ſeveral other books of the like copy, and bearing the ſame "title; which latter books had been injuriouſly printed by "ſome perſon or perſons without the licence or conſent of the plaintiff, Millar, the defendant knowing "that they had been ſo injuriouſly printed, without the "plaintiff's licence or conſent, by means whereof the "plaintiff, Millar, was deprived of the profit and benefit of "the ſaid copy and book, and of the books printed at his "expence, as aforeſaid, and then remaining in his hands unſold; and he laid his damages at 200l. The defendant, "Taylor, pleaded not guilty. Iſſue was thereupon joined, "and the jury found a ſpecial verdict." The general queſtion for the determination of the court was, WHETHER, *after a voluntary and general publication of an author's works by himſelf, or by his authority, the author had* A SOLE AND PERPETUAL PROPERTY *in that work; ſo as to give him a right to confine every ſubſequent publication to himſelf and his aſſigns for ever?* The judges *Willes* and *Aſton*, and lord *Manſfield*, CH. J. were of opinion, contrary to *Yates*, J. that an author had ſuch right, and conſequently there was judgment for the plaintiff: a writ of error was afterwards brought; but the plaintiff in error, after aſſigning errors, ſuffered himſelf to be nonpoſſed.

After this, the queſtion was finally decided in the Houſe of lords, in the caſe of *Donaldſons* v. *Becket* and others, which was an appeal from a decree of the court of chancery, founded upon the judgment of the court of king's bench, in *Millar* v. *Becket*. Upon this appeal, the judges were directed to deliver their opinions on the following queſtions: Donaldſons v. Becket & al. Dom. proc. 9 Feb. 1774, 4 *Burr.* 2408.

1ſt, Whether, at common law, an author of any book or literary compoſition, had the ſole right of firſt printing and publiſhing the ſame for ſale; and might bring an action againſt any perſon who printed, publiſhed, and ſold the ſame without his conſent?

Upon this firſt queſtion, the judges *Nares*, *Aſhhurſt*, *Blackſtone*, *Willes*, *Aſton*, *Perrot*, and *Adams*; and *Smythe*,

CH. BAR. and *De Grey*, CH. J. C.B. delivered their opinions *ſeriatim (contra Eyre* B.)—That at common law, an author of any book or literary compoſition, had the ſole right of firſt printing and publiſhing the ſame for ſale, and might bring an action againſt any perſon who printed, publiſhed, and ſold the ſame, without his conſent (1).

2dly, If the author had ſuch right originally, did the law take it away *upon his printing and publiſhing ſuch book or literary compoſition?* And might any perſon afterwards reprint and ſell for his own benefit, ſuch book or literary compoſition, againſt the will of the author?

Upon this ſecond queſtion, the judges *Nares*, *Aſhhurſt*, *Blackſtone*, *Willes*, and *Aſton*; and *Smythe*, CH. BAR. delivered their opinions *ſeriatim (contra Eyre*, *Perrot*, *Adams*, and *De Grey*, CH. J. C.B.)—That the law did not take away his right, *upon his printing and publiſhing* ſuch book or literary compoſition; and that no perſon might afterwards reprint and ſell for his own benefit, ſuch book or literary compoſition, againſt the will of the author.

3dly, If ſuch action would have lain at common law, is it taken away by the ſtatute of 8 Ann, c. 19 (2)? And is an author, by the ſaid ſtatute, precluded from every remedy, except on the foundation of the ſaid ſta-

---

(1) *Per Perrot* and *Adams*, if ſuch perſon obtained the copy by fraud or violence, and not otherwiſe.

(2) It is enacted by the ſtatute 8 Ann, c. 19, that the author and his aſſignee or aſſigns, ſhall have the ſole right and liberty of printing and reprinting his book for the term of fourteen years, to commence from the day of the firſt publiſhing the ſame; and after the ſaid term of fourteen years, the ſole right of printing or diſpoſing of copies ſhall return to the authors thereof, *if they are then living*, for another term of fourteen years, § 1, 11.

And if any perſon ſhall print, reprint, or import, or knowingly ſell, publiſh, or expoſe to ſale, any ſuch book, without the conſent of the proprietor thereof, firſt had in writing, ſigned in the preſence of two witneſſes; then ſuch offender ſhall forfeit ſuch book, and all ſheets thereof, to the proptietor of the copy, who ſhall forthwith damaſk and make waſte paper of them; and further every ſuch offender ſhall forfeit 1d. for every ſheet found in his cuſtody; one moiety to the crown, and the other moiety to any perſon that ſhall ſue for the ſame, to be recovered in any court of record at Weſtminſter, § 1.

But this is not to ſubject any bookſeller, printer, or other perſon, to the above forfeitures or penalties, unleſs the title of the work ſhall, before ſuch publication, be entered in the regiſter book of the Compa y of Stationers, § 2.

Bona fide imitations, *tranſlations*, and *abridgments*, in reſpect of the property, may be conſidered as *new* works, but *colourable* and fraudulent variations cannot. *Per Willes*, J. *Millar* v. *Taylor*, Ea. 9 Geo. 3. B.R. 4 *Burr.* 2310.

tute;

tute; and on the terms and conditions preſcribed thereby?

Upon this third queſtion, the judges *Eyre*, *Nares*, *Perrot*, *Gould*, and *Adams*; and *De Grey*, CH. J. C.B. delivered their opinions *ſeriatim (contra Aſhhurſt*, *Blackſtone*, *Willes*, and *Aſton*; and *Smythe*, CH. BAR.)—That *ſuch action at law is taken away by the ſtatute* 8 *Ann.*; *and that an author, by the ſaid ſtatute, is precluded from every remedy, except on the foundation of the ſaid ſtatute, and on the terms and conditions preſcribed thereby* (1).

4thly, Whether the author of any literary compoſition and his aſſigns had the ſole right of printing and publiſhing the ſame, in perpetuity, by the common law?

Upon this fourth queſtion, the judges *Nares*, *Aſhhurſt*, *Blackſtone*, *Willes*, *Aſton*, and *Gould*; and *Smythe*, CH. BAR. delivered their opinions *ſeriatim (contra Eyre*, *Perrot*, *Adams*, and *De Grey*, CH. J. C.B.)—That the author of any literary compoſition and his aſſigns, had the ſole right of printing and publiſhing the ſame, in perpetuity, by the common law.

5thly, Whether this right is any way impeached, reſtrained, or taken away by the ſtatute 8 Ann?

Upon this fifth queſtion, the judges *Eyre*, *Nares*, *Perrot*, *Gould*, and *Adams*; and *De Grey*, CH. J. C.B. delivered their opinions *ſeriatim (contra Aſhhurſt*, *Blackſtone*, *Willes*, and *Aſton*; and *Smythe*, CH. BAR.)—That *this right is impeached*, *reſtrained*, *and* TAKEN AWAY *by the ſtatute* 8 *Ann.*

The lord chancellor (lord *Apſley*) ſeconded lord Camden's

(1) By the 1ſt and 11th clauſes in the above ſtatute, a ſole right is poſitively veſted in the author, during the particular terms which the ſtatute has limited. The other proviſions indeed have annexed penalties, and forfeitures of the ſheets (which are to be damaſked) but the right is wholly confined to the parties intereſted, the authors and purchaſers of copies. The penalties are given half to the crown, and half to any common informer that will ſue for them. To the author, therefore, it is the ſame as a leaſe, a grant, or any other common law right, whilſt the term exiſts, and will equally intitle him *to all common law remedies*, for the enjoyment of that right. He may, I ſhould think, file an injunction-bill to ſtop the printing: but I may ſay with more poſitiveneſs, he might bring an action to recover ſatisfaction for the injury done him, contrary to law, under the ſtatute: for wherever a ſtatute gives a right, the party ſhall of conſequence have an action at law to recover it. The author's remedy is very different from an informer's proſecution for the penalty; the latter muſt purſue all the remedies the law requires: for in ſuch a proſecution the charge is for an offence; and therefore the offence muſt be ſtrictly brought within all the proviſions of the act. But if the plaintiff only ſeeks ſatisfaction to himſelf, as the party aggrieved, without proſecuting for any penalty, there is not, in any ſuch caſe, any limitation by the ſtatute. *Per Yates*, J. in the ſame caſe, 4 *Burr.* 2380.

Alſo *per Eyre*, there may be a remedy in equity *upon the foundation of the ſtatute*, independent of the terms and conditions thereof.

motion, *to reverſe*; and the decree of the court of chancery was accordingly REVERSED.

Millar *v.* Taylor. Ea. 9 Geo. 3. 4 *Burr.* 2340, 2356.

And it is ſettled, and not now to be controverted, that literary compoſitions, *in their original ſtate*, and the incorporeal right of the publication of them, are the private and excluſive property of the author; and that they may ever be retained ſo; and that if they are raviſhed from him before publication, trover or treſpaſs lies. *Per Aſton*, J.

Payne *v.* Rogers, M. 35 Geo. 3. C.B. 2 *Hen. Black.* 350.

3. *Conſequential damages ariſing from negligence.*] An action on the caſe may be maintained againſt the landlord of a houſe, if he, and not the occupier is bound to repair, for any injury that a ſtranger may ſuſtain from the want of repair. For in an action on the caſe againſt the defendant, as owner of a houſe in the occupation of one Platt, his tenant, for an injury ſuſtained by the plaintiff, by his leg ſlipping through a hole in the foot pavement, into a vault or cellar, owing to ſome plates or bars, which went under the pavement, being out of repair; it was moved, after verdict for the plaintiff, that there might be a new trial, on the ground that the action ought to have been brought againſt *the actual occupier* of the houſe; for though the landlord might bear the expence of the repairs, yet as between the occupier and the public, the occupier was bound to look to the ſtate of them, and ought to be liable for any accident that might happen by his neglect. But by *Eyre*, CH. J. Evidence was given of repairs being actually done by the landlord. And I thought at the trial, that though the tenant was *prima facie*, bound to repair, and therefore liable; yet if he could ſhew that the landlord was to repair, then that the landlord was liable. *Buller*, J. The direction of my lord chief-juſtice was moſt clearly right. I agree, that *the tenant, as occupier, is prima facie, liable to the public, whatever private agreement may be between him and the landlord.* But if he can ſhew that the landlord is to repair, the landlord is liable for neglect to repair. *Heath*, J. If we were to hold that the tenant was liable in this caſe, we ſhould encourage circuity of action, as the tenant would have his remedy over againſt the landlord. *Rooke*, J. of the ſame opinion.

Cheetham *v.* Hampſon, Tr. 31 Geo. 3. R.B. 4 *Ter. Rep.* 318.

But unleſs it is ſhewn that the landlord is liable, the action can only be brought againſt the occupier. For in an action on the caſe againſt the defendant, who was owner of the fee, for not repairing the fences of a cloſe, whereby the plaintiff was damaged, it was objected, that the action did not lie againſt the preſent defendant. And by lord *Kenyon*, Ch. J. it is clear, that this action cannot be ſupported againſt the owner of the inheritance, when it is in the poſſeſſion of another perſon. It is ſo notoriouſly the duty of the actual occupier to repair the fences; and ſo little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action againſt his tenant for not ſo doing.

upon

upon the ground of the injury done to the inheritance: and deplorable indeed would be the ſituation of landlords, if they were liable to be harraſſed with actions for the culpable neglect of their tenants. *Aſhhurſt*, J. and *Buller*, J. agreed.

So, where an action on the caſe was brought for not repairing a private road, leading through the defendant's ground, the declaration ſtated that the plaintiff was poſſeſſed of a certain meſſuage; and by reaſon of his poſſeſſion thereof, was entitled to a certain way from the ſaid meſſuage through and over a certain cloſe of the defendant into the king's common highway; and that the defendant was poſſeſſed of two other cloſes next adjoining, and *by reaſon of his poſſeſſion of the ſaid cloſe*; and the ſaid two other cloſes of land adjoining, of right ought to have repaired the ſaid way; yet he had not, *per quod*, &c. To this declaration there was a general demurrer, and joinder in demurrer. In ſupport of the demurrer, it was objected to the declaration, becauſe it did not ſhew by what right or obligation the defendant was bound to repair the road: that he was not bound of common right, merely as occupier; but declaring generally *on poſſeſſion* is not ſufficient againſt the owner of the ſoil, though it is againſt the wrong-doer. To this it was anſwered: formerly, a diſtinction was taken between a charge againſt a wrong-doer, and againſt the owner of the land; but it is now ſufficient to declare generally on the poſſeſſion of the defendant, and to charge him in reſpect of that poſſeſſion. The precedents for above this laſt century have been in that form, and no objection has hitherto been made to them. It ſeems admitted, that if the defendant had been charged *by reaſon of his tenure*, it would have been ſufficient. Now this amounts to the ſame thing; for the *onus prima facie* goes with the poſſeſſion. THE COURT were clearly of opinion, that the declaration ſufficiently charged the defendant, *by reaſon of his poſſeſſion*. And *Buller*, J. ſaid, the diſtinction was between caſes where the plaintiff lays a charge upon the right of the defendant; and where the defendant himſelf preſcribes in right of his own eſtate. In the former caſe, the plaintiff is preſumed to be ignorant of the defendant's eſtate, and cannot therefore plead it; but in the latter, the defendant, knowing his own eſtate, in right of which he claims a privilege, muſt ſet it forth. In *R.* v. *Bucknall*, 2 Ld. *Raym.* 804, Lord *Holt* ſaid, "*where* a man is obliged "to make fences againſt another, it is enough to ſay *omnes* "*occupatores* ought to repair, becauſe that lays a charge "upon the right of another, which it may be he cannot "particularly know;" and ſeveral caſes have been determined on the above diſtinction. In 1 *Vent.* 264. there is the report of an action on the caſe againſt the defendant, for not repairing a fence, where the allegation was, that *the tenants and*

Rider v. Smith, Tr. 30 Geo. 3. B.R. 3 *Ter. Rep.* 766.

and occupiers of ſuch a parcel of land, have, time out of mind, maintained it, &c. Holt moved, in arreſt of judgment, that the preſcription is laid in occupiers, and not ſhewn their eſtates, and that hath been adjudged nought in 1 Cro. 155. and 2 Cro. 665. But the court ſaid, it is true there have been opinions both ways; but it is good thus laid, for the plaintiff is a ſtranger, and preſumed ignorant of the eſtate: but otherwiſe it is if the defendant had preſcribed. So in Tenant *v.* Goldwin, *Salk.* 360. in an action on the caſe for not repairing a wall, *debuit reparare* was held ſufficient. The caſe of Windford *v.* Woollaſton, 3 *Lev.* 266. is alſo to the ſame effect.—Judgment for plaintiff.

Ruſſel and others *v.* the Men of Devon, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 667.

But an action on the caſe will not lie by an individual againſt the inhabitants of a place, who may be bound to repair a common highway, for a conſequential damage ſuſtained from their neglect to repair. For where an action upon the caſe was brought againſt *the Men dwelling in the county of Devon*, to recover ſatisfaction for an injury done to the waggon of the plaintiffs, in conſequence of a bridge, which ought to have been repaired by the county, being out of repair; two of the inhabitants, for themſelves and the reſt of the men dwelling in that county, appeared and demurred generally; and THE COURT held, that the action could not be maintained. *Per* lord *Kenyon*, CH. J. If this experiment had ſucceeded, it would have been productive of an infinity of actions. And though the fear of introducing ſo much litigation ought not to prevent the plaintiff's recovering, if by law he is intitled; yet it ought to have conſiderable weight in a caſe where there is no precedent of ſuch an action having been before attempted. *It is true, ſuch an action would lie by an individual, for an injury which he has ſuſtained, againſt any other individual, who is bound to repair.* But the queſtion is, whether this body of men, who are ſued in the preſent action, are a corporation, or *qua* a corporation, againſt whom ſuch an action can be maintained: if it be reaſonable that they ſhould be by law liable to ſuch an action, recourſe muſt be had to the legiſlature for that purpoſe. But it has been ſaid that this action ought to be maintained by borrowing the rules of analogy from the ſtatutes of hue and cry. But I think that thoſe ſtatutes prove the very reverſe, The reaſon of the ſtatute of Winton was this: as the hundred were bound to keep watch and ward, it was ſuppoſed that thoſe irregularities which led to robbery muſt have happened by their neglect; but it was never imagined that the hundred could have been compelled to make ſatisfaction, till the ſtatute gave them a remedy, and moſt undoubtedly no ſuch action could have been maintained againſt them before that time. Therefore, when the caſe called for a remedy, the legiſlature interpoſed; but they only

gave the remedy in that particular caſe, and did not give it in any other caſe, in which the neglect of the hundred had produced an injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action: they converted the hundred into a corporation for that purpoſe: but it does not follow, that in this caſe, where the legiſlature have not given the remedy, this action can be maintained; and even if we could exerciſe a legiſlative diſcretion in this caſe, there would be great reaſon for not giving this remedy; for the argument urged by the defendant's counſel, that all thoſe who became inhabitants of the county after the injury ſuſtained, and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true, indeed, that the inconvenience does happen in the caſe of indictments; but that is only becauſe it is ſanctioned by common law; the main pillar of which, as lord Coke ſays, is unbroken uſage. Among the ſeveral qualities which belong to corporations, one is, that they may ſue and be ſued; that puts it then in contradiſtinction to other perſons. I do not ſay that the inhabitants of a county or hundred may not be incorporated to ſome purpoſes, as if the king were to grant lands to them, rendering rent. But when an action is brought againſt a corporation for damages, thoſe damages are not to be recovered againſt the corporators in their individual capacity, but out of their corporate eſtate; but if the county is to be conſidered as a corporation, there is no corporate fund out of which ſatisfaction is to be made. Therefore, I think that this experiment ought not to be encouraged; there is no law or reaſon for ſupporting the action; and there is a precedent againſt it in *Broke*, Abr. title *Accion ſur le Caſe*, pl. 93. where it is ſaid, that if an highway be out of repair, by which my horſe is mired, no action lies; though even without that authority I ſhould be of opinion that this action cannot be maintained. *Aſhhurſt*, J. It is a ſtrong preſumption, that that which never has been done, cannot by law be done at all; and it is admitted, that no ſuch action as the preſent has ever been brought, though the occaſion muſt frequently have happened. But it has been ſaid, that there is a principle of law on which this action may be maintained; namely, that where an individual ſuſtains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law, which is more applicable to this caſe: that it is better that an individual ſhould ſuſtain an injury, than that the public ſhould ſuffer an inconvenience. Now, if this action could be ſuſtained, the public would ſuffer a great inconvenience: for, if damages are recoverable againſt the county, at all events they muſt be levied on one or two individuals, who have no means whatever of reimburſing

burſing themſelves; for if they were to bring ſeparate actions againſt each individual of the county for his proportion, it is better that the plaintiff ſhould be without remedy. However, there is no foundation on which this action can be ſupported; and if it had been intended, the legiſlature would have interfered and given a remedy, as they did in the caſe of hue and cry; thus this caſe ſtands on principle; but I think the caſe cited from *Broke's* Abr. is a direct authority to ſhew that no ſuch action can be maintained. *Buller*, J. and *Groſe*, J. aſſented. Judgment for defendants.

Paſley & *al. v.* Freeman, Hil. 29 Geo 3. B.R. 3 *Ter. Rep.* 51.

4. *Conſequential damages ariſing from a deceit.*] An action upon the caſe, in the nature of a writ of deceit, will lie for a wilful falſe affirmation, if the party to whom it is made, and who relies thereon, receives thereby a damage. This was an action in the nature of a writ of deceit, and the third count was in ſubſtance, "that "the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and perſuade "the plaintiffs to ſell and deliver to one John Chriſtopher "Falch, divers goods, of the value of 2634l. 16s. 1d. upon "truſt and credit; and for that purpoſe did *falſely, deceitfully, "and fraudulently aſſert and affirm*, to the plaintiffs, that "Falch was a perſon ſafely to be truſted and given credit "to; and that the plaintiffs confiding in, and giving credit "to the ſaid aſſertion and affirmation, and believing the "ſame to be true, and not knowing the contrary thereof, did "ſell and deliver the goods upon truſt and credit to Falch; "whereas, in truth and in fact, Falch was not then a perſon "ſafely to be truſted and given credit to; and the defendant "well knew the ſame, &c. By reaſon of which falſe, fraudulent, and deceitful aſſertion and affirmation of the defendant, the plaintiffs had been deceived and impoſed upon; "and had wholly loſt the goods, and the value thereof," &c. The defendant pleaded the general iſſue: and after a verdict for the plaintiffs, on the above count, a motion was made in arreſt of judgment. After the caſe had been fully argued, the court took time to conſider of the matter, and afterwards delivered their opinions *ſeriatim*. And the judges *Buller* and *Aſhhurſt*, and lord *Kenyon*, CH. J. were of opinion *(contra* (1) *Groſe*, J.)—*That the action was maintainable, on the grounds of deceit in the defendant, and injury and loſs to the plaintiffs*. *Buller*, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs: and the queſtion is, whether an action thus founded can be ſuſtained in a court of law? *Fraud without damage,*

(1) *Groſe*, J. delivered his opinion at conſiderable length; but as the other judges were moſt clearly of a different opinion, it is unneceſſary to notice his arguments in this abſtract of the caſe.

of

or damage without fraud, gives no cauſe of action. But where theſe two concur, an action lies. *Per Coke*, J. 3 *Bulſ.* 95. But it is contended, that this was a bare-naked lie; that as no collusion with Falch is charged, it does not amount to a fraud: and if there were any fraud, the nature of it is not ſtated. And it was ſuppoſed by the counſel, who originally made the motion, that no action could be maintained, unleſs the defendant, who made this falſe aſſertion, had an intereſt in ſo doing. I agree, that an action cannot be ſupported for telling a bare-naked lie: but that I define to be ſaying a thing which is falſe, knowing or not knowing it to be ſo, and without any deſign to injure, cheat, or deceive another perſon. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practiſed; its being coupled with ſome dealing; and the injury which it is calculated to occaſion, and does occaſion to another perſon. Deceit is a very extenſive head in the law; but the caſes cited on the part of the defendant (1), are ſo far from authorities againſt the preſent action, that they ſhew that if there be fraud or deceit, the action will lie, and that *knowledge of the falſehood of the thing aſſerted is fraud and deceit*. Colluſion then is not neceſſary to conſtitute fraud. In the caſe of a conſpiracy, there muſt be a colluſion between two or more to ſupport an indictment. But if one man alone be guilty of an offence, which, if practiſed by two, would be the ſubject of an indictment for a conſpiracy, he is civilly liable in an action for reparation of damages, at the ſuit of the perſon injured. If A. by fraud and deceit cheat B. out of 1000l. it makes no difference to B. whether A. or any other perſon pockets that 1000l. He has loſt his money, and if he can fix fraud upon A. reaſon ſeems to ſay, that he has a right to ſeek ſatisfaction. Authorities are not wanting on this point, 1 *Roll.* Abr. 91. pl. 7. If the vendor affirm, that the goods are the goods of a ſtranger, his friend, and that he had authority from him to ſell them, and upon that B. buy them, when in truth they are the goods of another; yet if he ſell them fraudulently and falſely on this pretence of authority, though he do not warrant them, and though it be not averred that he ſold them, *knowing* them to be the goods of the ſtranger, yet B. ſhall have an action for this deceit. It is not clear from this caſe, whether the fraud conſiſted in having no authority from his friend, or in knowing that the goods belonged to another perſon. What is ſaid at the end of the caſe only proves, that *falſely and fraudulently are equivalent to knowingly*. If the firſt were the fact in the caſe, namely,

(1) *Yelv.* 20. *Carth.* 90. *Salk.* 210. lord *Raym.* 593.

that

that he had no authority; the caſe does not apply to this point: but if he had an authority from his friend, whatever the goods were ſold for, his friend was entitled to, and he had no intereſt in them. But however that might be, the next caſe admits of no doubt; for, in 1 *Roll.* Abr. 100. pl. 1. it was held, that if a man acknowledges a fine in my name, or acknowledge a judgment in an action in my name of my land, this ſhall bind me for ever; and therefore I may have a writ of deceit againſt him who acknowledged it. So if a man acknowledge a recognizance, ſtatute, merchant, or ſtaple, there is no foundation for ſuppoſing that in that caſe the perſon acknowledging the fine or judgment was the ſame perſon to whom it was ſo acknowledged. If that had been neceſſary, it would have been ſo ſtated; but if it were not ſo, he who acknowledged the fine had no intereſt in it. Again, in 1 *Roll.* Abr. 95, l. 25, it is ſaid, if my ſervant leaſe my land to another for years, reſerving a rent to me, and, to perſuade the leſſee to accept, he promiſe that he ſhall enjoy the land without incumbrances, if the land be incumbered, &c. the leſſee may have an action on the caſe againſt my ſervant, becauſe he made an expreſs warranty. The ſame caſe is reported in *Cro.* Jac. 425; but no notice is taken of this point; probably becauſe the reporter thought it immaterial, whether the warranty be by the maſter or ſervant. And if the warranty be made at the time of the ſale, and the ſale is upon the faith of the warranty, I can ſee no diſtinction between the caſes. *The giſt of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had an intereſt in his iniquity, it proves his malice to be the greater:* but it was objected to this declaration, that if there were any fraud, the nature of it is not ſtated: to this the declaration itſelf is ſo direct an anſwer, that the caſe admits of no other. *The fraud is, that the defendant procured the plaintiffs to ſell goods on credit to one whom they would not otherwiſe have truſted, by aſſerting that which he knew to be falſe.* Then there is the fraud, and the means by which it was committed; and it was done with a view to enrich Falch, by impoveriſhing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The caſes which I have ſtated, and *Sider.* 146. and 1 *Keb.* 522. prove that the declaration ſtates more than is neceſſary; for *fraudulenter*, without *ſciens*, or *ſciens* without *fraudulenter*, would be ſufficient to ſupport the action. But Mr. Juſtice Twiſden ſaid, in that caſe, the fraud muſt be proved. *The aſſertion alone* will not maintain the action, but *the plaintiff muſt go on to prove that it was falſe, and that the defendant knew it to be ſo.* By what means that proof is to be made out in evidence, need not be ſtated in the declaration. Some general arguments were urged at the bar, to

ſhew

ſhew that miſchiefs and inconveniences would ariſe if this action were ſuſtained; for if a man, who is aſked a queſtion reſpecting another's reſponſibility, heſitate or is ſilent, he blaſts the character of the tradeſman; and if he ſay that he is inſolvent, he may not be able to prove it. But let us ſee what is contended for: it is nothing leſs than that a man may aſſert that which he knows to be falſe, and thereby do an everlaſting injury to his neighbour, and yet not be anſwerable for it. This is as repugnant to law, as it is to morality; then it is ſaid, that the plaintiffs had no right to aſk the queſtion of the defendant; but I do not agree in that, for the plaintiffs had an intereſt in knowing what the credit of Falch was. It was not the enquiry of idle curioſity, but it was to govern a very extenſive concern. The defendant had undoubtedly his option to give an anſwer to the queſtion or not; but if he gave none, or ſaid he did not know, it is impoſſible for any court of juſtice to adopt the poſſible inferences of a ſuſpicious mind, as a ground for grave judgment. All that is required of a perſon in the defendant's ſituation is, that he ſhall give no anſwer; or, if he do, he ſhall anſwer according to the truth, as far as he knows. If the anſwer import inſolvency, it is neceſſary that the defendant ſhould be able to prove that inſolvency to a jury; for the law protects a man in giving that anſwer, if he does it in confidence, and without malice. No action can be maintained againſt him for giving ſuch an anſwer, unleſs expreſs malice can be proved. From the circumſtances of the law giving that protection, it ſeems to follow, as a neceſſary conſequence, that the law not only gives ſanction to the queſtion, but requires, that, if it be anſwered at all, it ſhall be anſwered honeſtly. And if a man will wickedly aſſert that which he knows to be falſe, and thereby draw his neighbour into a heavy loſs, even though it be under the ſpecious pretence of ſerving his friend, I ſay, *auſis talibus iſtis non jura ſubſerviunt. Aſhhurſt*, J. The objection in this caſe, which is to the third count in the declaration, is, that it contains only a bare aſſertion, and does not ſtate that the defendant had any intereſt, or that he colluded with the other party who had. But I am of opinion that the action lies notwithſtanding this objection. I do not recollect any caſe which proves ſuch a poſition; and if there were any ſuch to be found, I ſhould not heſitate to ſay, that it could not be law; for I have ſo great a veneration for the law, as to ſuppoſe that nothing can be law which is not founded in common ſenſe, or common honeſty; for the giſt of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it? What is it to the plaintiff, whether the defendant was or was not to gain by it?

the

the injury to him is the ſame. And it ſhould ſeem, that it ought more emphatically to lie againſt him, as the malice is more diabolical, if he had not the temptation of gain. For the ſame reaſon it cannot be neceſſary that the defendant ſhould collude with one who had an intereſt. But if colluſion were neceſſary, there ſeems all the reaſon in the world to ſuppoſe both intereſt and colluſion, from the nature of the act: for it is to be hoped, that there is not to be found a diſpoſition ſo diabolical as to prompt any man to injure another without benefitting himſelf. But it is ſaid, that if this be determined to be law, every man may have an action brought againſt him for telling a lie, by the crediting of which another happens eventually to be injured. But this conſequence by no means follows; for in order to make it actionable, it muſt be accompanied with the circumſtances averred in this count, namely, that "the defendant "intending to deceive and defraud the plaintiffs, did deceitfully encourage and perſuade them to do the act; and for "that purpoſe made the falſe affirmation, in conſequence "of which they did the act." Every lie accompanied with thoſe circumſtances, I ſhould clearly hold to be the ſubject of an action, but not a mere lie thrown out at random, without any intention of hurting any body, but which ſome perſon was fooliſh enough to act upon; for the *quo animo* is a great part of the giſt of the action. Another argument that has been made uſe of is, that this is a new caſe, and that there is no precedent of ſuch an action. Where caſes are new in their principle, there I admit it is neceſſary to have recourſe to legiſlative interpoſition, in order to remedy the grievance: but when the caſe is only new in *the inſtance*, and the only queſtion is upon the application of a principle recognized by the law to ſuch new caſes, it will be juſt as competent to courts of juſtice to apply the principle to any caſe which may ariſe two centuries hence, as it was two centuries ago: if it were not, we ought to blot out of our law-books one-fourth part of the caſes that are to be found in them. Lord *Kenyon*, CH. J. All laws ſtand on the beſt and broadeſt baſis which goes to enforce moral and ſocial duties; though it is not indeed every moral and ſocial duty, the neglect of which is the ground of an action: for there are which are called, in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many caſes where the pure effuſion of a good mind may induce the performance of particular duties, which cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the juriſprudence of this country has made the ſubject of a civil action. And I find it laid down by the Ld. CH. BAR. *Comyns*

Comyns (1), that *an action upon the caſe for a deceit lies where a man does any deceit to the damage of another.* He has not indeed cited any authority for this opinion; but his opinion alone is of great authority, ſince he was conſidered by his cotemporaries as the moſt able lawyer in Weſtminſter Hall. Let us, however, conſider whether that propoſition is not ſupported by the invariable principle in all the caſes on this ſubject. In Bayley *v.* Merrel, 3 *Buſſter*, 95, it was held by *Croke*, J. that "fraud without damage, or damage without fraud, gives no cauſe of action: but where theſe two do concur, there an action lieth." It is true, that the judges were of opinion in that caſe, that the action did not lie on other grounds, but conſider what thoſe grounds were. *Dodderidge*, J. ſaid "If we ſhall give way to this, then every carrier would have an action upon the caſe; but he ſhall not have any action for this, becauſe it *is merely his own default* that he did not weigh it (2)." Undoubtedly, *where the common prudence and caution of man are ſufficient to guard him, the law will not* protect him in his negligence. And in that caſe, as reported in Cro. Jac. 386, the negligence of the plaintiff himſelf was the cauſe for which the court held that the action was not maintainable. Then how does the principle of that caſe apply to the preſent? There are many ſituations in life, and particularly in the commercial world, where a man cannot by any diligence inform himſelf of the degree of credit which ought to be given to the perſons with whom he deals; in which caſes, he muſt apply to thoſe whoſe ſources of intelligence enable them to give that information. The law of prudence leads him to apply to them, and the law of morality ought to induce them to give the information required. In the caſe in Bulſtrode, the carrier might have weighed the goods himſelf; but in this caſe, the plaintiff had no means of knowing the ſtate of *Falch*'s credit, but by an application to his neighbours. The ſame obſervation may be made to the caſes cited by the defendant's counſel, reſpecting titles to real property: for a perſon does not have recourſe to common converſations to know the title of an eſtate, which he is about to purchaſe: but he

(1) *Com. Dig.* tit. Act. upon caſe for Dec. A. 1.

(2) This was an action upon the caſe; and the declaration was, that "upon the defendant's hiring the plaintiff to carry with horſes and wain, a load of madder, the defendant, to deceive him in the carriage thereof, affirmed, fradulently, that the ſaid load was 800 pounds weight, whereas it weighed much more, viz. 2200 weight, by reaſon whereof his horſes drawing the ſaid wain with the ſaid load were compelled *ita vehementer laborare et trahere*, that ſeven of the horſes, *ratione inde peribant, per quod*," &c. Bayley *v.* Merrel, Tr. 13 Jac. *Cro. Jac.* 386. 3 Bulſt. 95.

may inſpect the title-deeds: and he does not uſe common prudence, if he rely on any othe ſecurity. In the caſe in *Bulſtrode*, the court ſeemed to conſider that *damnum* and *injuria* are the grounds of this action; and they all admitted that if they had exiſted in that caſe, the action would have lain there; for the reſt of the judges did not controvert the opinion of *Croke*, J. but denied the application of it to that particular caſe. Then it was contended here, that the action cannot be maintained for telling a naked lie: but that propoſition muſt be taken *ſub modo*. If, indeed, no injury be occaſioned by the lie, it is not actionable; but if it be attended with a damage, it then becomes the ſubject of an action; as calling a woman a whore, if ſhe ſuſtain no damage by it, is not actionable; but if ſhe loſe her marriage by it, then ſhe may recover ſatisfaction in damages. But, in this caſe, the two grounds of the action concur; here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him they were going to deal with Falch, and deſiring to be informed of his credit; when the defendant fraudulently, and knowing it to be otherwiſe, and with a deſign to deceive the plaintiffs, made the falſe affirmation, which is ſtated on the record, by which they ſuſtained a conſiderable damage; then can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then as to the loſs, this is ſtated in the declaration, and found by the verdict. Several of the words ſtated in this declaration, and particularly *fraudulenter*, did not occur in ſeveral of the caſes cited. It is admitted, that the defendant's conduct was highly immoral, and detrimental to ſociety. And I am of opinion, that the action is maintainable on the grounds of deceit in the defendant, and injury and loſs to the plaintiffs. Rule for arreſting the judgment diſcharged.

Fielder *v.* Starkin, Tr. 28 Geo. 3. C.B. 1 *Hen. Black.* 17.

Where a horſe has been ſold *warranted ſound*, which it can be clearly proved was unſound *at the time of ſale*, the ſeller is liable to an action on the warranty, without either the horſe being *returned*, or notice given of the unſoundneſs. This was an action on the warranty of a mare, ſold by the defendant to the plaintiff. It was proved, that on May 21, 1787, the defendant ſold the mare to the plaintiff, and warranted that *ſhe was ſound, quiet, and free from vice and blemiſh*. Soon after the ſale, the plaintiff diſcovered that ſhe was unſound and vicious; he, however, kept her for three months, and endeavoured to cure her; at the end of three months he ſold her, but ſhe was returned, as unſound. After ſhe was ſo returned, the plaintiff kept her till the month of October, when he returned her to the defendant, who refuſed to receive her. On her way back to the plaintiff's ſtable ſhe died; and on her being opened, it was the opinion of the farriers,

farriers, that ſhe had been unſound a full twelvemonth before her death. It alſo appeared, that the plaintiff and defendant had been often together during the period he had her; but it did not appear that the plaintiff had ever acquainted the defendant with the circumſtance of her being unſound. The jury found a verdict for the plaintiff; and the court afterwards refuſed to ſet the verdict aſide.—Lord *Loughborough*, Ch. J. Where there is an expreſs warranty, the warrantor undertakes that it is true at the time of making it. If a horſe, which is warranted ſound at the time of ſale, be proved to have been *at that time unſound*, it is not neceſſary that he ſhould be *returned to the ſeller*. No length of time elapſed after the ſale will alter the nature of a contract originally falſe. Neither is notice neceſſary to be given, though the not giving notice will be a ſtrong preſumption againſt the buyer, that the horſe at the time of the ſale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the ſeller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horſe warranted ſound, the buyer ſhould ſell him again at a loſs, an action might perhaps be maintained againſt the original ſeller, to recover the difference of the price. *Gould*, J. of the ſame opinion. *Heath*, J. If this had been an action for money had and received (1), to the plaintiff's uſe, an immediate return of the mare would have been neceſſary; but as it is brought on the expreſs warranty, there was no neceſſity for a return to make the defendant liable. *Wilſon*, J. who was of the ſame opinion, recollected a cauſe tried before *Buller*, J. at *niſi prius*, where the defendant had ſold the plaintiff a pair of coach-horſes, and warranted them to be ſix years old, which were in reality only four years old. It was contended, that the plaintiff ought to have returned the horſes; but *Buller*, J. held, that the action on the warranty might be ſupported without a return. As to part of the evidence being contrary to the verdict, the jury have a right to uſe their diſcretion either in believing or diſbelieving any part of the teſtimony of the witneſſes.

But if the warranty be accompanied with an undertaking on the part of the ſeller, to take the horſe again, and pay back the purchaſe money, *if, on trial*, he ſhall be found to have any of the defects mentioned in the warranty, the purchaſer muſt return the horſe as ſoon as the fault is diſcovered. This was an action on the warranty of a pair of

Adam *v.* Richards, M. 36 Geo. 3. C.B. 2 *Hen. Black.* 573.

(1) In *Power* v. *Wells*, Ea. 18 Geo. 3. B.R. it was decided, that an action for money had and received, with no other count, is an improper action to try a warranty in, and cannot be maintained.

coach-horſes ſold by the defendant to the plaintiff. It was proved, that the defendant ſold the horſes to the plaintiff on December 6, 1794, and in writing warranted them to be perfectly ſound, free from blemiſh, and in no manner vicious, "and, *if on trial, they ſhould have any of the before-mentioned faults*, he agreed to take them again, and allow "the plaintiff his purchaſe money." Soon after this ſale, it was diſcovered that one of the horſes was vicious and reſtive in harneſs; and there was evidence that he was ſo at the time of the ſale: of this the plaintiff informed the defendant, but continued to keep the vicious horſe for ſeveral months, partly at the perſuaſion of the defendant, and partly from his own ſuppoſition, that the horſe would improve, and grow better as he was more uſed. The plaintiff afterwards turned the horſe out to graſs for ſome weeks, and then ſent him to the defendant, who ſupplied another for a temporary purpoſe, till a better could be procured to match the remaining one of the pair. After this, the plaintiff took the reſtive horſe again from the defendant, and returned him the borrowed one, the defendant ſaying the reſtive horſe would then go very well; and it was not till ſome days after this, viz. on July 23, 1795, that the plaintiff finally returned the pair to the defendant, and demanded back the purchaſe-money. On this evidence, a verdict having been found for the defendant, a new trial was moved for, on the ground of the above caſe of *Fielder v. Starkin*. But the court ſaid, that though they fully aſſented to the doctrine laid down in that caſe, yet where there was an agreement to take the horſe back *if, on trial*, he ſhould be found faulty, though it were accompanied with an expreſs warranty, it was incumbent on the purchaſer to return the horſe, as ſoon as the faults were diſcovered, unleſs the ſeller, by any ſubſequent miſrepreſentation, induced the purchaſer to prolong the trial. That *a trial* meant *a reaſonable trial*, but here ſix months had elapſed after the horſe was known to be reſtive, and before the return. The verdict therefore was proper, and ought not to be ſet aſide.

Buchannan v. Parpſhaw, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 475.

In an action on the warranty of a horſe againſt the ſeller, the circumſtances of the caſe were theſe: the horſe was ſold at a public auction, *warranted ſix years old, and ſound*; and one of the conditions of the ſale was, that the purchaſer of any horſe warranted ſound, who ſhould conceive the ſame to be unſound, ſhould return him within two days, otherwiſe he ſhould be deemed ſound: *ten days after the ſale*, the plaintiff diſcovered that the horſe in queſtion was twelve years old; and then the defendant refuſed to receive him, and the plaintiff ſold him. It was proved, that the horſe was twelve years old. But the jury were of opinion that the plaintiff, by not returning this horſe ſooner, had

had made him his own, and gave a verdict for the defendant. A rule having been obtained to ſet aſide that verdict, *per* lord *Kenyon*, CH. J. (after cauſe ſhewn) The defendant ought to have taken the horſe again. The queſtion turns on the meaning of this condition of ſale; and I am of opinion, that it muſt be confined ſolely to the circumſtance of unſoundneſs. There is good ſenſe in making ſuch a condition at public ſales; becauſe, notwithſtanding all the care that can be taken, many accidents may happen to the horſe between the time of ſale and the time when the horſe may be returned, if no time were limited; but the circumſtance of the age of the horſe is not open to the ſame difficulty. This is therefore a verdict againſt evidence. *Per Cur.* Rule abſolute.

And the warranty including a promiſe, may be declared on as ſuch. In this caſe, the two firſt counts in the declaration were in ſubſtance as follows: "For that the defendant offered to "ſell to the plaintiff a certain mare, and in conſideration "that the plaintiff, at the inſtance and requeſt of the defen-"dant, would buy at a certain price, he, the defendant, *under-*"*took, and then and there faithfully promiſed, the ſaid plain-*"*tiff, that the ſaid mare was ſound*; and that the plaintiff, "confiding in the ſaid promiſe, &c. *did buy* of the ſaid de-"fendant the ſaid mare, &c.; yet the ſaid defendant, not re-"garding his ſaid promiſe, &c. but contriving and fraudu-"lently intending to injure the defendant, did not regard his "promiſe, &c. but craftily and ſubtilly deceived the plaintiff "in this; that the ſaid mare at the time of the making the "ſaid promiſe, &c. was not ſound, but, on the contrary "thereof, was unſound, and was afflicted with a certain "malady or diſeaſe, called the windgalls, *per quod*, &c." The next was a ſimilar count upon the aſſumpſit, with an averment generally, that the mare was unſound. To theſe were added a count for money laid out and expended; and another for money had and received. The cauſe was tried at the aſſizes at Hertford, before lord *Mansfield*, and a verdict found for the plaintiff; but the evidence given being of an expreſs warranty, and a doubt being raiſed, whether in ſuch a caſe, this was a proper form of action, the verdict was taken ſubject to the opinion of the court on that queſtion. Lord *Mansfield:* The declaration ſtruck me in particular, in departing from the old rule of declaring expreſsly on the warranty, *a warranty extends to all faults known and unknown to the ſeller, ſelling for a ſound price*, WITHOUT WARRANTY, *may be a ground for an aſſumpſit; but in ſuch a caſe, it ought to be laid, that the defendant knew of the unſoundneſs.* I left it to the jury as on a warranty, ſubject to the opinion of the court, whether a nonſuit ſhould not be entered. I am told by the learned judges on my left hand

Stuart *v.* Wilkins, M. 19 Geo. 3. B.R. *Doug.* 17.

(*Aſhhurſt* and *Buller*) that this ſort of declaration, when a warranty is to be proved, has been practiſed for twenty years; and that it is made uſe of with a view to let in both proofs, if neceſſary. *Aſhhurſt*, J. Whatever may have been the old form, I believe it has been long ſettled, that this form of action is right; and having been long eſtabliſhed, it ought to be ſupported. There may be caſes where the count for money had and received may be of uſe to the plaintiff, and the warranty including a promiſe may be declared on as ſuch. *Buller*, J. This mode has been in uſe ever ſince I have known any thing of practice. There is no objection to it in point of form, which could prevail even on a ſpecial demurrer. Promiſes are not all executory. And our books make a diſtinction between promiſes executed, and promiſes executory. That in one you may traverſe the conſideration, in the other not: becauſe another action would lie, it does not follow that this will not. It was determined in Slade's caſe, 4 Co. 92 *b*. that there may be different actions for the ſame remedy.

Power *v.* Wells, Ea. 18 Geo. 3. B R. *Gowſ.* 818 *Doug.* 24 (*n.* 8.)

But the warranty cannot be tried in an action for money had and received. In this caſe, the plaintiff gave a horſe of his own, and twenty guineas, for a horſe of the defendant's, which was warranted ſound, but proved to be unſound; upon which the plaintiff, after tendering a return of the horſe, which was refuſed to be received, brought an action for money had and received for the twenty guineas; and alſo an action of trover for his own horſe. The court held that both the actions were miſconceived. 1ſt, The action for money had and received, *with no other count*, was an improper action to try the warranty. 2dly, The action of trover could not be maintained, becauſe the property was transferred by the exchange. Accordingly a nonſuit was ordered to be entered up in both cauſes.

Weſton *v.* Downes, M. 19 Geo. 3. B.R. *Doug.* 23. 1 *Term Rep.* 134.

However, if the horſe be returned to the party who warranted it to be ſound, within the time agreed on, an action for money had and received will lie, to recover back the price paid for it.—In an action for money had and received by the defendant to the uſe of the plaintiff, it was proved on the trial, that the defendant had, in conſideration of ſeventy guineas, ſold the plaintiff a pair of coach-horſes, which he undertook to take back, if the plaintiff ſhould diſapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their ſtead, without making any new agreement. Theſe he alſo returned within a month, and received a third pair on the 23d of December, without making any freſh bargain; this third pair he diſapproved of, becauſe they were reſtive, and would not draw, and offered to return them on the 5th of January; but the defendant refuſed

to

to take them back. Lord *Mansfield* directed a nonſuit; and on a motion for a new trial, the queſtion was, whether the action of aſſumpſit for money had and received would lie in this caſe? For the plaintiff it was contended, that there was an end of the contract on the return of the firſt pair of horſes; and that then a right accrued to bring this action. On the other hand, it was inſiſted for the defendant, that the contract was continued by taking other horſes; and that the plaintiff ought to have declared upon the ſpecial agreement. Lord *Mansfield*, I am a great friend to the action for money had and received: and therefore I am not for ſtretching, leaſt I ſhould endanger it. I would guard againſt all inconveniences, which might ariſe from it, particularly a ſurprize on the defendant, as where the demand ariſes on a ſpecial contract, it ſhould be put on the record; the defendant ought to have notice, by the declaration, that he is ſued upon that contract. *Willes*, J. There was originally a ſpecial contract, and it continued between the parties through all their ſubſequent dealings. *Aſhhurſt*, J. *If the plaintiff had demanded the ſeventy guineas, and brought his action on the return of the firſt pair of horſes, and no ſecond pair had been ſent, this action would have lain.* But here the contract was continued, and the caſe reſembles *Power* v. *Wells*. *Buller*, J. This action will not lie, as the defendant has not precluded himſelf from entering into the nature of the contract, by taking back the laſt pair of horſes. Where the contract is open, it muſt be ſtated ſpecially.

This was an action for money had and received, and for money paid, laid out, and expended. On the trial of the cauſe, it appeared that this action was brought to recover ten guineas which he had paid to the defendant for a one-horſe chaiſe and harneſs, on condition to be returned in caſe the plaintiff's wife ſhould not approve of it, paying 3s. 6d. per day for the hire of it. This contract was made by the defendant's ſervant, but his maſter did not object to it at the time. The plaintiff's wife not approving of the chaiſe, it was ſent back at the expiration of three days, and left on the defendant's premiſes, *without any conſent on his part to receive it.* The hire of 3s. 6d. per day was tendered at the ſame time, which the defendant refuſed, as well as to return the money: after a verdict had been given for the plaintiff, it was moved to be ſet aſide, on the ground that this action for money had and received, would not lie, but that it ſhould have been on the ſpecial contract. By lord *Mansfield*, CH. J. on what ground can it be ſaid that this is not money paid to the plaintiff's uſe? The defendant has got his chaiſe again, and notwithſtanding that, he keeps the money. The caſe was well put by Mr. J. *Aſhhurſt*, in Weſton *v.* Downes;

Towers *v.* Barret, Hill. 26 Geo. 3. B.R. 1 *Term. Rep.* 133

and I think this is exactly like that. I was of opinion at the trial, that the action would lie; and I ſtill continue of that opinion. *Willes*, J. This caſe differs from Weſton v. Downes, on two grounds; that was an abſolute, this a conditional agreement: and another more material difference is, that this agreement was at an end; the contract was no longer open. In the preſent caſe, the defendant has precluded himſelf by taking back the chaiſe. *Aſhhurſt*, J. This action is maintainable; for it is different from the caſes of Weſton *v.* Downes, and Power *v.* Wells. The latter was merely a caſe of warranty. In theſe actions, the party cannot deſert the warranty, and reſort to the general count, becauſe the warranty itſelf is one of the facts to be tried. As to that of Weſton *v.* Downes, that is diſtinguiſhable from the preſent caſe. This is like the common caſes, where either party puts an end to a conditional agreement. Here the condition was to return the chaiſe if not approved of; therefore the moment it was returned, the contract was at an end; and the defendent held the money againſt conſcience, and without conſideration. *Buller*, J. On the very principle in Weſton *v.* Downes, and Power *v.* Wells, which determined, that the action for money had and received, would not lie in theſe caſes, it is clear that this action will lie. It is admitted, that if the defendant had actually accepted the chaiſe, the action would lie. But it has been remarked, that he did not receive it. Then let us ſee whether there be not ſomething equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here *it was not in his option to refuſe the chaiſe when it was offered to him.* He was bound to receive it; and therefore it is the ſame as if he had accepted it. The diſtinction between thoſe caſes where the contract is open, and where it is not ſo, is this: *if the contract be reſcinded, either, as in this caſe, by the original terms of the contract*, where no act remains to be done by the defendant himſelf, *or by a ſubſequent offer by the defendant*, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole ſum, but for damages ariſing out of that contract. In a late caſe before me on a warranty of a pair of horſes to Dr. Compton that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time; I held, that if the plaintiff would reſcind the contract entirely, he muſt do it within a reaſonable time; and that as he had not reſcinded the contract, he could only recover damages; and then

then the queſtion was, what was the difference of the value of horſes of four or five years old. So that the difference in caſes of this kind is this: where the plaintiff is entitled to recover his whole money, he muſt ſhew that the contract is at an end: but if it continue open, he can only recover damages, and then he muſt ſtate the ſpecial contract, and the breach of it.

5. *Conſequential damages ariſing from a miſfeaſance.*] An action does not lie againſt an auctioneer for ſelling an article at the higheſt price bid for it, contrary to the owner's expreſs directions, not to let it go under a larger ſum; for ſuch directions are a fraud upon real bidders. This was an action on the caſe brought by the plaintiff againſt the defendant, an auctioneer, for carelessly and negligently ſelling the plaintiff's gelding, *which he had directions not to let go under* 15l. for a leſs ſum, viz. 6l. 16s. 6d. contrary to ſuch directions, and contrary to his undertaking not to ſell it under 15l. Plea not guilty. Verdict for the plaintiff, ſubject to the opinion of the court upon this queſtion—whether, under the circumſtances of this caſe, the auctioneer was bound to bid for, and buy in the horſe, if no one bid to the amount of 15l. for it? The caſe at the trial appeared to be that the auction at which the horſe was ſold, purported to be *a ſale of goods and effects of a gentleman deceaſed, by order of the executors.* The horſe was not mentioned in the catalogue, but was ſent by the plaintiff, who had no other connection with the ſale, to be ſold, with a written order not to let him go under 15l. The conditions of ſale were, *that the goods ſhould be ſold to the beſt bidder.* Lord *Mansfield*, Ch. J. The direction given to the defendant is, *not to let the horſe go under* 15l. which implies there might be a bidding under that ſum. The queſtion then is, *whether the owner can privately employ another perſon to bid for him?*—The baſis of all dealings ought to be good faith; ſo more eſpecially in theſe tranſactions where the public are brought together upon a confidence that the articles ſet up to ſale will be diſpoſed of to the higheſt real bidder. That could never be the caſe, if the owner might ſecretly and privately enhance the price, by a perſon employed for that purpoſe; yet tricks and practices of this kind daily increaſe, and grow ſo frequent, that good men give into the ways of the bad and diſhoneſt in their own defence; but ſuch a practice was never openly avowed. An owner of goods ſet up to ſale at an auction, never yet bid in the room for himſelf: if ſuch a practice were allowed, no one would bid. It is a fraud upon the ſale, and upon the public. The diſallowing it, is no hardſhip upon the owner: For, if he is unwilling his goods ſhould go at an under price, he may order them to be ſet up at his own price, and not lower: ſuch a direction would be fair: or he may declare in the conditions of ſale, that

Bexwell *v.* Chriſtie, Hil. 16 Geo 3. B.R. *Cowp.* 395.

that he himſelf will bid once. Such a condition is fair, becauſe the public are then apprized, and know upon what terms they bid. The queſtion then is, is ſuch a bidding fair? if not, it is no argument to ſay it is a frequent cuſtom. Gaming, ſtock-jobbing, and ſwindling are frequent, but the law forbids them all. Suppoſe there was an agreement to abate ſo much; which is the caſe when goods are ſold by one perſon in the trade to another. They abate ſometimes 10 or 15 *per cent.* Such agreement between the owner and a bidder, at a ſale by auction, would be a groſs fraud. What is the nature of a ſale by auction? It is, that the goods ſhall go to the higheſt real bidder; but there would be an end of that, if the owner might privately bid upon his own goods; there is no contract with the auctioneer: he is only an agent between the buyer and the ſeller. He may fairly bid for a third perſon who employs him, but not for the owner. In this caſe, there is another fraud put upon the public; for by the catalogue, the goods are deſcribed to be *the goods of a gentleman deceaſed, and ſold by order of the executor.* Upon this repreſentation, many people would attend to bid, on a ſuppoſition that the goods were neceſſarily to be ſold at all events, whether valuable or not valuable; whereas they might have their ſuſpicions if they were the property of perſons living; horſes, or any other ſpecies of property, belonging to perſons that are dead are not ſo likely to be faulty, as thoſe which are parted with by perſons in their life-time. Therefore, upon full conſideration, I am of opinion, that *a bidding by the owner in the manner contended for, and agreeable to the directions given in this caſe, would have been a fraud upon the ſale: and conſequently that this action againſt the defendant, as auctioneer, cannot be maintained.* The judges *Aſton*, *Willes*, and *Aſhhurſt* were of the ſame opinion.

Howard v. Caſtle, Ea 36 Geo 3. B.R. 6 *Ter. Rep.* 642

So, if the owner of property put up to ſale by auction ſecretly employs puffers to bid for him, it is a deceit on the real bidders; and the higheſt bidder cannot be compelled to complete the contract. This was a ſpecial action on the caſe to recover the amount of the deficiency upon a reſale of leaſehold premiſſes, for which the defendant was the higheſt bidder at a former ſale, he having refuſed to pay the depoſit, or to complete his purchaſe on ſuch firſt ſale. It appeared in evidence on the trial, that at the firſt ſale, at which the defendant was declared the purchaſer, there was no other real bidder, but that all the other bidders were puffers, employed by the plaintiff: that the defendant, on diſcovering this, refuſed to complete the contract: that at the ſecond ſale there was one real bidder, who offered 270l. but the premiſes were bought in for the plaintiff at 273l. For the defendant, it was objected, that as all the other bidders at the firſt auction were puffers employed by the plaintiff, the whole

was

was a fraud and impoſition on the defendant; and that he was not bound to complete his contract. Lord *Kenyon* inclined to this opinion, and there was a verdict taken for the plaintiff, ſubject to the opinion of the court: a motion therefore having been made on the part of the defendant, to ſet aſide the verdict, and to enter a nonſuit, it was oppoſed on the part of the plaintiff, on the ground that there was no fraud; that, whatever might have been the caſe formerly, the practice of employing puffers at auctions has been ſanctioned by the legiſlature, in three different acts, which impoſe a duty on goods ſold by auction (1). Lord *Kenyon*, CH. J. It appeared at the trial, that the whole tranſaction was bottomed in fraud; it was fraud from the beginning to the end; the parties did not meet on equal terms; ſeveral other perſons beſides the defendant bid, who repreſented themſelves as embarking on their own judgment: but it afterwards turned out that it was falſe, and that this was an impoſition practiſed by the plaintiff on the defendant; for all thoſe other perſons were authorized by the plaintiff to bid for him. The whole of the reaſoning in the caſe of Bexwell *v.* Chriſtie, is founded on the nobleſt principles of morality and juſtice; principles that are calculated to preſerve honeſty between man and man. *The acts of parliament* that have been referred to, did not intend to interfere with this point; but to leave the civil rights of mankind to be judged of as they were before. In the caſe cited, an inſtance is mentioned, in which the owner may legally and fairly bid at the auction, namely, when, before the bidding begins, he gives public notice of his intention. And in ſuch a caſe, no duty is to be paid under the acts of parliament that have been referred to. The circumſtance of puffers bidding at auctions has been always complained of. Lord Mansfield's comprehenſive mind ſaw it in its true colours, as founded in fraud; he met the queſtion fairly, and made a precedent, which I am happy to follow. *Aſhhurſt*, J. If one perſon is induced to bid at an auction without exerciſing his own judgment, and that too by the act of the owner himſelf, the parties do not meet on equal terms. This ſeems to be a manifeſt fraud on the defendant. *Groſe*, J. If the owner of goods put up to ſale at an auction wiſhes that they ſhould not be ſold under a particular price, he may declare ſo before the auction begins, or he may reſerve one bidding for himſelf; or declare that he has appointed a particular perſon to bid for him: in

(1) By 17 Geo. 3. c. 50. § 10, 19 Geo. 3. c. 56. § 12, and 28 Geo. 3. c. 37. § 20. it is provided, that in caſe the real owner ſhall become the purchaſer by his own bidding, or *the bidding of any other in his behalf*, without fraud, the commiſſioners of exciſe and their officers are to make an allowance to ſuch owner of the duties.

either

either of theſe caſes, the parties meet on fair terms; but the whole of this was a ſecret tranſaction, unknown to the defendant; and it was a fraud and impoſition on him. Rule abſolute.

Payne *v.* Cave, Ea. 29 Geo. 3. B.R. 3 *Ter. Rep.* 148.

And a bidder at an auction may retract his bidding any time before the hammer is down. In a ſpecial action on the caſe againſt the defendant for not paying the uſual depoſit, &c. in reſpect of a lot which it was alleged he became the purchaſer of at a public ſale by auction, the caſe, as opened by the plaintiff's counſel, at the trial, appeared to be this: the goods were put up in one lot, at an auction; there were ſeveral bidders, of whom the defendant was the laſt, who bid 40l. the auctioneer dwelt on the biding, on which the defendant ſaid, *why do you dwell, you will not get more*; the auctioneer ſaid, that he was informed the worm weighed at leaſt 1300 cwt. and was worth more than 40l. The defendant then aſked him, whether he would warrant it to weigh ſo much, and receiving an anſwer in the negative, he then declared that he would not take it, and refuſed to pay for it. It was reſold on a ſubſequent day's ſale for 30l. to the defendant, againſt whom the action was brought for the difference, lord *Kenyon* being of opinion, on this ſtatement of the caſe, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonſuited the plaintiff: it being afterwards moved to ſet the nonſuit aſide, THE COURT thought the nonſuit very proper. The auctioneer is the agent of the vendor, and the aſſent of both parties is neceſſary to make the contract binding: that is ſignified on the part of the ſeller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*; every bidding is nothing more than an offer on one ſide, which is not binding on either ſide, till it is aſſented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Gunnis and others, *v.* Erhart, M. 30 Geo. 3. C.B. 1 *Hen. Black.* 289.

And the verbal declarations of an auctioneer at the time of the ſale are not admiſſible in evidence againſt the printed conditions. This was an action on the caſe brought againſt the defendant, to compel him to complete the purchaſe of an eſtate, which was in the printed conditions of ſale, ſtated to be *free from all incumbrances*; and the caſe was as follows: The defendant bid for the premiſes, and they were knocked down to him; but on diſcovering that there was a charge on the eſtate of 17l. *per annum*, he refuſed to compleie the purchaſe. At the trial, evidence was offered, that the auctioneer had publicly declared from his pulpit in the auction-room, when the eſtate was put up, that it was charged in the manner above ſpecified; but lord *Loughborough* refuſed

to

to admit ſuch evidence, and nonſuited the plaintiff. The nonſuit being afterwards moved to be ſet aſide, THE COURT were clearly of opinion that the evidence was not admiſſible, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of ſale: and no proof was offered that the defendant had any particular perſonal information given him of the incumbrance in queſtion.

It is now ſettled as clear law, that there are three inſtances in which a merchant reſiding in this country is under an obligation to inſure for his correſpondent abroad, if he receives an order for that purpoſe; and that an action on the caſe will lie againſt him for neglecting to make ſuch an inſurance: *per Buller*, J. and aſſented to by the whole court. Smith v. Laſcelles, H. 28 Geo. 3. B.R. 2 *Ter. Rep.* 187.

Firſt, where a merchant abroad has effects in the hands of his correſpondent here, he has a right to expect that he will obey an order to inſure, becauſe he is entitled to call his money out of the other's hands when and in what manner he pleaſes.

The ſecond claſs of caſes is, where the merchant abroad has no effects in the hands of his correſpondent; yet if the courſe of dealing between them be ſuch that the one has been uſed to ſend orders for inſurance, and the other to comply with them, the former has a right to expect that his orders for inſurance will ſtill be obeyed, unleſs the latter give him notice to diſcontinue that courſe of dealing.

Thirdly, if the merchant abroad ſend bills of lading to his correſpondent here, he may engraft on them an order to inſure, as the implied condition on which the bills of lading ſhall be accepted, which the other muſt obey if he accept them, for it is one entire tranſaction. It is true, that unleſs ſomething has been held out by the perſon here to induce the other to think that he will procure inſurance, he ſhall not be compelled to inſure. But if the commiſſion from the merchant abroad conſiſt of two parts, the one to accept the bill of lading, the other to cauſe an inſurance to be made, the correſpondent here cannot accept it in part, and reject it as to the reſt.

So alſo, if a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, in conſequence of which no inſurance can be procured, he is liable to make good the loſs to his correſpondent. Wallace v. Telfair, at Guild. ſitt. af. Tr. 1786, 2 *Ter. Rep.* 181 (n. a)

But if a perſon to whom ſuch orders are ſent, does what is uſual to get the inſurance made, that is ſufficient, becauſe he is no inſurer, and is not obliged to get inſurance at all events. Thus, if he ſend to Lloyds, and the underwriters refuſe to take the riſk, not on account of the premium offered, Smith v. Colegan, 2 *Ter. Rep.* 185. (n. a.)

fered, but becauſe they will not engage in the riſk at all; and he afterwards, by other means, gets an inſurance, which turns out ineffectual, but without his fault; as where it was ſent to a houſe at Newcaſtle, which houſe fraudulently kept the policy, there the agent was held to be diſcharged.

Moore v. Mourgue, Mic. 17 Geo. 3. B.R. Cowp. 480.

For, to maintain this action, the defendant muſt be guilty either of a breach of orders, groſs negligence, or fraud. Therefore, where the plaintiff, who was a merchant in Alicant, ſent directions to the defendant, who was his agent in London, to inſure a cargo of fruit, and *did not give any particular directions how or with whom to inſure; but only generally to inſure the cargo*, and the defendant inſured with the London aſſurance-office, who in policies upon fruit, always puts in an exception free from *particular average*; the policy was made with this exception: a loſs happened, but it was not entirely a total loſs; for though the goods were at firſt under water, ſome were ſaved; but thoſe that were damaged would not pay the ſalvage of them. The plaintiff brought this action againſt the defendant for neglect in effecting the inſurance: on the trial, lord *Mansfield* directed the jury, in general terms, that *if they thought there was groſs negligence, or the defendant had acted* mala fide, *they ſhould find for the plaintiff: if, on the contrary, they were of opinion that he had acted* bona fide, *and to the beſt of his judgment, then they ſhould find for the defendant.* The jury found a verdict for the defendant: and a new trial was moved for, on the ground, that though the commiſſion was to inſure generally, yet the defendant ought to have executed it in ſuch manner as would have effectually anſwered the end propoſed; that the very nature of the commodity ſhewed it was liable to *an average loſs*, and therefore the defendant ſhould have guarded againſt ſuch danger; and there being two offices where this exception is never put in, it was groſs negligence not to inſure with them. But the court diſcharged the rule for a new trial; for, *per* lord *Mansfield*, Ch. J. the plaintiff, if he pleaſed, might have given orders, not to inſure at the London inſurance, but at ſome other office, where this exception would not have been inſiſted on. But he gives no directions at all. Therefore he left it to the diſcretion of his correſpondent, who, if he meant no fraud, was at liberty to elect between the underwriters. And when the defendant appears to have acted *bona fide*, and when the plaintiff has himſelf been guilty of the firſt omiſſion, in giving no directions at all, there ſeems to be no ground for the court to interpoſe againſt the defendant.

Hart v. Aldridge. Tr. 14 Geo. 3. B.R. Cowp. 54.

6. *Conſequential damages by an injury done to a man in the relation of a maſter.*] An action on the caſe will lie for *enticing a ſervant* to leave the ſervice of his employer, although he be not employed for any determinate time, but only by

by the piece. This came before the court, on a caſe reſerved upon the following queſtion; whether, under the circumſtances of the caſe, the plaintiff was entitled to recover? It was an action of *treſpaſs on the caſe*, for enticing away ſeveral of the plaintiff's ſervants, who uſed to work for him in the capacity of journeymen ſhoemakers. The jury found that two perſons were employed as journeymen ſhoemakers by the plaintiff, but for no determinate time, but only by the piece; and had at the time laid in the declaration each of them a pair of ſhoes unfiniſhed; that the defendant perſuaded them to enter into his ſervice, and to leave theſe ſhoes unfiniſhed, which they did.—It was contended, that the plaintiff could not recover: for the jury having found that there was no hiring for any determinate time, but only by the piece, they could not be the plaintiff's ſervants; for the term journeyman does not import that they belong to a particular maſter. But by lord *Mansfield*, a journeyman is a ſervant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finiſh the work he had undertaken, and the defendant knowingly enticed him to leave it unfiniſhed; the giſt of the action is, that the defendant has enticed a man who ſtood in the relation of ſervant to the plaintiff, and by whom he was to be benefited; it might perhaps have been different if the men had taken work for every body; and after the plaintiff had employed them, the defendant had applied to them, and they had given the preference to him in point of time; for if a man lived in his own houſe, and took in work for different people, it would be a ſtrong ground to ſay that he was not the journeyman of any particular maſter. But the giſt of the preſent action is, that they were attached to this particular maſter. *Aſton*, J. *It is clear that a maſter may maintain an action againſt any one for taking and enticing away his ſervant upon the ground of the intereſt which he has in his ſervice and labour*; and even ſuppoſing, as that the ſervant did live in his own houſe, if he was employed to finiſh a certain number of ſhoes for a particular perſon, by a fixed time, and a third perſon enticed him away, I think an action would lie; if not, it might be of very bad conſequence in trade. He is a ſervant as to this: and though the ſeducer and enticer is much the worſe, yet the law inflicts a penalty upon workmen leaving their work undone. *Willes*, J. and *Aſhhurſt*, J. concurred: *poſtea* delivered to the plaintiff.

In an action on the caſe for enticing the plaintiff's ſervant-boy to leave his ſervice, the evidence was, that the defendant, who was a captain in the army, on a recruiting party, meeting the boy in the ſtreet, with his livery on, aſked him if he would enliſt? to which he aſſented; the defendant

Keane *v.* Boycott, Ea. 35 Geo. 3. C. B. 2 *Hen. Black.* 511.

dant then aſked whether he was an indented ſervant? to which he anſwered, that he was bound to the plaintiff for five years. After this, the boy went to the defendant's lodging, when the defendant gave him 2s. and told him to go to Glouceſter, to the regiment, to which place he accordingly went. Upon this the plaintiff procured a warrant from a magiſtrate, under which the boy was taken and brought back to his ſervice; after which the defendant ſent two ſerjeants to take the boy again, and bring him back to the regiment, which they did; but it did not appear that the boy went with them unwillingly, or by compulſion. On this evidence, the jury found a general verdict for the plaintiff: and on a motion for a new trial, the court were all agreed that there was evidence of enticing the ſervant ſufficient to go to the jury.

Blake *v.* Lanyon, Ea. 35 Geo. 3. 6 *Ter. Rep.* 221.

And an action will lie for *continuing* to employ the ſervant of another, after notice, though the perſon ſo continuing to employ the ſervant did not procure him to leave his maſter, or know when he employed him that he was the ſervant of another. In this caſe, a ſervant who was retained by the plaintiff to work by the piece, left the plaintiff's ſervice on a diſpute between them; the plaintiff having beaten him. At the time of his departure he had ſome work in hand; he then applied for work to the defendant, who was alſo a currier, and who *employed him, not knowing of his engagement with the plaintiff*; but in the courſe of a few days *after, the defendant having been appriſed by the plaintiff, that this man was his ſervant, and had left his work unfiniſhed; and being threatened with an action in caſe he continued to employ him, requeſted the ſervant to return to his former maſter, and finiſh his work: this he refuſed, and the defendant continued him in his ſervice.* By the court, an action will lie for receiving or continuing to employ the ſervant of another after notice, without enticing him away: here no fault could be imputed to the defendant for taking this man into his ſervice, in the firſt inſtance, becauſe then he had no notice of his prior engagement with the plaintiff; but as ſoon as he had notice of that fact, he ought to have diſcharged him. A perſon who contracts with another to do certain work for him, is the ſervant of that other till the work is finiſhed, and no other perſon can employ ſuch ſervant, to the prejudice of the firſt maſter; the very act of giving him employment, is affording him the means of keeping out of his former ſervice.

Bird *v.* Randall, M. 3 Geo. 3. B. R. 3 *Ter. Rep.* 1745 1 *Black.* 373, 387.

But no action will lie for ſeducing an articled ſervant from his maſter, if the ſervant has paid the penalty ſtipulated by the articles for leaving him.--This was a caſe reſerved upon a trial in an action upon the caſe, wherein a verdict was given

given for the plaintiff, ſubject to the opinion of the court, upon a caſe ſtated; which was in ſubſtance as follows: one Burford entered into articles with the plaintiff, to ſerve him as a journeyman ſilk-dreſſer, for five years, and to work at the uſual hours. The plaintiff covenanted to employ and pay him wages; and they mutually bound themſelves in the penalty of 100l. to perform theſe articles. The defendant enticed him to depart from and out of the plaintiff's ſervice, upon which he brought his action againſt Burford, the journeyman, for the penalty, which he recovered and received, but not till after the commencement of the preſent action, which was brought by the plaintiff againſt the now defendant, for *the enticing and ſeducing* the ſaid Burford out of his ſervice. And the queſtion was, whether the preſent action could be maintained or not, under the circumſtances of this caſe? By lord *Mansfield*, in EVERY CASE of articles with a penalty, the party injured may, if he chooſes it, have an equitable relief, ſo often and ſo far as he ſuffers injury; he may recover partial damages upon partial breaches, proportionable to the reſpective injuries done him, as often as the injuries are repeated: he may do this toties quoties. So in the preſent caſe, the maſter might have done, if the ſervant had left his ſervice ſeveral different times, for a ſhort ſpace of time, as a week, or a fortnight, or a month, at each departure; and had every time returned again to his ſervice; he might, upon this equitable remedy, have recovered partial damages againſt the ſervant for *each* breach of his contract, in proportion to its degree, but not beyond it. And for civil injuries, a man ought not in point of juſtice to recover more than in proportion to what he has actually ſuffered. Beſides this equitable relief, there is in theſe caſes, a further election given to the party injured, to proceed by the *ſummum jus*, and by a rigorous remedy, for the penalty, which is intended *in terrorem*, and by way of puniſhment for breaking the contract, which rigorous remedy may be taken for a very ſlight breach, and includes the idea of *more* than the damage actually ſuſtained, certainly not of leſs: but this rigorous remedy cannot be repeated, for the penalty extends to the uttermoſt farthing that can ever be recovered for all and every of the breaches; and where the party injured has once got all that he could be entitled to have for every breach, there is an end of the articles, and conſequently of all further remedy upon them. It was agreed on the trial, that after the penalty had been recovered againſt the ſervant, the ſervant himſelf was totally at liberty to go into what ſervice he pleaſed. And ſo alſo was the maſter at liberty, and quite freed from the articles with reſpect to the ſervant: for there was a total end of the contract as between them two. Then how will the caſe ſtand as to the ſeducer? It is actual injury done to the maſter that gives him the ac-

tion againſt the ſeducer. *A bare attempt to ſeduce*, without any damage following upon it, would not be an injury to the maſter; and conſequently would be no ground upon which he could maintain an action. There is no injury at all done to the maſter; for he has recovered and received a complete ſatisfaction and more. Therefore all the injury is done away, and is as if it never exiſted. A penalty in the very term includes more than the real damages actually ſuffered. And if the ſeducer, or ſecond maſter, who employs the ſervant, after the ſervant has paid the penalty, were to be liable to damages in an action brought by the firſt maſter for ſo doing, this would finally fall upon the ſervant; and in effect be an addition to the penalty: for the ſecond maſter will pay the ſervant for his ſervice no more than he eſtimates it to be worth to him. And if he muſt pay a ſum of money to the firſt maſter for damages for entertaining his ſervant, he will make his bargain with the ſervant in ſuch manner as to pay him ſo much the leſs. This reaſoning is upon the ſuppoſition of the maſter having actually received the penalty of the ſervant before the commencement of his action againſt the ſecond maſter, as the ſeducer of the ſervant: but even taking it as this caſe is, "That he had not actually re-"ceived it of the ſervant till after the commencement of the "preſent action," that circumſtance will not vary the caſe. Whether he could have recovered in an action commenced againſt the preſent defendant, after having received the penalty from the ſervant, but without having actually received the money ſo recovered from the ſervant, I will not now determine: I ſhould have doubted of it extremely, but here the penalty recovered by him from the ſervant was actually received by him before the preſent action came on to be tried, without any ſort of difficulty. He might have received it when he would: but he chooſes to lie by, till he has brought his action againſt a third perſon, who would not have been liable to any thing, if the plaintiff had received the money of the ſervant in due time, and then receives it of the firſt defendant, and afterwards proceeds in this action to recover it again againſt the ſecond defendant, which is againſt conſcience. Therefore, in ſuch an action as this is, an action of equity, not a formed action *ſtricti juris*; it is enough if it appears upon the evidence, that the plaintiff ought not in conſcience to recover. If he had actually recovered it, through the defendant not knowing that the penalty had been paid, an action would lie againſt him for money had and received. As the plaintiff has already received from the ſervant more than ample ſatisfaction for the injury done him, he cannot afterwards proceed againſt any other perſon for a further ſatisfaction; and it has been ſuggeſted by brother *Denniſon*, J. that the court would, upon the application of the preſent defendant, by way of motion, have ſtayed the plaintiff's proceeding

ceeding further againſt him, upon the defendant's ſhewing them, that the plaintiff had actually received the money recovered by him in the former action againſt the ſervant.

IX. *Action upon the Caſe for Trover.*

An action of trover muſt be founded in the property of the plaintiff. This was an action of trover, brought by the tenant in tail, expectant on the determination of an eſtate for life, without impeachment of waſte, for timber which grew upon, and had been ſevered from the eſtate, and was in the poſſeſſion of the defendant. On the part of the plaintiff it was proved, that he was under a deed of ſettlement, tenant in tail, expectant on the determination of an eſtate for life, limited to his father, without impeachment of waſte; and it was proved, that one Searl, who had been appointed by the tenant for life to take care of the eſtate, gave orders for cutting the timber in queſtion, and afterwards ſold it to the defendant. Notorious devaſtation was proved. By lord *Mansfield*, CH. J. An action of trover muſt be founded in the property of the plaintiff. But what property had he in this timber? none. A tenant for life, without impeachment of waſte, has a right to the trees the moment they are cut down. I am of opinion, that the plaintiff cannot maintain this action. Rule for entering a nonſuit abſolute. Pyne *v.* Dor, Mic. 26 Geo. 3. B. R. 1 *Ter. Rep.* 55.

So, where the plaintiff gave a horſe of his own, and twenty guineas for a horſe of the defendants, which was warranted ſound, but proved to be unſound; the plaintiff, after tendering a return of the horſe, brought the action for money had and received, for the twenty guineas, and alſo an action of trover for his own horſe: but the court held that neither would lie; not the latter, becauſe *the property* was transferred by the exchange. Power *v.* Wells, Ea. 18 Geo. 3. B R. *Cowp.* 818. *Doug.* 24. (n. 8.)

Poſſeſſion is a good title to maintain trover againſt a wrong doer. This was an action of trover againſt the defendants, for carrying away ſix loads of ruſhes, which had been cut by the plaintiff on Theberton Common; and the caſe was in ſubſtance as follows: The plaintiff claiming a right to cut down ruſhes, without ſtint as to quantity, had cut five or ſix loads, which the defendants took and carried away, and converted to their own uſe. The judge, who tried the cauſe, thought that the poſſeſſion of the ruſhes was obtained *under a pretence* of right of common, and nonſuited the plaintiff. It was afterwards moved to ſet this nonſuit aſide. And BY THE COURT, a cuſtom for all the inhabitants of Theberton to cut ruſhes on Theberton Common is a good cuſtom; the plaintiff proved at the trial, that he was an inhabitant, and that there was a cuſtom for every Rackham *v.* Jeſſup and Thompſon, M. 13 Geo. 3. C B. 3 *Wilſ.* 332.

body inhabiting there, to cut and take ruſhes on the place in queſtion; that he, by his ſervants, having cut down five or ſix loads of ruſhes, the defendant took and carried the ſame away. *This is ſuch evidence of property* in the plaintiff, and converſion in the defendants, that they appear to be wrong doers; for they have neither by evidence or pleading, ſhewn any right or title whatever to theſe ruſhes, and appear to the court to be mere ſtrangers. Indeed, if a perſon hath no colour of right at all to cut down ruſhes, or to take any other thing, he cannot by cutting the ruſhes, or taking the thing without any colour of right, acquire property therein; but here the plaintiff proved he had a right to cut the ruſhes, that he did cut them; and we are all of opinion, that he thereby gained a property therein. Whereupon *per tot. cur.* The rule was made abſolute for ſetting aſide the nonſuit, and for a new trial, without coſts on either ſide, the plaintiff having been nonſuited upon the miſtake of the judge.

Tinkler *v.* Poole, Ea. 11 Geo. 3. B.R. 5 *Burr.* 2657. 3 *Wilſ.* 146.

Trover lies againſt cuſtom-houſe officers, for ſeizing and carring to the king's warehouſe goods not ſeizable, for the converſion is wrongful. This was an action of trover for goods ſeized by a cuſtom-houſe officer; it was a parcel of herrings ſeized by him for not having ſatisfied the ſalt-duty, and carried by him to the king's warehouſe. It was agreed that they were not ſeizable; and the only queſtion was, "Whether this ſpecies of action lay againſt the offi-"cer for ſeizing them and carrying them away?" By lord *Mansfield.* Nothing is clearer than that *trover lies*; it is a wrongful converſion, let the property be in whom it will. The caſe of Chapman *v.* Lambe, in 2 *Strange*, 943. was trover againſt a cuſtom-houſe officer for fourteen ſhirts, a night-gown and cap, ſeized for nonpayment of duty, which was ſtated negatively not to be imported as merchandize, the plaintiff had judgment, without any objection to its being an action of trover.

Shipwick *v.* Blanchard, Ea. 55 Geo. 3. B.R. 6 *Ter. Rep.* 298.

So if a party pay money in order to redeem his goods from *a wrongful diſtreſs* for rent, he may maintain trover againſt the wrong-doer.—An action of trover for certain goods was brought, in order to try the bankruptcy of one Grunden, who was the landlord of the plaintiff, for the houſe ſhe inhabited. The defendant was his aſſignee under the commiſſion: it appeared from the report of the judge who tried the cauſe, that one White, by order of the defendant, as aſſignee, entered the plaintiff's houſe, and ſeized and diſtrained her goods for rent in arrear to the bankrupt. He declared this to the plaintiff at the time of the ſeizure, and gave her a written notice to that effect; the plaintiff, to redeem her goods, paid him 5l. for rent, and 40s. for the expences. It appeared further, that the debt of the petitioning creditor accrued,

accrued, and became due, after the repeated acts of bankruptcy. The plaintiff having obtained a verdict, it was moved to be ſet aſide, on the ground that no actual converſion was proved: ſecondly, that there was no converſion in point of law. But, by lord *Kenyon*, CH. J. in Tinkler *v.* Poole, the court were of opinion that trover would lie againſt a cuſtom-houſe officer for ſeizing the plaintiff's goods, as it turned out that the ſeizure was not founded in law. So here, inaſmuch as it appears that the diſtreſs made by the defendant as the aſſignee of the bankrupt was illegally made, becauſe he was not the legal aſſignee, the petitioning creditor's debt not having accrued until after the act of bankruptcy, this action of trover may be maintained againſt the defendant, who illegally made the diſtreſs; the caſe in Burrow removes all doubts.

But if the diſtreſs be only irregular, trover will not lie.— This was an action on the caſe for ſelling goods diſtrained for rent in arrear, before five days had expired next after the diſtreſs was taken and notice given. The declaration conſiſted of three counts: the firſt was for an exceſſive diſtreſs; the ſecond for an irregular diſtreſs, and *the third was in trover*, for the goods diſtrained. At the trial, a verdict was entered on the count in trover for the value of the goods; and this being moved to be ſet aſide, THE COURT, after argument, were clearly of opinion, that the count in trover, on which the verdict was taken, could not be ſupported, not being a remedy which could be purſued, ſince the ſtatute of 11 Geo. 2. c. 19. for that ſtatute declares that a party making an irregular ſale of a diſtreſs, ſhall not be deemed a treſpaſſer *ab initio*, but gives an action on the caſe to the party aggrieved, to recover ſatisfaction for the ſpecial damages ſuſtained: and it would tend to place the landlord in the ſame ſituation, as before the paſſing of that act, by conſidering him as a treſpaſſer *ab initio*.

Wallace *v.* King, and others, Ea. 2 Geo. 3. C.B. 1 Hen. *Black.* 13.

Trover does not lie againſt a wharfinger or common carrier for goods ſtolen or loſt out of their poſſeſſion. An action of trover was brought by the plaintiff againſt the defendants for certain goods mentioned in the declaration. On the trial, the plaintiff was nonſuited ſubject to the opinion of the court on the following caſe: The goods in queſtion being the property of the plaintiff, were delivered by the captain of a veſſel to the defendants as wharfingers for the uſe and upon the account of the plaintiff, to whom they were directed; but were *ſtolen or loſt* out of their poſſeſſion. And afterwards, before the commencement of this action, were demanded by the plaintiff of the defendants, to whom he tendered the wharfage for the ſame; but the goods were not delivered to him. The queſtion for the opinion of the court was, whether the action would lie? Lord *Mansfield* looked

Roſs *v.* Johnſon and Dawſon, Hil. 12 Geo. 3. B.R. 5 *Burr.* 2825.

upon it as eſtabliſhed upon principles and authorities, that trover would not lie in the preſent caſe, but that it muſt be an action upon the caſe. It is impoſſible, he ſaid, to make a diſtinction in this reſpect between a wharfinger and a common carrier. They both receive the goods upon a contract. Every caſe againſt a carrier, is like the ſame caſe againſt a wharfinger: but in order to maintain trover, there muſt be an injurious converſion. This is not be eſteemed a refuſal to deliver the goods. They can't deliver them; it is not in their power to do it; it is a bare omiſſion. *Aſton.* J. agreed, that this being a bare omiſſion, and no evidence of a converſion, *trover* would not lie; but the clear remedy was by action upon the caſe. And he cited 1 *Vent.* 223. Owen *v.* Lewyn, where Hale ſaid, that if a carrier loſeth goods committed to him, a general action of trover doth not lie againſt him. *Willes*, J. and *Aſhhurſt* J. concurred.

Syeds *v.* Hay, Ea. 31 Geo. 3. B.R. 4 *Ter. Rep.* 260.

But if a carrier is expreſsly directed not to deliver the goods with which he is intruſted, to a particular perſon, it is a converſion if he deliver them contrary to ſuch direction, and trover may be maintained. This was an action of trover brought by the owner of certain goods againſt the captain of a veſſel in which they had been ſhipped: the goods were left by the defendant in the hands of a wharfinger for the plaintiff's uſe; and he might have had them at any time, by ſending there, and paying the wharfage. But previous to their being landed on the wharf, the plaintiff intending to convey them from the veſſel himſelf, *expreſsly directed* the defendant not to land them there, which the latter promiſed not to do, but nevertheleſs he did ſo. The defendant, by way of juſtification for this breach of orders and promiſe, attempted to ſet up a uſage, that every wharfinger, againſt whoſe wharf a veſſel was moored for the purpoſe of unloading, as in the preſent caſe, was intitled to the wharfage fees for all goods unloaded therefrom, whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to diveſt him: the uſage was not ſatisfactorily eſtabliſhed in point of fact; but there was a reaſonable ground from the evidence to ſuppoſe, that the captain in this inſtance had acted from the impreſſion that the wharfinger had ſuch a right: It was objected at the trial that trover would not lie; for that the proper remedy againſt a carrier for not delivering goods purſuant to order, was by action on the caſe. A verdict was taken for the plaintiff, reſerving this point for the conſideration of the court. By lord *Kenyon*, CH. J. It is clear, that the plaintiff is entitled to recover either againſt the defendant or the wharfinger; and if no wharfage be due, of which there was no ſatisfactory evidence, I think this action may

be

be maintained againſt the defendant. *Aſhhurſt*, J. If the wharfage duty be not due, it is clear that trover will lie againſt the defendant; or even if the defendant landed the goods on the wharf, with the view of ſheltering himſelf from the payment of the moorage-duty, that alſo would ſubject him to this action. *Buller*, J. The objection to the form of the action is not well founded; for the plaintiff gave expreſs orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards diſobeyed thoſe orders, and delivered the goods into the poſſeſſion of the wharfinger. Now, on theſe facts I think that trover will lie; for, *if one man who is intruſted with the goods of another put them into the hands of a third perſon, contrary to orders, it is a converſion.* If a perſon take my horſe to ride, and leave him at an inn, that is a converſion: for though I may have the horſe on ſending for him, and paying for the keeping of him, yet it brings a charge on me. So here, the defendant, by putting theſe goods into the cuſtody of the wharfinger, brought a charge on the plaintiff, and this is a deliberate act, it being done contrary to the orders of the owner, and therefore diſtinguiſhable from a miſdelivery of goods, merely owing to a miſtake, in which the remedy is by action on the caſe only. If the wharfage duty was due, that would be an anſwer to the action; but the uſage ſet up at the trial was not ſatisfactorily eſtabliſhed; and the caſe of Stephen *v.* Coſter, in 1 *Black.* 513, 4-3, where the queſtion aroſe as to the wharfinger's right to wharfage, when the goods had not been landed on his wharf, goes a great way to prove that no ſuch payment can be exacted.

Holliday, *v.* Camſell and White, Ea. 27 Geo. 3. E.R. 1 *Ter. Rep.* 658.

One tenant in common cannot maintain an action of trover againſt another. The plaintiff and defendant Camſell were members of a friendly ſociety; the aggregate fund raiſed by this ſociety was kept in a box, which was depoſited in the plaintiff's houſe, who was an inn-keeper, and a bond was given by him for the ſafe cuſtody of it: the defendant Camſell got poſſeſſion of this box, carried it away, and delivered it to the other defendant White, who was not a member of the ſociety; the plaintiff having brought trover to recover this box of money, *Heath*, J. before whom the cauſe was tried at the aſſizes, nonſuited the plaintiff, on the ground that one tenant in common could not maintain an action of trover againſt another; afterwards it was moved to ſet aſide this nonſuit; but the court refuſed to make the rule abſolute.—*Aſhhurſt*, J. The rule of law is undoubtedly true, and applies to this caſe. All the members of this ſociety have a joint property in the box and its contents; they are therefore tenants in common; and one tenant in com-

mon cannot maintain trover againſt another. *Buller*, J. One of the defendants was a member of this ſociety, and conſequently had a general property in the box: at any rate, therefore, a ſpecial property cannot give a right in this action againſt a general property. The cuſtody only is committed to the plaintiff, the property remains in the ſociety. *Groſe*, J. agreed.

Hambly & *al.* *v.* Trott, Hil. 16 Geo. 3. B.R. *Cowp.* 371.

In trover againſt an adminiſtrator, *cum teſtamento annexo*, the declaration charged both the trover and converſion to have been committed by the teſtator in his life-time. The plea pleaded was, that the teſtator was *not guilty*. Verdict having been found for the plaintiffs, a motion was made in arreſt of judgment, becauſe this is a tort, for which an executor or adminiſtrator is not liable to anſwer. After this caſe had been argued, and well conſidered, lord *Manſfield* delivered the unanimous opinion of the court. The maxim *actio perſonalis moritur cum perſona*, upon which the objection is founded, not being generally true, and much leſs univerſally ſo, leaves the law undefined as to the kind of perſonal actions, which die with the perſon, or ſurvive againſt the executor. An action of trover being in form a fiction, and in ſubſtance founded on property, for the equitable purpoſe of recovering the value of the plaintiff's ſpecific property uſed and enjoyed by the defendant; if no other action could be brought againſt the executor, it ſeems unjuſt and inconvenient that the teſtator's aſſets ſhould not be liable for the value of what belonged to another man, which the teſtor had reaped the benefit of. We therefore thought the matter well deſerved conſideration. We have looked into all the caſes upon the ſubject; and, upon the whole, think theſe concluſions may be drawn from them: *Firſt*, as to actions which ſurvive againſt an executor, or die with the perſon on account of the cauſe of action. *Secondly*, as to actions which ſurvive againſt an executor, or die with the perſon on account of the form of action. As *to the firſt*, where the cauſe of action is money due, or a contract to be performed, gain, or acquiſition of the teſtator, by the work and labour, or property of another, or a promiſe of the teſtator, expreſs or implied; where theſe are the cauſes of action, the action ſurvives againſt the executor: but where the cauſe of action is a tort, or ariſes *ex delicto*, ſuppoſed to be *by force*, and *againſt the king's peace*, there the action dies; as battery, falſe impriſonment, treſpaſs, words, nuiſance, obſtructing lights, diverting a water-courſe, eſcape againſt the ſheriff, and many other caſes of the like kind. *Secondly*, as to thoſe which ſurvive or die in reſpect of *the form of action*. In ſome actions the defendant could have waged his law; and therefore no action in that form lies againſt an executor. But now, other actions are eſtabliſhed in

in their room, upon the very ſame cauſe, which do ſurvive and lie againſt the executor. No action where in form the declaration muſt be *quare vi et armis et contra pacem*; or where the plea muſt be, as in this caſe, that *the teſtator was not guilty*, can lie againſt the executor upon the face of the record, the cauſe of action ariſes *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. But in moſt, if not in all the caſes where trover lies againſt the teſtator, another action might be brought againſt the executor, which would anſwer the purpoſe. An action on the cuſtom of the realm againſt a common carrier is for a tort, and ſuppoſed crime, the plea is not guilty; therefore it will not lie againſt an executor. But aſſumpſit, which is another action for the ſame cauſe, will lie. So, if a man take a horſe from another, and bring him back again, an action of treſpaſs will not lie againſt his executor, though it would againſt him; but an action for the uſe and hire of the horſe will lie againſt the executor. The caſe of Bailey *v.* Birtles, in Sir *Tho. Raym.* 71. ſets this matter in a clear light: there, in an action upon the caſe, the plaintiff declared that he was poſſeſſed of a cow, which he delivered to the teſtator in his life-time, to keep the ſame for the uſe of him the plaintiff, which cow the ſaid teſtator afterwards ſold, and did convert and diſpoſe of the money to his own uſe; and that neither the ſaid teſtator in his life, nor the defendant after his death, ever paid the ſaid money. Upon this ſtate of the caſe, no one can doubt but the executor was liable for the value. But the ſpecial injury charged, obliged him to plead, that the teſtator was not guilty. The jury found him guilty. It was moved in arreſt of judgment, becauſe this is a tort, for which the executor is not liable to anſwer, but *moritur cum perſona*. For the plaintiff, it was inſiſted, that though an executor is not chargeable for a *misfeaſance*, yet for a *nonfeaſance* he is. As for non-payment of money levied upon a *fieri facias*, and cited Cro. Car. 539—9. Co. 50, b. where this very difference was agreed; for non-feaſance ſhall never be *vi et armis*, nor *contra pacem*. But notwithſtanding this, the court held it was a tort, and the executor ought not to be chargeable; Sir *Tho. Raymond* adds, *vide Savile*, 40. a difference taken. That was the caſe of Sir Henry Sherrington, who had cut down trees upon the queen's land, and converted them to his own uſe in his life-time. Upon an information againſt his widow, after his deceaſe; *Manwood*, J. ſaid, "In every "caſe, where any price or value is ſet upon the thing in "which the offence is committed; if the defendant dies, his "executor ſhall be chargeable, but where the action is for "damages only, in ſatisfaction of the injury done, there "his executor ſhall not be liable." Here, therefore, is a fundamental diſtinction. If it is a ſort of injury, by which the

the offender acquires no gain to himſelf at the expence of the ſufferer, as beating or impriſoning a man, &c. for there the perſon injured has only a reparation for the *delictum* in damages, to be aſſeſſed by a jury. But where, beſides the crime, property is acquired, which benefits the teſtator, there an action for the value of the property ſhall ſurvive againſt the executor; as, for inſtance, the executor ſhall not be chargeable for the injury done by his teſtator in cutting down another man's trees, but for the benefit ariſing to his teſtator for the value or ſale of the trees, he ſhall. So far as the tort itſelf goes, an executor ſhall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but ſo far as the act of the offender is beneficial, his aſſets ought to be anſwerable; and his executor ſhall therefore be charged. There are expreſs authorities, that *trover and converſion does not lie againſt the executor, where the converſion is by the teſtator.* Sir William *Jones*, 173—4. *Palmer*, 330. There is no ſaying, that it does. The form of the plea is decilive, viz. that the teſtator was *not guilty*; and the iſſue is to try the guilt of the teſtator: and no miſchief is done—for ſo far as the cauſe of action does not ariſe *ex delicto*, or *ex malificio*, of the teſtator, but is founded in a duty, which the teſtator owes the plaintiff: upon principles of civil obligation, *another form of action may be brought, as an action for money had and received*; therefore judgment muſt be arreſted.

Yea *v.* Field, M. 29 Geo. 3. B. R. 2 *Ter. Rep.* 708.

This was an action of trover for title-deeds. The defendant had purchaſed a parcel of the eſtate, but the reſt being in mortgage, no title-deeds were produced; and he took a covenant from the vendor to produce them at any time, or on any trial: afterwards, he took an aſſignment of the mortgaged premiſes, and had all the deeds delivered to him with the aſſignment. He then aſſigned the ſame mortgage to the plaintiff, who advanced the money on it, and the title-deeds, of which there was no mention in this laſt aſſignment, remaining with the defendant, who refuſed to deliver them up, this action was brought. At the trial of the cauſe, at the aſſizes, the plaintiff was nonſuited: and it being afterwards moved to ſet ſuch nonſuit aſide, the rule was refuſed: for, by lord *Kenyon*, CH. J. Although at the time of the purchaſe, the defendant had no right to the poſſeſſion of the deeds, yet ſince that time, they have by accident come into his poſſeſſion; and the plaintiff cannot recover them from him. To entitle the plaintiff to recover, he ſhould have a better right to the deeds than the defendant: but in the aſſignment to him, there is no grant of them. In old conveyances, there is a reſervation made of ſuch deeds as tend to deraign the warranty paramount.

The

The original owner of goods ſtolen, who proſecutes the felon to conviction, has a right to a reſtitution of them (1), and may maintain trover for them; but ſuch action is only maintainable againſt the perſon who had poſſeſſion of the goods at the time of the conviction of the thief, or afterwards, and not againſt any perſon who may in the intermediate time, between the felony and conviction, *have had* poſſeſſion thereof, by ſale in market overt, and afterwards parted with the property. This was an action of trover for ſheep, in which there was a verdict for the plaintiff, ſubject to the opinion of the court, on the following caſe. On the 29th of June, 1787, the plaintiff had eighteen ſheep ſtolen from his grounds; on the 6th of July following, the defendant (a Middleſex grazier) bought the eighteen ſheep in Smithfield-market of a ſaleſman, at a fair price: on the 17th of the ſame month, the plaintiff gave the defendant notice, that the ſheep which he then found in the defendant's poſſeſſion, had been ſtolen from him, and he demanded them of the defendant, who refuſed to deliver them up. The perſon who ſtole the ſheep was apprehended, and at the Lent Aſſizes, 1788, the plaintiff proſecuted and capitally convicted him, and he was executed for the offence in November following; the defendant ſold the ſheep, which were of the value of 18l. becauſe they did not thrive, and he had notice of the conviction of the felon before the action was brought. The caſe was fully argued. Lord *Kenyon*, CH. J. To maintain this action, the defendant ſhould have been in poſſeſſion when the attainder happened. The plaintiff may recover with equal propriety againſt any one of the various perſons through whoſe hands the goods may have paſſed in the intermediate time. Now, it cannot be conceived that he ſhould have his remedy againſt ſo many: there muſt be ſome perſon to anſwer him to the extent of his demand. The ſtatute has directed that, in certain circumſtances, there ſhall be a reſtitution of the goods. But during the interval between the felony and the conviction, the property remains in *dubio*, liable to be defeated by the attainder. Now, during that time, the defendant purchaſed the goods in queſtion for a valuable conſideration. If in this caſe the goods had remained in the defendant's poſſeſſion at the time of the attainder, that would have altered the caſe; but he got rid of them before that time, and another perſon was then ſubſtituted in his room, the plaintiff has a right to reſtitution of the goods in ſpecie, and perhaps would be entited to recover damages

Horwood *v.* Smith, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 750.

(1) By ſtatute 21 Hen. 8. c. 11. goods ſtolen ſhall be reſtored to the owner upon his giving or procuring evidence againſt the felon, ſo that he be proſecuted to conviction.

in

in trover againſt any perſon who is fixed with the goods after conviction, and refuſes to deliver them; for then the goods are converted to the prejudice of the owner: but there is no caſe in which it has been held, that this action can be maintained againſt a perſon in this defendant's ſituation. *Aſhhurſt*, J. Notwithſtanding the notice, the defendant was not obliged to keep poſſeſſion of the goods, when it was doubtful whether the felon would or would not be attainted: the property may be of a periſhable nature: and in this caſe, the keeping of the ſheep would have been attended with a conſiderable expence. *Buller*, J. The plaintiff could not demand the goods of the defendant merely becauſe they had been ſtolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. This is an action of trover for ſheep; and in order to maintain it, the plaintiff muſt prove that the ſheep were his property, and that while they were ſo, they came into the defendant's poſſeſſion, who converted them to his own uſe. Now the plaintiff's property did not begin till after the conviction of the felon; becauſe, before that time the property had been altered by a ſale in market overt; from the time of the conviction, the defendant has never had the poſſeſſion of the ſheep; then it never can be ſaid that he converted the plaintiff's ſheep to his uſe, having parted with them before the time when the property was veſted in the plaintiff. *Groſe*, J. If this action could be maintained, it would defeat the object of the act of parliament, which entitles the owner of ſtolen goods, proſecuting to conviction, to a reſtitution of them. For, if third perſons, in whoſe poſſeſſion goods which had been ſtolen came fairly, and for a valuable conſideration, were compelled to deliver them up before a conviction of the felon; it would take away the incitement to the proſecutor to convict the felon, which it was the intention of the legiſlature to give.

Parker v. Patrick, Ea. 33 Geo. 3. B.R. 5 *Ter. Rep.* 175.

But if goods be obtained by *fraud only*, the owner is not on the conviction of the offender, intitled to a reſtitution—This was an action of trover; and on the trial it appeared that the goods in queſtion had been obtained from the defendant by falſe pretences, and afterwards pawned to the plaintiff for a valuable conſideration, without notice of the fraud: that the perſon obtaining them had been convicted by the defendant, on which the latter got poſſeſſion of the goods again; and now this action was brought by the plaintiff, the pawn-broker, to recover them from the defendant. There was a verdict for the plaintiff; and on a motion to enter a nonſuit, it was argued, that in this reſpect there was no difference between the obtaining of goods by fraud or felony. But by the court, this is diſtinguiſhable from the caſe of felony; for there, by a poſitive ſtatute, the owner, in caſe he

proſecutes the offender to conviction, is entitled to reſtitution: but that does not extend to this caſe, where the goods were obtained from the defendant by fraud.

Where trover is brought for *a ſpecific chattel*, of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the real value; but that its real and aſcertained value muſt be the ſole meaſure of the damages, there the ſpecific thing demanded may be brought into court; and this is the more reaſonable, as this action of trover comes in the place of the old action of detinue. By this, no injury is done to the plaintiff; for though the court ſhould think, on a motion for the delivery of the article to the plaintiff, that he ought not to proceed for damages beyond the ſpecific thing, yet he may ſtill proceed for more; and the jury may give damages for the detention; but this is at the peril of coſts, and ſo it ought to be, to prevent vexatious litigation, which a plaintiff otherwiſe might be tempted to purſue, if *in all events* he was ſure of coſts. Fiſher *v.* Prince, Mic. 3 Geo. 3. B.R. *Burr.* 1363.

But where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to eſtimate the additional value, there it ſhall not be brought in. Therefore, in this caſe, upon ſhewing cauſe by the plaintiff's counſel againſt a rule obtained, calling upon the plaintiff to ſhew cauſe, *why upon* DELIVERING *to the plaintiff the ſeveral goods and chattels, for which this action*, (which was an action of trove) *was brought, and paying him his coſts to the day of making the motion, further proceedings ſhould not be ſtaid*; Lord *Manſfield* ſaid, that ſuch motions ought neither to be refuſed nor granted of courſe; but that they muſt depend upon their own circumſtances: and in the preſent caſe, the goods appearing to have been altered, and their value changed; the rule was refuſed.

So in an action of trover in the common pleas for a bond of 400l. it was moved for the defendant, that on delivering up this bond, and payment of coſts, all proceedings might be ſtaved; but for the plaintiff, cauſe was ſhewn, that he had ſuſtained great loſs by the detention of this bond: and the above caſe of Fiſher and Prince was cited. By *De Grey*, CH. J. and the whole court, *we cannot ſtay proceedings* on delivering up the bond, if the plaintiff inſiſts upon going for ſpecial damages. Whitren & ux. *v.* Fuller, Ea. 13 Geo. 3. C.B. 2 *Black.* 902.

X. *Action upon the Caſe for Detinue.*

Pawly *v.* Holly, M. 13 Geo. 3. C.B. 2 *Black.* 853.

In detinue for two books of entries of admiſſions and ſurrenders in a copy-hold manor, two other books belonging to the ſaid manor, and divers court-rolls and writings, to the value of 500l. On the general iſſue pleaded, and trial at the aſſizes, a verdict was found for the plaintiff, as to the two books of entries and admiſſions, value 100l. each, with damages 20l. and coſts 40s. and as to the reſidue for the defendant. It was afterwards moved in arreſt of judgment, that the ſeveral things ſued for ought to have been ſeparately valued in the declaration. But, by the court, the nature of this action requires, that the verdict and judgment be ſuch, that a ſpecific remedy may be had, for recovery of the goods detained; or a ſatisfaction in value for each ſeveral parcel, in caſe they be not delivered. This is as well done by ſevering the values in the verdict, as in the declaration; which is of no uſe; as in caſe of a judgment upon verdict, the jury muſt aſſeſs the damages according to their evidence; and in caſe of judgment by default, a writ of enquiry muſt be awarded for the ſame purpoſe.

II. Actions of Treſpaſs, *vi et armis.*

1. *The Action of Aſſault and Battery.*

Scott *v.* Shepherd, Ea. 13 Geo. 3. C.B. 3 *Wilſ.* 403. 2 *Black.* 892.

This was an action of treſpaſs and aſſault againſt the defendant, for throwing, caſting, and toſſing a lighted ſquib, at and againſt the plaintiff, and ſtriking him therewith on the face, and ſo burning one of his eyes, that he loſt the ſight of it. On not guilty pleaded, the cauſe came on to be tried at the aſſizes, when it appeared in ſubſtance by the plaintiff's evidence, that the defendant, on the evening of a fair-day, threw a lighted ſerpent, being a large ſquib, conſiſting of gunpowder and other combuſtible materials, from the ſtreet into the market-place at Milborne port, which lighted ſerpent, being toſſed from hand to hand by different perſons to ſave their goods, was at laſt thrown by one, who by ſo doing ſtruck it in the plaintiff's face, and thereby put out his eye. Upon this evidence, the jury found a verdict for the plaintiff, with 100l. damages, ſubject to the opinion of the court, whether this action was maintainable? And the queſtion was, whether treſpaſs *vi et armis* would lie againſt the defendant? or, whether it ſhould not have been an action upon the caſe againſt him, upon a ſuppoſal that the injury done to the plaintiff was conſequential, and not immediate,

immediate. The judges *Nares*, *Gould*, and *De Grey*, CH. J. (*contra Blackſtone*, J.) were of opinion that the action was well brought: and there was judgment for the plaintiff.—*Nares*, J. The nature of the act, the time and place when and where it was done, made it highly probable that ſome perſonal damage would immediately happen to ſomebody then preſent in a crowded market-houſe on the fair-day. The act was of a miſchievous nature, and beſpeaks a bad intention, and whether the plaintiff's eye was put out *mediately* or *immediately* thereby, the defendant, who firſt threw the ſquib, is anſwerable in this action. But ſuppoſing the defendant had no bad or miſchievous intention when he threw the ſquib, yet as the injury done was not inevitable, this action well lies againſt him; for the *malus animus* of a defendant is not neceſſary to be alleged, proved, or taken into conſideration in this action. If the injury done be not inevitable, the perſon who doth it, or is the immediate cauſe thereof, even by accident, misfortune and againſt his will, is liable in this action of treſpaſs *vi et armis* (1). If the act in the firſt inſtance be unlawful, treſpaſs will lie; but if the act is *prima facie* lawful, and the prejudice to another is not immediate but conſequential, it muſt be an action upon the caſe, 1 *Str.* 535, 2 lord *Raym.* 1399. In the caſe at bar, the act in the firſt inſtance done by the defendant was unlawful; therefore treſpaſs *vi et armis* well lies againſt him; every ſubſequent act in throwing the ſquib by the others, did partake of the nature of the firſt act, and was *quaſi cauſa cauſata* immediately and *inſtanter*. The defendant was the firſt actor, and the cauſe of the cauſe of the putting out of the eye of the plaintiff, the act was not complete until the exploſion. If a man turns out a mad bull, ox, or any other wild or miſchievous beaſt towards A. who turns the brute towards B. who turns it again towards C. whom it hurts, he who was the firſt actor, and turned out the beaſt is anſwerable in treſpaſs *vi et armis*, for the injury done to C. *Gould*, J. The defendant is the only wrong doer; his act put the others, who afterwards threw the ſquib, under an inevitable neceſſity of acting as they did; and ſo neither of them is liable to an action. *De Grey*, CH. J. Treſpaſs *vi et armis* lies againſt the perſon from whom an injury is received by force. In doing a lawful act, treſpaſs *vi et armis*, will, in ſome caſes, lie againſt the actor; and yet there are caſes where treſpaſs *vi et armis* will not lie againſt a perſon for doing an unlawful act; legal acts may become treſpaſſes *vi et armis*, by accident, or inadvertency. If a man cuts his own thorns, which by ac-

(1) 1 *Strange*, 596. *Hob.* 134. Sir *T. Jones*, 205. 6 Ed. 4. 7, 8. Sir *Tho. Ray.* 422. 4 *Mod.* 404.

cident, or through his inadvertency, fall upon his neighbour's ground, his going upon that ground to take them away is a treſpaſs *vi et armis*, becauſe not inevitable. So if one ſhooting at a mark, wounds or hurts another by mere accident; ſo if I aim a blow at one, and by accident ſtrike another, treſpaſs *vi et armis* lies. For, doing an unlawful act, as by laying a log in the highway, whereby another perſon is hurt, it is a nuiſance, for which treſpaſs *vi et armis* will not lie, but treſpaſs upon the caſe; whether the injury occaſioned by the act be immediate and direct or not, is the criterion, and not whether the act be unlawful or not: if the injury be immediate and direct, it is treſpaſs *vi et armis*, if conſequential, it will be treſpaſs on the caſe. It has been admitted that if a man turns a wild ox looſe amongſt people, not with any intent to hurt any one, and he gores a man, treſpaſs *vi et armis* lies. The throwing the ſquib by the defendant was unlawful; the ſquib had a natural power and tendency to do miſchief indiſcriminately. The other perſons did not act with or in combination with the defendant, and their removal of the ſquib for fear of danger to themſelves, ſeems to be a continuation of the firſt act of the defendant, until the exploſion: No man contracts guilt by defending himſelf; the ſecond and third man were not guilty of any treſpaſs, but all the injury was done by *the firſt act* of the defendant; for all the acts of throwing the ſquib muſt be conſidered as one ſingle act, namely, the act of the defendant, the ſame as if it had been a cracker made with gunpowder, which had bounded and rebounded again before it had ſtruck out the plaintiff's eye.

Michell *v.* Neal, *et ux.* Tr. 18 Geo. 3. B.R. *Coup.* 823.

The declaration in aſſault and battery cannot lay the offence on a day certain, *and on divers other days and times, from and between* that day, and, &c. For an aſſault is one entire individual act, and cannot be committed at divers times: beſides, it would be impoſſible for a defendant, upon ſuch a declaration, to know whether the plaintiff meant to prove one aſſault only, or twenty; therefore he could not be prepared to juſtify.

White *v.* Shaw, M. 4 Geo. 3. C.B. 2 *Wilſ.* 203.

Where the action is by bill in the king's bench, the offence ſhould be charged fully and poſitively, and not by way of recital; as, *whereas*, A. B. on ſuch a day, made an aſſault, &c. But in the court of common pleas, ſuch a declaration has, on a ſpecial demurrer, been held good; becauſe, in that court the writ is ſet forth in the declaration, and is part thereof; and therefore the count is helped and made good by the writ.

Cotterill *v.* Tolly, Ea. 27 Geo. 3 B.R. 1 *Ter. Rep.* 655.

In an action of aſſault and battery, wherein the declaration, after ſtating the aſſault, ſtated in the ſame count, that the defendant then and there tore, rent, ſpoiled, damaged, and deſtroyed the clothes of the plaintiff, the jury found

found a verdict for the plaintiff, with 1s. damages, and they alſo found, upon being aſked by the judge, that *the clothes were torn in conſequence of the beating*. It was moved, that the maſter might tax the plaintiff his coſts. But, by the court, the rule is, that wherever the tearing of the plaintiff's clothes is merely conſequential to the beating, the plaintiff is not entitled to more coſts than damages, unleſs the jury find to the amount of 40s. damages (1); now here it is expreſsly found, that the tearing was in conſequence of the beating; therefore the plaintiff is not entitled to his coſts.

Mears *v.* Greenaway, M. 30 Geo. 3. C.B. 1 *Hen. Black.* 291.

And the adding to the count, for an aſſault, that the defendant *then and there tore the plaintiff's clothes*, is only an aggravation and part of the aſſault, and will not, on a general verdict for the plaintiff, entitle him to full coſts. In this action of treſpaſs for an aſſault and battery, the declaration, after having ſtated, in the uſual way, that the defendant aſſaulted the plaintiff, went on—*and the ſaid defendant then and there tore, rent, ſpoiled, damaged, and deſtroyed the clothes of the plaintiff, which he then and there had on.* The jury found a verdict for the plaintiff, with 5s. damages; and the prothonotary allowed full coſts. It was moved to review his taxation. Lord *Loughborough*. In this caſe, the ſame queſtion might have been left to the jury, which was aſked them in the caſe of Cotterill *v.* Tolly, namely, whether the tearing the clothes were part of the ſame act for which they gave damages; if they had anſwered that it was ſo, there would have been no queſtion. But *it is the ſame thing if it appear on the face of the declaration*, which, after ſtating the beating, goes on to ſtate, that the clothes of the plaintiff were then and there ſpoiled: in ſuch way, it is evident, that one act was in conſequence of the other. And the law is not to be evaded by a device of pleading. *Gould*, J. If the declaration ſtates the tearing of the clothes to be done at the ſame time with the beating, the court will conſtrue it ſo as to accompliſh the object of the ſtatute, and will hold the tearing to be part of the ſame act, and in conſequence of the battery. It was well determined in Walker's caſe, 4 *Co.* 41. b. that the words *adtunc et ibidem*, united and coupled all together. *Heath*, J. of the ſame opinion. *Wilſon*, J. was alſo of opinion that the plaintiff was not entitled to his full coſts. If in an action of this kind, the party chooſes to forego the tort to his perſon, and goes only for the injury to his clothes, he would have his full coſts; but if he

(1) By 22 & 23 Car. 2. c. 9. in actions of aſſault and battery, if the damages recovered are under 40s. the plaintiff ſhall have no more coſts than damages, unleſs the judge ſhall certify that *the aſſault and battery were ſufficiently proved.*

will combine both together in one count, the caſe is within the ſtatute of *Car.* 2. becauſe the principal injury is the battery, and the judge may certify. Rule abſolute.

Lockwood. *v.* Standard, Hil. 34 Geo. 3. B.R. 5 *Ter. Rep.* 482.

So, in another caſe, in the court of King's Bench, the declaration, after alleging, in the uſual form, that the defendant aſſaulted the plaintiff, ſtated in the ſame count, that *he then and there* tore and ſpoiled the plaintiff's clothes: on the trial, the jury found a verdict for the plaintiff, with 1d. damages; and the maſter taxed the plaintiff his full coſts. It was moved to ſet the taxation aſide. The court noticed the laſt caſe in the court of common pleas; and ſaid, that the rule there eſtabliſhed was, that unleſs the tearing of the clothes were at a different time, the plaintiff ſhould have no more coſts than damages, if he recovered leſs than 40s.; and that in this caſe the tearing of the clothes was evidently a part of the ſame tranſaction. Rule abſolute.

Page *v.* Creed, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 391.

If the defendant juſtifies, and there is a verdict for the plaintiff, the plaintiff is not entitled to full coſts, unleſs the juſtification be both of the aſſault and battery. In an action of treſpaſs for an aſſault and battery, the defendant pleaded the general iſſue to the whole, and a plea of juſtification *as to the aſſault only*; damages 1s. and coſts 40s. It was moved, on the behalf of the defendant, that the coſts ſhould be reduced to 1s. By the court, if a plea of juſtification extend to the battery as well as the aſſault, it has been held that no certificate under the ſtatute of Car. 2. is neceſſary, the juſtification being tantamount to it; but here the battery is not juſtified; neither is there any certificate that a battery was proved, therefore this caſe falls within the ſtatute of *Car.* 2. and the plaintiff is entitled to no more coſts than damages.

Smith *v.* Edge, H. 36 Geo. 3. B.R. 6 *Ter. Rep.* 562.

But if the defendant plead the general iſſue, and a juſtification to the whole, and the plaintiff obtain a verdict with damages under 40s. the plaintiff is intitled to full coſts. To treſpaſs for aſſaulting the plaintiff, and ſeizing, graſping him by the breaſt and ſhoulders, and dragging, pulling, and hauling him with great force, the defendant pleaded, firſt, the general iſſue; and, ſecondly, a juſtification. On the trial, a verdict was given for the plaintiff on both the iſſues, with one farthing damages. The maſter refuſed to allow the plaintiff his full coſts; and it was moved, that he might review his taxation, which was oppoſed. But, by lord *Kenyon*, CH. J. here the plea juſtifies the battery, as well as the aſſault; and where the juſtification goes to the battery, it has been the uſage in all times, without any contradiction, to allow the plaintiff his full coſts. We are now told, however, that that practice is not warranted by law; and are deſired to overturn every thing that has been done upon the ſubject, from the time of lord Holt to the preſent moment.

But

But I think that the true conſtruction of the ſtat. 22 & 23 Car. 2. is this; if it do not appear on the record that a battery was committed, there muſt be a certificate from the judge to entitle the plaintiff to his full coſts. But if it do appear on the record, then there is no neceſſity for a certificate to certify that which does ſo appear. If this were *res integra*, I ſhould think it proper to decide this point in favour of the plaintiff. But in addition to the reaſon of the thing, there is the univerſal practice that has prevailed in the courts of law. *Aſhhurſt*, J. agreed. *Groſe*, J. Where a battery is not admitted on the record, the judge muſt certify to entitle the plaintiff to his full coſts; but where the defendant admits a battery, no certificate is neceſſary. *Lawrence*, J. of the ſame opinion. Rule abſolute.

2. *Action for Falſe Impriſonment.*

Barker *v.* Braham and Norwood, Hil. 13 Geo. 3. C.B. 3 *Wilſ.* 368. 2 *Black.* 866.

An action of treſpaſs, *vi et armis*, for falſe impriſonment, lies againſt the attorney, as well as againſt the client, for ſuing out an illegal *ca. ſa.* againſt a defendant, and cauſing him to be impriſoned thereon. This was an action of treſpaſs for falſe impriſonment; and on the trial there was a verdict for the plaintiff, with 150l. damages againſt both the defendants jointly: on a motion for a new trial, the judge reported the evidence in ſubſtance, as follows: the huſband of the plaintiff was indebted to the defendant, Braham, in 490l. conditioned for the payment of 200l. the defendant, Braham, on the death of the plaintiff's huſband, brought her action againſt the plaintiff, his adminiſtratrix, and recovered judgment for want of a plea: on this a *fieri facias* iſſued, under which the defendant, Braham, levied on the inteſtate's goods all her debt, except 102l. 18s. 1d. for which, *without ſuggeſting any devaſtavit*, the defendant Norwood, as attorney for the defendant Braham, ſued out a *ca. ſa.* againſt the plaintiff, reciting what had been levied under the *fi. fa.* and directing the ſheriff to take her body for the reſidue of the debt and damages. This was perſonally delivered by Norwood to the bailiff, with orders to execute it immediately. He accordingly arreſted her on the 15th of March, and ſhe lay in cuſtody till the 18th of November following, when, upon motion, the court of King's Bench, ſet the *ca. ſa.* aſide for irregularity, and the then defendant Barker was diſcharged out of cuſtody. *De Grey*, CH. J. after the caſe had been argued and fully conſidered, gave the judgment of the whole court for the plaintiff.—The queſtion is, whether an action of treſpaſs *vi et armis* can be maintained againſt the attorney, as well as againſt his client, for wrongfully and illegally cauſing the now plaintiff to be impriſoned? for if ſuch action cannot be maintained againſt him, as well as

againſt his client, judgment ought to be arreſted, becauſe 150l. entire damages are given againſt them both, which cannot be ſevered by the court. But we are all of opinion, that treſpaſs *vi et armis* well lies againſt both the defendants. It is certain, the plaintiff hath received great injury in her perſon and liberty, becauſe ſhe hath been impriſoned by and under the colour of a *ca. ſa.* illegally taken out againſt her, which is the ſame thing as if ſuch writ had never been taken out at all.—A man had a judgment and execution executed, and afterwards the judgment was ſet aſide, for being unduly obtained, and reſtitution awarded; and afterwards the defendant brought treſpaſs againſt the plaintiff in the firſt action for taking the goods; and it was adjudged, that it well laid againſt the party; for by vacating the judgment it is as if it had never been, and not like a judgment reverſed by error.—A ſheriff, or his officers, or any acting under his or their authority, may juſtify themſelves by pleading the writ only: becauſe *that* is ſufficient for their excuſe, although there be no judgment or record to ſupport or warrant ſuch writ; but if a ſtranger interpoſes, and ſets the ſheriff to do an execution, he muſt take care to find a record that warrants the writ, and muſt plead it; ſo muſt the party himſelf, at whoſe ſuit ſuch an execution is made. No treſpaſs can be excuſed, but what is inevitable.—The attorney has pleaded not guilty; he could not juſtify by a ſpecial plea, becauſe there is no record to warrant a *ca. ſa.* againſt the plaintiff, nor could he have juſtified himſelf by pleading that he ignorantly ſued out the writ, for ignorance is no excuſe: but the attorney's defence is, that whatever remedy there is againſt him, it is not treſpaſs *vi et armis*. It is true, there may be circumſtances which will excuſe in treſpaſs *vi et armis*, as where a man goes peaceably into the houſe of another, to demand a juſt debt, or goes to make a viſit to another where he is not forbidden to go: but in the preſent caſe, the acts done by Norwood cannot be qualified, excuſed, or juſtified, in any way whatſoever; no man can ſay that the plaintiff has not been illegally impriſoned, or that Norwood was not an actor in cauſing ſuch impriſonment. But it is ſaid here is no injury done by Norwood, the attorney; for he, acting as ſuch, is only a ſervant to his client, and by ſuing out the *ca. ſa.* and delivering it to the ſheriff's officer, and ordering him to take and arreſt the plaintiff thereupon, he only acted as a medium or inſtrument by the direction of his client, or the command of the court. In anſwer to this, all the books ſay, that all are principals in treſpaſs (1)—procuring, commanding, aiding,

(1) Co. Litt. 57. a. 2 Inſt. 183.

or

or aſſiſting, makes one a treſpaſſer (1)—a ſervant keeping the key of a room, knowing that a man is impriſoned therein, is a treſpaſſer—one aſſiſting to a treſpaſs after it is done, is a treſpaſſer (2). To apply what is ſaid and laid down in the books upon this ſubject to the preſent caſe; they ſay, whoever procures, commands, aſſiſts, aſſents, &c. is a treſpaſſer: here the client commands the attorney, the attorney actually commands the ſheriff's officer. The real commander is the attorney, the nominal commander is the plaintiff in the action; ſo attorney and client are both principals: and upon this ground we are all of opinion, that judgment muſt be entered for the plaintiff, againſt both Norwood, the real actor, and his client, Braham, the nominal actor.

So, if a man be arreſted upon a writ that is void, treſpaſs *vi et armis* will lie againſt the plaintiff who ſued out ſuch writ. In this caſe, which was treſpaſs and falſe impriſonment, the pleas were 1ſt, not guilty; 2dly, a juſtification for that the plaintiff was indebted to the defendant in 21l. 12s. for which, viz. on the 27th of October, 1770, he, the ſaid defendant, ſued forth a *capias*, returnable *in eight days of St. Hilary*, for 42l. and marked the ſame for bail, to the amount of 21l. 12s. upon which the preſent plaintiff afterwards, and before the return of the writ, viz. on the 6th of November, was arreſted: the plaintiff replied, and admitted the ſuing forth of the *capias*; but alleged, that it was afterwards ſet aſide by the court for irregularity, by reaſon of its bearing *teſte* in Trinity Term, and not being returnable before Hilary Term following; to this the defendant demurred, and the plaintiff joined in demurrer. *De Grey*, Ch. J. (after argument) This is not a new queſtion; the *capias* being teſted in Trinity Term, and returnable not before Hilary Term next following, is void, and a mere nullity: there is a difference between writs of meſne proceſs, and writs of execution; for in the caſe of writs of meſne proceſs, if a term be omitted (3) between the teſte and return, the cauſe is out of court, if it be in a perſonal action, for *in real actions* it is otherwiſe; in them there muſt be nine returns between the teſte and return; alſo in the caſe of a writ of execution, the cauſe is come to its end; and on a *ca. ſa.* a defendant ought to lie in execution, and the ſheriff ought to have his body always ready to bring to the court, when he ſhall be commanded by *habeas corpus*, &c. But in caſes of meſne proceſs, it would be hard to ſuffer ſo long a return, becauſe

Parſons *v.* Lloyd, Mic. 13 Geo. 3. C.B. 3 *Wilſ.* 341. 2 *Black.* 845.

(1) Bro. Treſ. pl. 148, 232, 307. 1 Salk. 409.
(2) Bro. Treſ. pl. 133, 256, 265, 2 Hawk. pl. Cor. 312.
(3) And here Michaelmas term was omitted.

the body muſt lie in priſon, without having an opportunity to make a defence, when perhaps he is able to make a good defence. Theſe are the diſtinctions taken between writs of *capias* with reſpect to real actions, perſonal actions, and executions, by *Holt*, Ch. J. in 1 Ld. Raym, 775, 776, which is good law. The now plaintiff has been illegally impriſoned, under colour of a writ ſued out againſt him, which is a mere nullity, he has been unlawfully injured, and muſt have a remedy; but he has none againſt the officer, who is not to exerciſe his judgment touching the validity of the proceſs in point of law, but is obliged to obey the command of the courts at Weſtminſter, or other ſuperior courts, having general juriſdiction; and he may juſtify under the writ although it be void: the officer not being liable; it is clear from 1 Lev. 95. 1 Sider. 272. and many other caſes which might be cited, that this action well lies againſt Lloyd, the party himſelf, who ſued out this void writ; and to ſay now, that this action does not lie againſt the party himſelf, would be *quieta movere*. There is a great difference between erroneous proceſs, and irregular, that is to ſay, void proceſs; the firſt ſtands valid and good until it be reverſed, the latter is an abſolute nullity from the begining; the party may juſtify under the firſt until it be reverſed, but he cannot juſtify under the latter, becauſe it was his own fault that it was irregular and void at the firſt. It is ſaid that treſpaſs *vi et armis*, is not the proper action, and that a man cannot be made a treſpaſſer by relation; but relation is not at all applicable to this caſe, for Lloyd, who ſued out this void irregular writ, and cauſed Parſons to be unlawfully arreſted thereupon, was the principal mover or treſpaſſer in this caſe; the act of an attorney is the act of his client, and I am very clearly of opinion, that treſpaſs *vi et armis* well lies, and therefore the plaintiff muſt have judgment. *Gould*, J. The act of the attorney in point of law, is the act of the party the client, and ſo alſo is the act of the officer who arreſted the plaintiff; it is the very ſame thing as if the now defendant had been actually preſent when the plaintiff was arreſted, and had ordered the officer to make the arreſt, therefore treſpaſs *vi et armis* will lies. *Blackſtone*, J. of the ſame opinion. *Nares*, J. Every plaintiff ſues out proceſs at his peril. If a plaintiff purchaſes a *capias*, he cannot have it returnable two terms after the purchaſe, or omit or paſs over one term, for that would be a delay of juſtice, and contrary to the ſtatute of Mag. Char. which ſays, *nulli deferemus juſtitiam*. Judgment for the plaintiff.

Tarlton v. Fiſher, & al. Ea. 21 Geo. 3. B.R. *Doug.* 671.

But treſpaſs and falſe impriſonment will not lie againſt the ſheriff or his officer, for arreſting a perſon privileged from arreſts. This was an action of treſpaſs and falſe impriſonment;

priſonment; the declaration contained two counts: 1ſt, for impriſoning the plaintiff on the 27th November, 1780, at Bath, and detaining him in priſon three days; 2dly, for impriſoning him at the ſame place on 29th December, 1780, and detaining him 11 days: the defendants pleaded, 1ſt, not guilty, upon which iſſue was joined; 2dly, to the firſt count a juſtification, as ſheriff's officers, under a writ of attachment out of the court of exchequer; 3dly, to the ſecond count, a like juſtification, under a precept in the nature of a *ca. ſa.* from the court of requeſts at Bath, directed to them as officers of that court. The plaintiff replied, 1ſt, That he *had ſurrendered himſelf in diſcharge of his bail*, in another action, under the terms of the act 20 Geo. 3. c. 64, made on the occaſion of the priſons in London having been burnt by the rioters, and that he was therefore *not liable to be arreſted by* virtue of the writ mentioned, *of all which premiſes the defendants had notice*; 2dly, a ſimilar replication to the ſpecial plea in bar of the 2d count; 3dly, a new aſſignment on the firſt count of another aſſault and falſe impriſonment. To the replication on the firſt count, the defendants rejoined, that the plaintiff did not conform to the rules of the act; on which iſſue was joined: to the replication on the 2d count, they rejoined, that the plaintiff was not committed in diſcharge of his bail; on which iſſue was alſo joined: and to the new aſſignment, they pleaded the general iſſue. A general verdict having been taken at the aſſizes for the plaintiff, by miſtake, it was afterwards amended from the judge's notes, and entered for the defendants on all the iſſues, except on ſo much of the general iſſue as related to the treſpaſs in the firſt count, and on the iſſue joined on the juſtification pleaded in bar to the firſt count, and then the rule was to ſhew cauſe *why judgment ſhould not be arreſted?* The queſtion then turned upon the conſtruction of the following words, in the ſtat. 20 Geo. 3. c. 64. § 2. "and *ſhall not be* "*liable to be arreſted* by virtue of any civil proceſs out of "any court; and in caſe they have been, or ſhall be ſo "arreſted, ſhall be diſcharged therefrom."—Lord *Manſfield*, This is a direct action of treſpaſs *quare vi et armis*, and not on the caſe; and there is this diſtinction between them, which always ought to be attended to: in treſpaſs, innocence of intention is no excuſe, in caſe the whole turns upon it; malice, or the *quo animo*, is the very giſt of the action. In this caſe, the notice is immaterial: for it is contended, that the arreſt was illegal; and the queſtion ſingly is, Whether the ſheriff muſt abſtain, at his peril, from arreſting any man who has taken advantage of the act? There is no direction in the act how the diſcharge is to be, which in the ſtatutes relative to bankrupts and inſolvents is expli-

citly pointed out; but the expreſſions "ſhall not be liable to be arreſted," and "ſhall be diſcharged," from the nature of the thing, means, "ſhall be diſcharged by proper authority." The ſheriff is not bound not to arreſt; if he chooſes to take the truth of the facts upon him, and not arreſt the party, he may; and the ſurrender and compliance with the act will be a good return; but he will be anſwerable. I am clear, that an action of treſpaſs does not lie in this caſe againſt the officers. Whether, if the defendants had done any thing oppreſſive, with full notice of all the circumſtances, an action on the caſe might be maintained? would be another queſtion. *Willes*, J. had great doubt in this caſe. and inclined to the opinion that treſpaſs would lie. *Aſhhurſt*, J. I think this action is not maintainable. A ſheriff is bound to execute proceſs iſſuing out of a court of competent juriſdiction; and though there be no cauſe of action, or the proceſs is erroneous, he is not reſponſible. The plaintiff himſelf, in ſuch caſes, is only liable, it is a plaintiff's buſineſs to take care how he takes out his writ; if he deliver it to the ſheriff, he takes all upon himſelf. *Buller*, J. The meaning of the firſt part of the clauſe of this act muſt have been to veſt the power of diſcharge where, in other caſes, it was veſted before, viz. in the court out of which the proceſs iſſued; or, in vacation, in one of the judges. That ſatisfies the words of the act. In caſes of bankrupts, or inſolvents, what is done? Hundreds have been arreſted, but there never was an inſtance of an action againſt the ſheriff or his officers in ſuch caſe. The practice in the caſe of bankrupts is to apply to a judge, and verify the certificate by affidavit. How could the ſheriff aſcertain that the certificate was ſigned by the commiſſioners? he cannot adminiſter an oath. In the caſe of inſolvent debtors, the proviſions for their diſcharge are ſomewhat different in words, but are, in ſubſtance, I think, the ſame. The party there is to be diſcharged, not by the ſheriff, but by the order of a judge, or two juſtices of the peace; and there is in all inſolvent acts, ſimilar words to thoſe of the firſt part of the clauſe in the ſtatute now under conſideration; for it is generally enacted, "that no perſon to be diſcharged by the act *ſhall be impri-* "*ſoned.*" So that if this is to be conſidered as a poſitive injunction upon ſheriffs not to execute proceſs but at their peril, falſe impriſonment would lie in every caſe where an inſolvent is diſcharged by a judge's order. The general law as to ſheriffs is, that if a ſheriff has acted in obedience to the mandate of the court, he is excuſed. If he arreſt a peer, the writ is erroneous, yet he is not a treſpaſſer for executing it. In treſpaſs, the defendant muſt ſhew an excuſe. Have the defendants done ſo in this caſe? Yes, for the mandate of the

the court was compulſory on them. The original plaintiff would not be liable to an action of treſpaſs till the writ is ſuperſeded; for till then it is a juſtification. After a *ſuperſedeas*, treſpaſs will lie againſt the party, but ſtill not againſt the ſheriff: I take this to have been ſettled over and over again; and the inconvenience would be very great if the law were otherwiſe. Rule for arreſting judgment abſolute.

Neither will it lie for arreſting one who has a temporary privilege from arreſts. This was an action of treſpaſs and falſe impriſonment, brought by the plaintiff, who was a witneſs in a cauſe at Weſtminſter, and was arreſted while dining at a tavern in his return from attending the court. The arreſt was afterwards ſet aſide, on account of the defendant's privilege; and the action was brought againſt the plaintiff in that action: upon not guilty pleaded, there was a verdict for the plaintiff, ſubject to the opinion of the court, whether the action would lie? The caſe was argued; and after ſome days conſideration, *De Grey*, CH. J. delivered the opinion of the whole court—for all arreſts made without lawful authority, treſpaſs and falſe impriſonment will lie, as if there be no writ, or a void writ. But in the preſent caſe, there is no irregularity in the proceſs itſelf, but only in the time of executing it. The queſtion therefore is, whether the privilege of the king's court extended to ſuitors *redeundo*, ſo vitiates an arreſt, or ſuſpends the operation of the writ, that the taking a man thereon becomes an act of treſpaſs to the party taken. The ancient way of availing one's ſelf of the privilege of the courts was by ſuing out a writ of privilege, which was always accompanied by either a *habeas corpus*, or a *certiorari*, as the caſe required. If, on the return, the party appeared entitled to privilege, he was delivered (or his goods, as the caſe might be) and a *ſuperſedeas* was granted, otherwiſe a *procedendo* iſſued. But ſtill the irregularity, even in caſes of privilege, did not lie in the proceſs itſelf, but in the ſervice of it. The modern way of giving the ſame relief as was had by the tedious method of a writ of privilege, is by a ſummary motion to diſcharge: this was purſued in the caſe at bar; but courts will be very ſcrupulous in diſcharging, if their allowance of privilege will lay a ground for an action of treſpaſs. A treſpaſs (by the way) muſt be certain, and either an injury to the party or not ſo, at the time the act is done, it cannot depend on the ſubſequent diſcretion of the court in granting or refuſing the diſcharge (1). And therefore it has been held, 1 *Keb.* 220. that

Cameron v. Lightfoot, Ea. 18 Geo. 3. C B. 2 *Black.* 1190. alſo *Ibid. v.* Bowles and others for the ſame cauſe, Ea. 18 Geo. 3 C.B. 2 *Black.* 1195.

(1) For, as this privilege is not conſidered as the privilege of the perſon

that a witneſs arreſted during his attendance hath no remedy, but by *habeas corpus*, to deliver him: but the officer who knew the reaſon of his attendance, might be attached for his contempt. So in *Style's* Prac. Reg. 195, 227, 395, &c. a like diſtinction is taken. If one be arreſted on a writ unduly obtained, falſe impriſonment lies againſt the plaintiff. But if one who hath a ſuit depending, be arreſted *eundo vel redeundo*, the court, upon motion, will ſet him at liberty, and puniſh the party that arreſted him, if he knew the cauſe of his attendance. In none of the books is there any intimation of an action being maintainable for ſuch an arreſt, but the queſtion has always been merely the delivery of the party: the proceſs ſtill continuing legal, and capable of being executed at a ſubſequent time, where privilege does not intervene. The ſame privilege extends in ſome inſtances to *places*, to which particular immunities have been annexed by ancient or modern law. The execution of the writ has been ſet aſide, but the writ ſtill held to be legal, and therefore no treſpaſs to execute it. Arreſts on Sundays were good at common law, 2 *Bulſt.* 72. but the ſtatute expreſsly directs, that ſuch arreſts ſhall be *as if no proceſs* had iſſued; this perhaps may make a difference. Ambaſſadors are much upon the ſame footing. Privileges of parliament, and of peerage, ſtand upon their own bottom, and the conſtruction of ſeveral ſtatutes. So, bankrupts when certificated, ſoldiers to a certain degree, and many other individuals, are privileged from arreſts by acts of parliament; but though in many caſes, the proceſs is declared *void*, yet in none has any inſtance been produced of an action of falſe impriſonment being brought, much leſs will it lie in the preſent caſe, where the writ is not void, nor the arreſt illegal, but only improly timed.

Rafael *v.* Vereiſt, Hil. 16 Geo. 3. C.B. 2 *Black.* 1055.

Treſpaſs and falſe impriſonment has been held to lie in this country againſt the governor of a ſettlement in the Eaſt Indies, for procuring by awe, fear, and influence, and contrary to his own inclination, a ſovereign, independent, abſolute prince to impriſon another. This was an action of treſpaſs, aſſault, and falſe impriſonment; and being tried by a ſpecial jury, there was a ſpecial verdict to the following effect:—That the plaintiff was an Armenian merchant, and a native of Iſpahan—had for ſome years reſided in Bengal; but in March, 1768, and before, had been reſident at Fyza-

---

perſon attending the court, but of the court which he attends, the allowing or not allowing the privilege is diſcretionary, and it hath been diſallowed in *colluſive* actions, *Raſt.* 476; and in *vexatious* ones, 11 *Mod.* 79: or where the party attended as a volunteer, and not upon proceſs, *Salk.* 545. *per* De Grey, Ch. J. in the above caſe.

bad,

bad, the capital of the province of Oude, in the dominions of the nabob Sujah al Dowla, for the purpoſe of trading there, both on his own account, and as agent to ſome Engliſh merchants. That the defendant was preſident of Bengal, under the Eaſt India Company; and that a battalion of the Company's troops, being 600 men and upwards, was ſtationed at Fyzabad, under the command of captain Harper, and another brigade, commanded by Sir Robert Barker, was ſtationed at Illahabad, the then reſidence of the Mogul Shah Allum; that the battalion at Fyzabad were in pay of the Eaſt India Company, and had been ſtationed there at the requeſt of the nabob, from whom they received additional pay. That in March, 1768, the plaintiff was ſeized and impriſoned at Fyzabad, *by order of the nabob*, by ſome ſoldiers of captain Harper's battalion, and conveyed to Muxadabad the capital of Bengal, and there detained for two months; and that *the ſaid arreſt and impriſonment were by the means and procurement of the defendant.* That the nabob was conſtitutionally independent of the Eaſt India Company; but in ordering the ſaid arreſt and impriſonment, was *under the awe and influence of the defendant, and acted contrary to his own inclination, being fearful of offending him.* That the impriſonment in the province of Bengal was by the procurement of the defendant, and was a continuation of that made in the province of Oude: and if, upon the whole, the defendant is guilty of the whole treſpaſs, they aſſeſs 40001. damages; if only of that in Bengal, then only 30001. if only of that in Oude, 10001. and conclude to the judgment of the court. *De Grey*, CH. J. In the preſent caſe, there are ſome things found by the ſpecial verdict, which have not, nor cannot be inſiſted on as material, in excuſe of the defendant: as, 1ſt, That the plaintiff is an alien; for this is no objection in perſonal actions, 1 *Atk.* 51. 2dly, That the defendant was preſident or governor of Bengal; he not having juſtified ſpecially under that authority. 3dly, The place where the impriſonment happened, viz. the dominions of a foreign prince. Crimes are in their nature local, and the juriſdiction of crimes is local. And ſo, as to the rights of real property, the ſubject being fixed and immoveable; but perſonal injuries are of a tranſitory nature, and *ſequuntur forum rei:* and though in all declarations of treſpaſs, it is laid *contra pacem regis*, yet that is only matter of form, and not traverſable. But the great doubt is, whether, when an injurious act is committed by colour of juridical authority, or by the order of an abſolute prince, ſuch act can be a treſpaſs there where it is done, or here where it is not done. I ſhall ſay nothing as to the nature of the nabob's government, or to the poſition that the commands of abſolute princes do of courſe legalize their acts. But I conſider

ſider the nabob as not being the actor in this caſe; but the act to be done, in point of law, by thoſe who procured or commanded it; and in them it may doubtleſs be a treſpaſs. Sujah Dowlah was a mere inſtrument, he acted not from any motives of his own, but gave way through awe and fear. If in the doing of an act, there be ſeveral intervening agents, and one happens not to be anſwerable, will it be ſaid that all the reſt are excuſed? Suppoſe it *the very act* of the nabob, who bends himſelf to the defendant's will, and undergoes a voluntary ſervitude to his pleaſure--the accidental circumſtances of ſuch a man ſhall not exempt the reſt who concur in the act. It is laid down in *Foſter*, 125. that procuring a felony to be committed, makes an acceſſory to the felony: and I take it to be a ſettled rule, that whatever makes an acceſſory in felony, will make a principal in treſpaſs. Since, therefore, the jury have found the procurement of the defendant, it follows, that he is liable as a principal for this treſpaſs. *Gould*, J. of the ſame opinion. *Blackſtone*, J. of the ſame opinion. This verdict not only finds the impriſonment to have been committed by the means and procurement, but by the command, nay even the compulſion of the defendant. The nabob acted contrary to his own inclination, through fear of offending the defendant, and under his awe and influence: after ſuch a finding, there is no room for argument. The nabob is a mere machine, an inſtrument and engine of the defendant. *Nares*, J. of the ſame opinion. Judgment for the plaintiff for the whole damages (1).

Moſtyn. *v.* Fabrigas, M. 15 Geo. 3. B.R. *Cowp.* 161.

So where an action of treſpaſs *vi et armis* was brought by one Fabrigas, againſt general Moſtyn, who had been governor of Minorca, for an aſſault and falſe impriſonment, and baniſhing him from the iſland of Minorca, to Carthagena in Spain, without cauſe; the action was held to be well brought (2).

Wall *v.* Macnamara, Sitt. at Weſtm. aft. M. 1779, cited 1 *Term Rep.* 536.

So where an action was brought by the plaintiff, as captain in the African corps, againſt the defendant, as lieutenant-governor of Senegambia, for impriſoning him for nine months at Gambia in Africa: the defendant pleaded the general iſſue, intending to juſtify the impriſonment, under the mutiny act for diſobedience of orders. At the trial, it appeared, that the impriſonment, which was at firſt legal, namely, for leaving his poſt without leave from his ſuperior officer, though in a bad ſtate of health, was aggravated with many circumſtances of cruelty, and lord *Mansfield* directed a verdict for the plaintiff (3).

(1) See *Cowp.* 166, 180. (2) See this caſe in p. 41. *ſupra.*
(3) See this caſe in p. 44. *ſupra.*

So,

So, where the defendant, who was captain of the Trident man of war, put the plaintiff, who was the purſer, into confinement, and kept him there for three days, and then liberated him, without any charge or court-martial: the plaintiff recovered for the impriſonment (1). Swinton, *v.* Molloy, Sitt. at Weſtm. Mic. 1783, cited 1 *Ter. Rep.* 537.

But an action of treſpaſs and falſe impriſonment will not lie, where the impriſonment is merely in conſequence of taking a ſhip *as prize*, although the ſhip has been acquitted. The defendant was captain of a letter of marque, called the Enterprize, and being on a cruiſe, fell in with and *took as a prize*, a trader called the Bee, belonging to Jerſey, of which one Fainton was captain, Robine ſupercargo, and Le Caux, the preſent plaintiff, ſecond mate. They, with others, belonging to the Bee, were removed into the Enterprize, and brought to England: and the court of admiralty reſtored the ſhip and cargo, and condemned the captor in coſts and damages (2). After this, Fainton, Robine, and Le Caux brought ſeparate actions of treſpaſs and falſe impriſonment againſt Eden, to which he pleaded the general iſſue. Lord *Mansfield*, on the trial of the firſt cauſe, of Fainton *v.* Eden, ſaid, he thought the action a new attempt, which, if it ſucceeded, would deſtroy the Britiſh navy. If an action at law ſhould lie, by the owners and every man on board a ſhip, taken as prize, againſt the captor, and every man on board his ſhip, no man would dare to take a ſhip. He thought a doubt made, and the pendency of ſuch a queſtion, eſpecially if large damages were given, would have very bad effects, and obſtruct the neceſſary operation of the ſea-ſervice; and being clearly of opinion, that no ſuch action had ever been ſuſtained; that he himſelf had frequently ruled that ſuch an action would not lie: and that, upon principles of law, conſcience, and ſound policy, and alſo upon the authority of precedents, ſuch an action could not be maintained, he refuſed to direct to make a caſe, or find a ſpecial verdict. The plaintiff might move for a new trial, the jury might find a ſpecial verdict if they choſe ſo to do; but he adviſed them to find for the defendant, which they did. In the next cauſe, Robine *v.* Eden, the counſel for the plaintiff very ſtrongly combated the opinion of lord Mansfield: but his lordſhip adhering to his firſt opinion, there was alſo a verdict for the defendant. In the preſent caſe of Le Caux *v.* Eden, his lordſhip underſtanding that the counſel for the plaintiff ſtill perſiſted ſtrongly that the action lay, and, in- Le Caux *v.* Eden, Hil. 21 Geo. 3. B.R. *Doug.* 594.

(1) See this caſe in p. 45. *ſupra.*

(2) And referred the ſame to the regiſter of the court, taking to his aſſiſtance two merchants, who were to make their report thereon. The regiſter afterwards made his report, which contained allowances, under different articles, ſuch as for the wages, proviſions, and expences of the different parties on board, repairs, &c. &c.

ſtead

ſtead of moving for a new trial, meant to tender a bill of exceptions, told them he would conſent to a ſpecial verdict; the jury, however, found for the defendant; upon which they were again told, it was agreed they ſhould find a ſpecial verdict, and aſſeſs damages for the plaintiff; and they then went back, and with great reluctance, found 1s. damages; the ſpecial verdict ſtated the facts upon which the action was brought; and the caſe was fully argued.—Lord *Mansfield* adhered to the opinion he had ſo repeatedly and peremptorily given at *niſi prius*. *Willes*, J. I am of opinion that the action is not maintainable. The rule I would lay down is, that, where the injury is the neceſſary and natural conſequence of the capture, the court of admiralty has the ſole and excluſive juriſdiction. Nothing appears to have been done which could have been avoided, conſiſtent with ſeizing the ſhip as prize. I will not ſay there may not be caſes where this court would have a concurrent juriſdiction: if, for inſtance, perſonal ill-treatment ſhould be uſed, not the neceſſary effect of the capture. Suppoſe the ſhip was condemned as lawful prize, but that ſome of the crew had been uſed with unneceſſary cruelty, I do not know whether, in ſuch a caſe, the admiralty would take cognizance of the injury, though it is very remarkable, that no action at law has ever been brought. However, that difficulty does not ariſe here. It is ſaid, there is no jury in the admiralty court, to aſſeſs damages for a perſonal injury, but I ſee no reaſon why that court ſhould not judge of ſuch injuries, as well as of thoſe which affect property. They have an adequate method of aſcertaining the damages by reference to the regiſter, who may call in the aſſiſtance of aſſeſſors. There is nothing in the ſuppoſed difficulty of apportioning the damages; why may not 100l. be aſſeſſed to one man, and 1s. to another? There has been ſuch an apportionment in this very caſe. If there is a remedy in the admiralty court, *that* is ſufficient: and it is certainly a great advantage, that the parties there can all join in one libel. It would be of the moſt dangerous conſequence to the ſea-ſervice, if ſuch an action as this could be maintained. *Aſhhurſt*, J. The circumſtance of no action having ever been brought is almoſt deciſive, that it has been the general apprehenſion that no ſuch action will lie; for the occaſions in time of war have been innumerable. The inconvenience of entertaining ſuch cauſes would be intolerable; becauſe every individual in the captured ſhip might bring a ſeparate action againſt every man in the crew of the veſſel making the capture. It is unneceſſary to go into all poſſible caſes, or to ſay how it would be, if unneceſſary perſonal cruelty were exerciſed; but where the admiralty court has juriſdiction of the original matter, it ought alſo to have juriſdiction of every thing neceſſarily incidental.

cidental. *Buller*, J. The queſtion on this ſpecial verdict, is, whether an action at common law can be maintained for an impriſonment on a capture at ſea, *as prize*. There is no caſe in which it has ever been holden that ſuch an action would lie: and if it could be maintained, there are in every war ſuch frequent opportunities for it, that it muſt have happened in every day's practice, or ſome inſtance, at leaſt, muſt have been in the memory of thoſe who have had long experience at Weſtminſter Hall: but there is not the ſmalleſt trace of ſuch a determination, or even dictum, in any court in England. An univerſal ſilence in Weſtminſter Hall, on a ſubject which ſo frequently gives occaſion for litigation, is a ſtrong argument to prove that no ſuch action can be maintained. But the caſe does not reſt on negative uſage only, for there is a current of authorities from the time of queen Elizabeth to the preſent time, all of which agree that the admiralty has juriſdiction not only of the queſtion *prize or not prize*, but of all its conſequences (1): and many of them agree that the admiralty has *the ſole and excluſive juriſdiction*; and that the courts of common law have no juriſdiction at all of ſuch queſtions (2). The caſe moſt in point with the preſent is that of *Rous* v. *Haſſard*, and *e contra*, argued at the cock-pit on an "appeal from the "courts at Newport in Rhode Iſland, and determined by "lord chief juſtice *Lee*. The great queſtion was, whether "an action of treſpaſs would lie for taking a ſhip as a prize? "Lord chief juſtice *Lee* having called in two civilians to his "aſſiſtance, delivered the opinion of the court; that though "for taking a ſhip on the high ſeas, treſpaſs would lie at "common law; yet, when it was taken *as a prize*, though "taken wrongfully, though it were acquitted, and though "there were no colour for the taking, the judge of the ad-"miralty was judge of the damages and coſts, as well as of "the principal matter. And he laid it down as law, that if "ſuch an action were brought in England, and the defen-"dant pleaded not guilty, the plaintiff could not recover." Unleſs a diſtinction between injuries to property, and injuries to the perſon can be ſupported, ſuch an authority, uncontradicted by any caſe or dictum, repeatedly recognized at *niſi prius*, and ſtrengthened by the negative uſage of the courts of law, would of itſelf be binding upon us now, and conclude againſt the plaintiff. So, in *Vanderwoodſt and others* v. *Thompſon*, tried before Mr. Juſtice *Gould*, on 13th May, 1780, at Guildhall, and afterwards brought before the court

(1) For this he afterwards cited 1 *Vent.* 173. 1 *Lev.* 243. 1 *Sider*, 367, 2 *Lev.* 25. *Carthew*, 398.

(2) For this he cited *Carthew*, 474. *Key and Hubbard* v. *Pearſe* at the Cockpit Temp. Ld. Wilmington.

of

of common pleas. It was an action of treſpaſs againſt the defendant, who had letters of marque, and who had attacked and taken a ſmuggling veſſel, which was afterwards condemned in the exchequer. It was contended for the plaintiff, that the capture was unlawful, becauſe the defendant did not belong to the cuſtom-houſe; and he could not juſtify the ſeizure under the hovering act, as king's ſhips only can ſeize under ſuch circumſtances. But Mr. Juſtice *Gould* held, that *as there was reaſon to ſuppoſe that the ſhip was a pirate*, though the jury ſhould be ſatisfied ſhe was not really ſo, yet the action would not lie. Afterwards there was a motion for a new trial, which, upon conſideration, was denied by the court. If there had been no ſuch authorities, and the queſtion had been now to be decided for the firſt time, there can be no caſe in which that maxim *quod inconveniens eſt non licitum eſt*, would deſerve more attention. It is a very uſeful and a wiſe maxim, when applied to new or undecided points—and in this caſe the inconvenience would be intolerable, the convenience none. If ſuch an action were ſuſtained, the inconvenience would be ſo great, that no officer would venture to ſeize a ſhip as prize, for he muſt do it at the peril of his utter ruin; ſince if he were miſtaken, he would be liable to an infinite number of actions, the coſts of which alone, ſuppoſing the damages to be univerſally as trivial as in the preſent caſe, no private man could diſcharge: the convenience would be none, becauſe by one ſuit in the admiralty court, each individual is entitled to recover a full recompence for the injury ſuſtained. The plaintiff is not at the mercy of the owner, for he might inſtitute a ſuit himſelf, or he might make himſelf perſonally a party in the ſuit commenced by the owner, or captor; and in that ſuit would be entitled to recover not only for damages done to his clothes or property, but for perſonal injuries to himſelf; ſome inſtances of which I have been favoured with from that court. And in this caſe, the admiralty have made allowance for the wages, proviſions, and expences of every man on board; which, for any thing that appears to the contrary on this record, is the meaſure of the real damages ſuſtained. I agree, that if it be clear upon principles or judicial authorities, that an action may be maintained, the inconvenience will not avail; the court muſt pronounce according to the law, as they find it, and parliament alone can relieve. But no ſuch principle, or authority, has been produced at the bar. The authorities are the other way; and ſo alſo is the principle, for the principle is, that the queſtion, prize or not prize, and the conſequences of it, are conuſable ſolely in the admiralty court; the true reaſon of which is, that prizes are acquiſitions *jure belli*, and the *jus belli* is to be determined

by the law of nations, and not by the particular municipal law of any country. It is true, that none of the caſes mentioned were founded on injuries to the perſon, but were all for damage done to the ſhip, or to the cargo or goods on board: but that I think makes no difference, for the queſtion muſt be the ſame in an action of falſe impriſonment, as it is in an action of treſpaſs for taking away the goods, or the ſhip; and the party injured is as much intitled to a ſatisfaction in the one caſe, as in the other in the admiralty court. But if there be any difference, that difference will operate in favour of the defendant; for a confinement under a capture is diſtinguiſhable from the common caſe of a falſe impriſonment. In the caſe of a capture, there is no diſtinct ſubſtantive act of impriſonment, it is only a neceſſary and unavoidable conſequence of the capture. The captors do not mean to confine the captured longer than they are forced to do ſo, for the purpoſe of ſecuring their ſuppoſed prize. They cannot throw them overboard, and they cannot ſecure the ſhip and cargo, without impoſing ſome reſtraint on the men; but the moment they get to a ſhore, they are as willing to get rid of the men, as the men themſelves can be. It has been admitted in the argument, that the queſtion *prize or not prize*, is a queſtion ſolely and excluſively to be determined in the admiralty court: but then it was contended, that after a ſentence in that court, declaring the ſhip to be no prize, an action might be maintained. But in ſuch actions as the preſent, the principal queſtion muſt be *prize or not prize*; for if the ſhip be a lawful prize, it is not a falſe impriſonment; and that is a queſtion which we cannot decide. The queſtion of *prize or not prize*, muſt ſtill ariſe, notwithſtanding the acquittal in the admiralty; for though the ſentence in that court is concluſive on the queſtion, yet it is evidence of a thing which this court cannot enquire into; for the original cauſe muſt all come in queſtion again, and that is not triable at common law, but altogether appropriated to the ſole juriſdiction of the admiralty. Beſides this, if *the original taking* be not a treſpaſs conuſable at common law, the ſentence of the admiralty court cannot give a juriſdiction to this court, which it had not before: that ſentence does not alter the nature of the original taking: It was ſtill a ſeizure as prize, which the common law does not take notice of as a treſpaſs, and *the ſentence cannot make that a treſpaſs which was not ſo at the time when the fact was committed.* Upon the whole, as the plaintiff has had, or may have, a remedy elſewhere, as there is no caſe in which it has ever been holden that ſuch an action can be maintained, and it would be attended with great miſchief and inconvenience if it could be maintained, and as there are ſeveral authorities which ſay the action will not lie, I am of opinion there muſt be judgment for the

defendant. Lord *Mansfield* declared his aſſent to every thing *Buller*, J. had ſaid. Judgment for defendant.

Rowland v. Veale and others, Hil. 14 Geo. 3. B.R. *Cowp.* 18.

In an action for falſe impriſonment, the plea of a juſtification under proceſs ſued out by the defendant, need not ſet forth the cauſe of action.—In an action of treſpaſs, aſſault, and falſe impriſonment, it was pleaded, 1ſt, as to the treſpaſs and aſſault, not guilty; 2dly, as to the impriſonment, a ſpecial juſtification, "that in a certain "court of record within the fee of Trematon, in the "counties of Devon and Cornwall, holden at the caſtle "of Trematon from three weeks to three weeks, the defen- "dant, Veale, *levied his certain plaint againſt the plaintiff, in "a certain plea of treſpaſs on the caſe, for a cauſe of action "perſonal, ariſing within the juriſdiction of that court*; and "that having therein recovered damages, a precept iſſued, "requiring the officer of the court to take the ſaid plaintiff, "ſo that he might have his body *at the next court*, under "which the plaintiff was arreſted." On a ſpecial demurrer to this plea, one objection was, that the defendants had not ſet out the cauſe of action, having only ſaid that the plaintiff below *levied his plaint*; and that they had not ſet forth, that *the preſent plaintiff became indebted* within the juriſdiction of the court. The point was argued; but the court held it well enough, and over-ruled the demurrer: for, by lord *Mansfield*, CH. J. who delivered the opinion of the court, Formerly, the courts of Weſtminſter Hall were much more ſtrict in regard to the ſetting-out proceedings of inferior juriſdictions: and nothing was to be preſumed in favour of their regularity, nor was it allowable to ſet them out with *a taliter proceſſum eſt*. But theſe objections, in point of form, have of late years been over-ruled to come at the real merits. As to the latter part of the objection, that it is not ſtated in the plea, that the plaintiff *became indebted within the juriſdiction*, the defendant ſhould have availed himſelf of it by plea in the court below; or if it was not alleged in the plaint below, to be within the juriſdiction, it would have been bad on error, or writ of falſe judgment; and ſo he might have taken advantage of it: but as he has taken neither of theſe methods, the preſumption is, that the cauſe of action did ariſe within the juriſdiction; and, in fact, it does appear as ſtrongly as poſſible, that the cauſe of action did ariſe within the juriſdiction; for it is expreſsly ſet forth, that the plaint was for a cauſe of action ariſing within the juriſdiction of the court.

Pelk v. Broadbent & ux. Ea. 2. Geo. 3. B.R. 3 *Ter. Rep.* 183.

So, in an action of treſpaſs and falſe impriſonment, to which the defendants pleaded a juſtification, ſtating, that a bill of Middleſex was ſued out at the ſuit of the defendants, indorſed for bail for 200l. *by virtue of an affidavit of the cauſe of action*, upon which the plaintiff was arreſted: to this

this plea there was a ſpecial demurrer, becauſe no cauſe of action was ſhewn for which the plaintiff was liable to be arreſted: the court over-ruled the demurrer. For *Per Buller*, J. with whom the other judges agreed, the objection has been over-ruled in ſeveral caſes, particularly that of Trematon, which was decided on the ground that the original cauſe of action was not traverſable. From that time to the preſent, it has been conſidered to be unneceſſary to ſtate the cauſe of action.

Another objection on the ſpecial demurrer to the plea in the caſe of *Rowland* v. *Veale* was, that it was not alleged that the precept for taking the body was ever returned to the court. But this was over-ruled; for, by lord *Mansfield*, CH. J. the diſtinction which has prevailed as to the neceſſity of ſtating that the writ was returned or not, is between a capias upon meſne proceſs, and a writ of execution: to a capias upon the former, the return of the precept muſt be ſet forth. But in the latter caſe it is unneceſſary, becauſe after execution the plaintiff has had the effect of his ſuit; but if the capias in proceſs be not returned, the arreſt is tortious, for there the object of the writ is to enforce the appearance of the party. Rowland v. Veale, Hil. 14 Geo. 3. B.R. *Cowp.* 18.

The third and laſt objection on the ſpecial demurrer in the ſame caſe was, that the writ was void, not being returnable *on a day certain*, but at *the next court*. But this was alſo over-ruled by the court, for by lord *Mansfield*, CH. J. it is ſtated in the preſent juſtification, that this court is holden from three weeks to three weeks; and that this is an execution againſt the body, not a writ upon meſne proceſs. In ſupport of this objection, *Cro. Car.* 254. *Dyer* 262. b. pl. 33. *Cro.* Jac. 314. 2 *Bulſt.* 436. 1 *Mod.* 81. were cited: but all theſe are caſes upon *meſne proceſs*, imparlance, or continuance. And the laſt caſe in order of time has departed from this rule of ſhewing a day certain, even upon *meſne proceſs*; and that is the caſe of *Crowder* v. *Goodwin*, 2 *Mod.* 58, 59. and was thus: in aſſault and battery, and falſe impriſonment, there was a juſtification by proceſs out of an inferior court; upon demurrer, ſeveral exceptions were taken to the plea; the ſecond was, that the precept was to take the plaintiff, and have him *ad proximam curiam*, which was not good, for it ſhould have been on a day certain. To this it was anſwered, that it was well ſet forth to have the plaintiff *ad proximam curiam:* the chief juſtice doubted, that upon this exception the plea was ill, but the three other judges held it good; and it was argued at the bar to be well ſet forth: for how can a return be upon a day certain, when the judge may adjourn *de die in diem?* But this caſe is much ſtronger than that, for here it is alleged upon the record,

that the court was holden from three weeks to three weeks, the day, therefore, was certain: *nam certum eſt quod certum reddi poteſt.* Judgment for the defendant.

Bingham *v.* Garnault, ſitt. Lond. cor. *Buller*, J. *Eſſinaſſe's Dig.* 317.

In an action for an aſſault and falſe impriſonment againſt the captain of a ſhip, who had pleaded not guilty; the defendant croſs-examined the plaintiff's witneſſes, as to expreſſions uſed by the plaintiff, which would have juſtified the impriſonment, they tending to create mutiny and diſobedience. Though this evidence was objected to by the plaintiff's counſel, yet the judge admitted it, holding as good evidence in mitigation of damages, *what was ſaid at the time*; for every thing which paſſed at the time was part of the tranſaction on which the plaintiff's action was founded, and he, therefore, could not be ſurprized by the evidence.

Sayre *v.* Earl of Rochford, M. 18 Geo. 3. C.B. 2 *Black.* 1165.

In treſpaſs and falſe impriſonment, the defendant pleaded, firſt, not guilty; ſecondly, a juſtification, as a privy counſellor and ſecretary of ſtate, for iſſuing a warrant againſt the plaintiff on a charge of high-treaſon. The plaintiff replied generally *de injuria ſua propria*; and on the trial, gave evidence of an offer and refuſal of bail. The jury, upon the *firſt iſſue*, found for the plaintiff; and on the juſtification for the defendant, ſubject to the opinion of the court, whether an offer and refuſal of bail was admiſſible under the iſſue joined on the ſpecial plea: By the court, nothing ought to be admitted in evidence, but what is material to the iſſue joined, either to prove or diſprove it. Nothing is in iſſue upon a ſpecial plea but what is directly traverſed: and the general replication *de injuria ſua propria abſque tali cauſa*, traverſes all the matters, and nothing but the matters contained in the plea. The plaintiff declares on a fact, which at firſt view is a treſpaſs. The defendant, in his plea, acknowledges that fact; but ſtates ſuch new circumſtances, as, if true, amount to a juſtification. If the plaintiff can ſuggeſt additional new matter, which ſhews that the defendant's aſſertions, though true, will not juſtify the treſpaſs committed, he ought to reply that new matter in a ſpecial replication, that the defendant may demur, or take iſſue upon it. In the preſent caſe, he has replied generally; the impriſonment I complain of is ſtill an injury, becauſe all you have ſaid in juſtification is abſolutely untrue. The word *de injuria ſua propria*, of his own wrong, are merely introductory. The traverſe is contained in the words *abſque tali cauſa*, without the cauſe alledged by the defendant. Whatever therefore goes to diſprove that cauſe is admiſſible evidence, but nothing elſe. Judgment for defendant.

3. *Treſpaſs, for an Injury affecting another in the Relation of a Maſter.*

Edmondſon *v.* Machell, Tr. 27 Geo. 3. B.R. 2 *Ter. Rep.* 4.

On a motion for a new trial, on the ground of a miſdirection to the jury, the judge before whom the cauſe was tried reported that this was an action of treſpaſs for aſſaulting and beating the plaintiff's niece, *per quod ſervitium amiſit.* The niece lived with her aunt as a ſervant; and the caſe proved on the part of the plaintiff, was aggravated with many circumſtances of ill treatment. Another cauſe ſtood next in the paper for trial, which was brought by the niece againſt the ſame defendant for the ſame aſſault; but the counſel for the plaintiff declared their intention of not trying that cauſe, and withdrew the record. The judge thought the aunt in this caſe ſtood in *loco parentis*; and as in actions brought by a father for deflowering his daughter, whereby he loſt her ſervice, large damages had been often given: he thought this caſe bore an analogy to that; and that the jury, upon the whole of the caſe, had a right to give ſuch damages as they thought juſt, conſidering the ſituation and circumſtances of the defendant, who was proved to have 300l. a-year. The jury found a verdict for the plaintiff, damages 300l.—It was admitted, that the damages were not exceſſive, according to the evidence given, if the jury could take both the actions into their conſideration at once. After a queſtion put to the plaintiff's counſel, whether the niece would enter into a rule not to proceed in the action, in which ſhe herſelf was plaintiff, which was anſwered in the affirmative, *Aſhhurſt*, J. ſaid, that an application for a new trial is an application to the diſcretion of the court, who ought to exerciſe that diſcretion in ſuch a manner as will beſt anſwer the ends of juſtice; but, in this caſe, it was certain that the girl herſelf ought to have ſome ſatisfaction for the injury ſhe received; and as ſhe conſented not to try her action, juſtice had been done, as it was admitted that if the injury ſhe had ſuſtained could be taken into conſideration in the action brought by the aunt, the damages were by no means exceſſive. He then ſaid, that there did not appear to be any ground for the defendant to call on the diſcretion of the court to ſend the cauſe down to be re-tried on a technical objection in point of law: and that all the judges were unanimouſly of opinion, without giving any poſitive opinion upon the queſtion of law, that as complete and ſubſtantial juſtice had been done, there was no reaſon to grant a new trial. And on the plaintiff's undertaking to pay over to the niece the damages, after deducting the coſts of this action, and on the niece's undertaking not to proceed in the action in which ſhe herſelf was plaintiff, the rule was ordered to be diſcharged *without* coſts.

4. *Treſpaſs for an Injury affecting a Man in the Relation of a Huſband.*

Smith *v.* Alliſon, ſitt. aſ. Tr. 5 Geo. 3. B.R. cor. Lord Manſfield *Buſl.* N.P. [27.]

In an action for criminal converſation with the plaintiff's wife, lord *Manſfield* laid it down as clear law, that if a woman be ſuffered to live as a proſtitute, with the privity of her huſband, and a man is thereby drawn into *crim. con.* and the huſband brings an action, it will not lie: it is a damage without an injury. If it be not with the huſband's privity, it will not go to the action, let her be ever ſo profligate, but only in mitigation of the damages; and *Pratt*, CH. J. of C.B. declared himſelf of the ſame opinion in a like caſe, much about the ſame time.

Duberly *v.* Gunning, Ea. 32 Geo. 3. B R. 4 *Ter. Rep.* 651.

So, in this action, which was for criminal converſation with the plaintiff's wife, the defendant, in anſwer to the caſe proved on the part of the plaintiff, gave evidence of many indecent familiarities between him (the defendant) and the plaintiff's wife in the preſence of her huſband, from whence the jury were preſſed to draw the inference of connivance on his part. Lord *Kenyon*, in ſumming up the evidence, told the jury, that, if they were of opinion that the huſband had conſented to the infidelity of his wife, it took away altogether the ground of the action, and they ſhould find a verdict for the defendant. If they thought, that though he had not gone that length, yet he had been guilty of groſs negligence or inattention to her conduct with reſpect to the defendant, that would go far in mitigation of the damages; and to this opinion he himſelf moſt ſtrongly inclined. But if they ſaw no ground for imputing even ſuch negligence to the plaintiff, then they were to aſſeſs what damages, under all the circumſtances, he was entitled to. The jury found a verdict for the plaintiff, with 5000l. damages. A new trial was afterwards moved for, on two grounds: 1ſt, on its being a verdict contrary to evidence; 2dly, on the ground of exceſſive damages. As to the firſt, the judges *Aſhburſt*, *Groſe*, and lord *Kenyon*, CH. J. *contra Buller*, J. thought that the jury had at all events done right in finding a verdict for the plaintiff; and as to the ſecond point, although they were of opinion that the court had the power in all caſes, under particular circumſtances, to order a new trial, on the ground of exceſſive damages, and they agreed that here the damages were enormous; yet they refuſed to ſet the verdict aſide: 1ſt, becauſe the damages depended upon mere ſentiment and opinion; and therefore the court having no certain rule to aſcertain how far they were exceſſive, could not interfere, and ſet up their own judgment againſt that of the jury, to which the conſtitution had referred the

queſtion

queſtion of damages: 2dly, becauſe there were no inſtances of the court's ever granting a new trial in ſuch a caſe as this for exceſſive damages, though many inſtances have occurred where the damages have been confeſſedly exceſſive.

Neither can any action for *crim. con.* be maintained for any act of adultery, after a ſeparation between huſband and wife. In an action for criminal converſation with the plaintiff's wife: it appeared that the plaintiff and his wife had agreed to live ſeparately: ſubſequent to their ſeparation, the plaintiff proved ſeveral acts of adultery committed by the defendant; but there was no direct proof of any act of adultery before the ſeparation. Lord *Kenyon*, who tried the cauſe, was of opinion that, as the giſt of the action was the loſs of the comfort and ſociety of the wife (which was alleged in the declaration in the uſual form) and there was no evidence of the act of adultery till after the plaintiff and his wife were ſeparated, proof of that act afterwards would not ſupport that allegation; and his lordſhip nonſuited the plaintiff. A new trial was afterwards moved for; but lord *Kenyon* adhered to his firſt opinion, and ſaid, it is material to conſider what is the giſt of this action: the plaintiff contends, that it is the criminal act, but that I deny. It is a civil action, brought to recover ſatisfaction for a civil injury done to the huſband, and not to puniſh the defendant for having broken the laws of morality and decency; but what injury is done to the plaintiff, who has voluntarily relinquiſhed his wife? it cannot be ſaid that he is deprived of the comfort and ſociety of his wife: I can ſee the immorality of the defendant's conduct in as ſtrong a light as any perſon; but ſtill this action muſt be confined within legal limits: this is like the caſe of an action by a father for the loſs of ſervice of his child; in which, however the parent may feel for the violation of his daughter's chaſtity, it is clear that no action can be maintained, unleſs ſome evidence be given that the daughter performed ſome acts of ſervice for the father. This is not like the inſtance of a temporary ſeparation from the wife, by the huſband's being in a different country, or the like; in ſuch caſe, the wife ſtill continues within the protection of the huſband, which ſhe does not here. *Aſhhurſt*, J. *Buller*, J. and *Groſe*, J. were of the ſame opinion. Rule diſcharged.

Weedon *v.* Timbrell, Tr. 33 Geo. 3. B.R. 5 *Ter. Rep.* 357.

To ſupport an action for criminal converſation with the plaintiff's wife, the plaintiff muſt bring proof of an actual marriage.—In this caſe, the plaintiff proved articles made after marriage with his wife, for the ſettling of the wife's eſtate, with the privity of the relations on both ſides, cohabitation, name, and reception of her by every body as his

Morris *v.* Miller, Ea. 7 Geo. 3. B.R. 4 *Burr.* 2057. 1 *Black.* 632. *Bull.* N. P. [28].

his wife (1). He proved further, that the defendant, on being aſked where major Morris's wife was? anſwered, in the next room; ſhe being there with him. But there was no proof of an actual marriage by any regiſter, or by any witneſſes preſent: and the fact was, that they were married at May-fair chapel, the regiſter-books of which could not, by 26 Geo. 2. c. 33. § 14. and 15. be admitted in evidence, and the miniſter who had married them was tranſported, and the clerk dead. A verdict was taken for the plaintiff, with 500l. damages, ſubject to the opinion of the court, whether, to ſupport an action for a criminal converſation, there muſt not be proof of an actual marriage. The caſe was fully argued: and lord *Mansfield* delivered the opinion of the court as follows: proof of *actual marriage* is always uſed and underſtood in oppoſition to proof by cohabitation, reputation, and other circumſtances from which a *marriage* may be *inferred:* and we are all clearly of opinion, that in this kind of action, an action for criminal converſation with the plaintiff's wife, *there muſt be evidence of a marriage in fact:* acknowledgment, cohabitation, and reputation are not ſufficient to maintain this action. But we do not at preſent define what may or may not be evidence of a marriage in fact. This is a ſort of criminal action; there is no other way of puniſhing this crime at common law: and it ſhall not depend upon the mere reputation of a marriage, which ariſes from the conduct or declarations of the plaintiff himſelf. No inconvenience can happen by this determination; but inconvenience might ariſe from a contrary determination; which might render perſons liable to actions founded upon evidence made by the perſons themſelves, who ſhould bring the action. Judgment of nonſuit.

Birt *v.* Barlow, Mic. 10 Geo. 3. B R. *Bull.* N.P. [27], *Doug.* 170 171.

But proof of a marriage in fact, may be done either by a copy of the regiſter, or by the teſtimony of one who was preſent at the ceremony: and it is not neceſſary to call one of the ſubſcribing witneſſes to prove the identity of the perſons married; for a copy of the regiſter is ſufficient evidence of the marriage in fact between perſons of the deſcription there mentioned; and any evidence which ſatisfies the jury as to the identity of the plaintiff and his wife being the perſons married, is ſufficient, as if the hand-writing of the huſband and wife to the regiſter is proved; or bell-ringers came to the parties, and ſaid they rung for the wedding, and were paid by them; or people dined at the wed-

(1) Which ſort of evidence may be offered and received in all caſes except two: one is in proſecutions for bigamy, and the other in actions for crim. con. *per* lord *Mansfield*, 4 *Burr.* 2058, 2059.

ding-

ding-dinner, or other circumſtances to aſcertain the perſons. In this caſe, which was an action of treſpaſs and aſſault for criminal converſation with the plaintiff's wife; the firſt witneſs called proved a copy of the regiſter of the pariſh of St. Alfred, Canterbury, in *hæc verba*—1767, No. 106. John Birt, Eſq. of the pariſh of St. Margaret, Rocheſter, county of Kent, and Harriot Champneys of this pariſh, married by banns, 15th December, 1767, by John Lynch, miniſter; witneſſes, Robert Lynch, Francis Champneys, Ann Lynch, Elizabeth Lynch. A witneſs was then called to prove the fact of adultery: and the plaintiff's counſel ſtated, that the identity of the parties would come out on the examination of the witneſſes, who would prove the adultery; but the judge directed the plaintiff to be non-ſuited, on the ground, that the identity of the parties ought to be proved by the miniſter, or ſome of the atteſting witneſſes, unleſs their not being produced could be accounted for, in the ſame manner as is required in the caſe of ſubſcribing-witneſſes to a deed. It was moved that this nonſuit might be ſet aſide, and a new trial granted. By lord *Mansfield*, the clauſes of the marriage act relative to regiſters, are of infinite utility to the kingdom. They were meant as well to prevent falſe entries, as to guard againſt illegal marriages without licence, or the publication of banns. The regiſters are directed to be kept as public books, and accompanied with every means of authenticity. But, beſides facilitating and aſcertaining the evidence of marriages, they were intended for other wiſe purpoſes. They are of great aſſiſtance in the proof of pedigrees, which has become ſo much more difficult ſince inquiſitions *poſt mortem* have been diſuſed, that it is eaſier to eſtabliſh one for five hundred years back, before the time of Charles II. than for one hundred years ſince his reign. But this advantage would be loſt; and it would be very prejudicial if the act were ſo conſtrued as to render the proof of marriages more difficult than formerly. I take it for granted, that the law ſtands as it did before in that reſpect. *Regiſters are in the nature of records, and need not be produced nor proved by ſubſcribing witneſſes. A copy is ſufficient, and is proof of a marriage in fact between two parties deſcribing themſelves by ſuch and ſuch names and places of abode, though it does not prove the identity.* An action for crim. con. is the only civil caſe where it is neceſſary to prove an actual marriage. In other caſes, cohabitation, reputation, and the like, are equally ſufficient ſince the marriage-act, as before. But an action for crim. con. has a mixture of penal proſecution; for which reaſon, and becauſe it might be turned to bad purpoſes by perſons giving the name and character of *wife* to women to whom they are not married, it ſtruck me

in

in the caſe of *Morris* v. *Miller*, that, in ſuch an action, a marriage in fact muſt be proved. I ſay a marriage in fact, becauſe marriages are not always regiſtered; there are marriages among particular ſorts of diſſenters, where the proof by a regiſter would be impoſſible. And *Denniſon*, J. in a caſe of that kind which came before him, admitted other proof of an actual marriage. BUT *as to the proof of identity, whatever is ſufficient to ſatisfy a jury, is good evidence. If neither the miniſter nor the clerk, nor any of the ſubſcribing witneſſes were acquainted with the married couple, in ſuch a caſe, none of them might be able to prove the identity.* But it may be proved in a thouſand other ways, ſuppoſe the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; ſuppoſe the hand-writing of the parties were proved; ſuppoſe perſons called, who were preſent at the wedding-dinner, or the like. *Willes*, J. and *Aſhhurſt*, J. of the ſame opinion. *Buller*, J. The original regiſter is not neceſſary to be produced; and it is only where *that* is required, that ſubſcribing witneſſes muſt be called. In this caſe, the wife's maiden name was *Harriot Champneys*; ſuppoſe a maid-ſervant had proved that ſhe always went by that name till the day of marriage; that ſhe went out that day, and on her return, and ever ſince was called Mrs. Birt: that would have been evidence of the identity. Rule abſolute.

Weedon v. Timbrell, Tr. 33 Geo. 3. B.R. 5 *Ter. Rep.* 361.

This action is conſidered as an action on the caſe, and not of treſpaſs; and the plaintiff is entitled to full coſts, though he recover leſs than 40s.

Batchelor v. Pigg, M. 13 Geo. 3. C.B. 3 *Wiſ.* 319. 2 *Black.* 854.

This was an action of treſpaſs againſt the defendant for having had criminal converſation with the wife of the plaintiff, wherein he declared, in the uſual form, that the defendant, with force and arms, made an aſſault upon the wife; and then and there debauched, abuſed, and carnally knew her, whereby he loſt the comfort and ſociety of the wife. On the trial, there was a verdict for the plaintiff, with 1l. 11s. 6d. damages; and the prothonotary taxed the plaintiff his full coſts; afterwards it was moved to ſet aſide the taxation, on the ground that this being an action of treſpaſs, aſſault, and battery, and the judge not having certified that an aſſault and battery was well proved, under the ſtatute, the plaintiff was not entitled to more coſts than damages. But the court were unanimouſly of opinion, that the plaintiff was entitled to his full coſts; for the giſt and ſubſtance of the action is the ſpecial damage; the criminal converſation; and not the aſſault, and is fully contained in theſe words of the declaration, viz. that the defendant debauched, abuſed, and carnally knew the plaintiff's wife: and its being laid that the defendant *with force and arms*, made *an aſſault*, are mere words of courſe, and only matter of form.

5. *Treſpaſs*

5. *Treſpaſs for an Injury affecting a Perſon in the Relation of a Parent.*

An action of treſpaſs will lie at the ſuit of a father for getting his daughter with child. This was treſpaſs againſt the defendant, for that he with force and arms made an aſſault upon the daughter and ſervant of the plaintiff, and got her with child, *per quod ſervitium amiſit*; and the jury, on the trial of the cauſe, gave 50l. damages. It being moved to ſet aſide the verdict, on the ground of exceſſive damages; it appeared from the judge's report, that the plaintiff's daughter, who was called as a witneſs, proved that the plaintiff was a maſter, and kept a public-houſe; that ſhe was his daughter and ſervant, and was about thirty years old; that the defendant was an exciſeman, and paid his addreſſes to her with an intention, as ſhe then thought, to marry her, with the conſent of her family. She alſo ſwore, that he promiſed her marriage, and got her with child. *Wilmot*, CH. J. Actions of this ſort are brought for example's ſake; and although the plaintiff's loſs in this caſe may not really amount to 20s. yet the jury have done right in giving liberal damages: and if the daughter brings another action againſt the defendant for the breach of promiſe of marriage, ſo much the better, he ought to be puniſhed twice: the daughter being of the age of thirty, is nothing to mitigate damages, or leſſen the defendant's fault. The other judges concurred. Rule diſcharged. Tullidge *v.* Wade, Ea. 9 Geo. 3. C.B. 3 *Wilſ.* 18.

But the daughter muſt be reſident in her father's houſe, and not in the ſervice of another. This was an action of treſpaſs *vi et armis*, for an aſſault upon the plaintiff's daughter, and getting her with child: and the declaration concluded with *per quod ſervitium amiſit*. On the trial, there was a verdict for the plaintiff, with 40s. damages, ſubject to the opinion of the court, whether the plaintiff could maintain the action, under the circumſtances of the caſe, which were in ſubſtance theſe?—The plaintiff's daughter, being twenty-three years of age, hired herſelf to one Saul, as a ſervant, and continued to ſerve him for ſome time: during her ſervice ſhe was got with child by the defendant; and becoming big, and unable to perform her ſervice, was diſcharged by her maſter: upon this ſhe returned to her father, who received her when no one elſe would, and lodged and boarded her in his houſe; and maintained her in her lying-in. It was argued for the defendant, that the foundation of actions of this kind has been the loſs of ſervice; that if the father maintains the daughter in his own houſe, he is entitled to her ſervice, and may maintain an action for the loſs of her ſervice, but here ſhe was hired out to ſervice in another man's houſe. THE COURT, as it appeared that the parties were poor, propoſed a com- Poſſlethwaite, *v.* Parkes, Ea. 6 Geo. 3. B.R. 3 *Burr.* 1878.

a compromiſe, which was accepted: it was, that all proceedings be ſtayed, without coſts on either ſide. Lord *Manſfield*, addreſſing himſelf to the counſel ſaid: "It is not upon "any doubt in point of law, that I propoſe this compro-"miſe;" meaning, as Sir James *Burrows* ſuppoſed, "that "this action could not be maintained." And there can be no doubt, adds the reporter, but that the court were all of opinion, "That the action could not be maintained;" and therefore, in compaſſion to the plaintiff, whoſe daughter had been injured by the defendant, they wiſhed to ſave him from the payment of coſts.

Bennet v. Allcott, M. 28 Geo. 3. B.R. 2 *Ter. Rep.* 166.

In treſpaſs for breaking and entering the plaintiff's houſe, debauching his daughter, deſcribing her as a menial ſervant, and getting her with child, *per quod ſervitium amiſit*. At the trial, it appeared that the defendant, who was a collector of the land-tax, viſited the plaintiff's daughter, in the character of a ſuitor, but at the time, when his entering the houſe was proved, in order to ſupport the treſpaſs, he went there to demand payment of the land-tax, when the plaintiff being from home, his wife invited the defendant to go into the daughter's bed-chamber, where ſhe was lying upon the bed, and left them together for ſeveral hours: it likewiſe appered, that the plaintiff was a conſiderable farmer; and that his daughter, who was thirty years of age, occaſionally did acts of ſervice. The jury gave a verdict for the plaintiff, with 200l. damages, which the judge thought was not exceſſive. A motion was made to ſet aſide this verdict: 1ſt, on the ground of exceſſive damages; 2dly, becauſe the daughter was above the age of twenty-one, and no contract for ſervice proved: BUT the court diſcharged the rule. For, by *Buller*, J. with whom the other judges concurred. An action merely for debauching a man's daughter, by which he loſes her ſervice, is an action on the caſe: but when the offence is accompanied with an illegal entry of the father's houſe (1), he has his election either to bring treſpaſs for the breaking and entering, and lay the debauching of the daughter, and loſs of her ſervice as conſequential; or he may bring the action on the caſe, merely for debauching his daughter, *per quod ſervitium amiſit*. In the preſent caſe, the plaintiff has made his election, and has brought an action of treſpaſs for breaking and entering his houſe, and all the reſt is merely conſequential. And, therefore, if the treſpaſs had not been proved, the defendant would have been entitled to a verdict; but it is now perfectly clear that a licence to enter cannot be given in evidence under the general iſſue. The plea of *not guilty* only goes to deny the fact of the treſpaſs: now as that was proved in fact, the plaintiff was entitled to a verdict; and

(1) 2 Lord *Raym.* 1032.

the

the only conſideration for the jury was as to the quantum of damages. And, indeed, upon the whole, the damages are not exceſſive; becauſe, though the mother acted indiſcreetly, yet the defendant was very culpable. He was introduced into the plaintiff's family as a ſuitor; he gained admiſſion into the houſe on honourable terms, and the family truſted to his honour. With reſpect to the objection that this action cannot be maintained by the father for debauching his daughter *above age, per quod ſervitium amiſit*, no contract for ſervice having been proved; I take it to be perfectly well ſettled, ſince the caſe of *Poſtlethwaite* v. *Parkes*, that the action will not lie by the father, unleſs the daughter be proved in ſome way or another his ſervant. In that caſe, the ground which influenced the opinion of the court, was, that the daughter was in the ſervice of another perſon. But in actions of this kind, the ſlighteſt evidence is ſufficient; even milking cows. Here *inſtances of actual ſervice* were *proved*; and therefore *it is immaterial whether the daughter were of age or not.* Neither is it material whether the ſervant be, or be not hired for a year, or whether ſhe has any wages, it being ſufficient that ſhe is a ſervant *de facto*. If this had been an action on the caſe, this objection could not have prevailed; and much leſs can it in this form of action.

6. *Treſpaſs by an Injury done to the Property of another.*

1. *Treſpaſs in reſpect of perſonal property.*] It has been decided in the court of King's Bench, that for driving one carriage againſt another, and thereby damaging the latter; the proper remedy is treſpaſs *vi et armis*. This was an *action on the caſe*, wherein the plaintiff declared that he was on a certain day poſſeſſed of a landaulet, and of a horſe drawing the ſame; and that the defendant was alſo on the ſame day poſſeſſed of a certain cart and horſe drawing the ſame, under his direction and management, and that the ſaid defendant then and there *ſo furiouſly*, negligently, and improperly drove the ſaid cart and horſe, that it was *driven, and ſtruck with great force and violence* upon and againſt the ſaid carriage of the plaintiff, &c. To this there was a ſpecial demurrer, aſſigning for cauſes that the declaration was for a mere conſequential injury, whereas it appeared to have been an immediate and direct treſpaſs; that the plaintiff had declared in treſpaſs on the caſe; whereas it ought to have been treſpaſs *vi et armis*, that the defendant was not poſitively charged with any of the facts, but only by way of recital: and alſo, that it was not alleged to be with force and arms, nor againſt the peace, &c. joinder in demurrer. Lord *Kenyon*, CH. J. The diſtinction between the actions of treſpaſs *vi et armis*, and on the caſe is perfectly clear. If the injury be committed by the immediate act complained of, the action muſt be

Day v. Edwards, Tr. 34 Geo. 3. B.R. 5 *Ter. Rep.* 648.

treſpaſs; if the injury be merely conſequential upon that act, an action upon the caſe is the proper remedy; in 1 *Strange*, 636, it is ſaid, if a man throw a log into the highway, and in that act it hits me, I may maintain treſpaſs, becauſe it is an immediate wrong: but if, as it lies there, I tumble over it, and receive an injury, I muſt bring an action upon the caſe. In the preſent caſe, the plaintiff complains of the immediate act; and therefore he ſhould have brought treſpaſs.— Judgment for the defendant.

Savignac v. Roome, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 125.

So, where the plaintiff declared in a plea of *treſpaſs on the caſe*, for that whereas the plaintiff was, on a certain day, poſſeſſed of a horſe and chaiſe, and that the defendant was poſſeſſed of a coach and two horſes, then under the care, government, and direction of his ſervant, and that *the defendant, by his ſaid ſervant*, then and there *wilfully* drove the ſaid coach and horſes againſt the plaintiff's chaiſe, &c. and cruſhed, broke, and damaged the ſame, &c. The defendant pleaded the general iſſue, and on the trial there was a verdict for the plaintiff; it was afterwards moved, in arreſt of judgment: 1ſt, Becauſe no action could be maintained againſt the defendant for *a wilful* act of the ſervant, accompanied with force, unleſs done by the command of the maſter; 2dly, If any action could be ſupported, it ſhould have been treſpaſs and not caſe; it was argued, that this was within the ſtatute 16 & 17 Car. 2. which ſays, that judgment is not be arreſted by reaſon of the omiſſion of the words *vi et armis* or *contra pacem*. Lord *Kenyon*, Ch. J. The whole frame and ſtructure of the declaration ſhew, that this is an action on the caſe, the memorandum is of an action of treſpaſs on the caſe, but in realty it ſhould have been treſpaſs, and the ſtatute 16 & 17 Car. 2. was never meant to apply to a caſe of this kind: this is as much the cauſe of an action of treſpaſs, as if the ſervant had given the plaintiff a blow, becauſe the injury was immediate, this falls directly within the principle of the caſe we ſo lately decided (*Day* v. *Edwards*) and therefore the judgment muſt be arreſted. *Aſhhurſt*, J. It appears from the frame of the declaration independently of the memorandum, to be an action on the caſe. And if it were in its inception an action on the caſe, the plaintiff cannot afterwards convert it into an action of treſpaſs, by means of the ſtatute of Charles the ſecond: that is a very beneficial act, but it never meant to confound the boundaries of actions, and to enable the plaintiff to call his action what he pleaſed at firſt, in order to meet the evidence at the trial, and afterwards to ſay it was intended to be a different kind of action: that act ſays, that if in an action of treſpaſs, which the plaintiff deſcribes in his declaration as an action of treſpaſs, he happens to omit the words *vi et armis* or *contra pacem*, the want of theſe words ſhall not vitiate the declaration, but where the action

action itſelf is miſconceived, the act of parliament was never intended to cure ſuch an objection. *Groſe*, J. and *Lawrence*, J. of the ſame opinion. Rule for arreſt of judgment abſolute.

But it has been decided contrary to the two laſt caſes in the court of common pleas: this was an action on the caſe, and the declaration ſtated that the plaintiff was on a certain day poſſeſſed of a chaiſe and horſe, and that the defendant was alſo poſſeſſed of a cart and horſe, then under the care, conduct, and management of his ſervant, and that the ſaid defendant, by his ſaid ſervant, ſo negligently drove the ſaid cart, that it ſtruck and run to and againſt the ſaid chaiſe of the plaintiff, *with great force and violence*, and then and there dragged the ſame to a great diſtance, and then and there broke, &c. A verdict having been found for the plaintiff; *Cockell*, ſerjeant, moved in arreſt of judgment, on the authority of the above caſes of *Day* v. *Edwards*, and *Savignac* v. *Reome*. The court ſeemed at firſt inclined to refuſe the rule, ſaying, that it was difficult to put a caſe, where the maſter could be conſidered as a treſpaſſer for an act of his ſervant, which was not done at his command; but they ſaid, that reſpect for the deciſions of the court of King's Bench, would induce them to give the point further conſideration, and accordingly a rule to ſhew cauſe was granted: but a few days afterwards *Cockell* acknowledged, that the rule could not be ſupported, in which the court concurred, being clearly of opinion, that caſe and not treſpaſs was the proper form of action. Rule diſcharged.

Morley v. Gaiſford, Ea. 35 Geo. 3. C.B. 2 *Hen. Black.* 442.

Evidence, that the defendant's ſervant drove a cart againſt the plaintiff's horſe, will ſupport a declaration which charges the defendant with the fact.—In this caſe the plaintiff declared againſt the defendant, for that he, on ſuch a day, was driving a cart and horſe, and ſo careleſly drove the ſame, that it was violently forced, and driven, and run againſt the plaintiff's horſe, and thereby the plaintiff's horſe was killed. The fact was, that the defendant's ſervant was driving the cart at the time the accident happened, and the defendant himſelf was not preſent. Whereupon it was objected at the trial, that the action was miſconceived, as it ought to have been ſtated not that the defendant himſelf had done the act, but that it had been done by the act of his ſervant, and on this objection the judge nonſuited the plaintiff. A rule was afterwards obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted, which was oppoſed on the authority of the caſe of *Tuberville* v. *Stampe* (1), where the plaintiff

Brucker v. Fromont, Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 659.

(1) Lord *Raym.* 264. *Skin.* 681. *Carth.* 425. *Salk.* 13.

declared

declared upon the cuſtom of the realm, againſt the defendant, for ſo negligently keeping his fire, that it conſumed the plaintiff's heath, and it only appeared that the fire was made by the defendant's ſervant, which ſhews that this mode of declaring was conſidered in Lord *Holt*'s time as the proper form where an action is brought againſt the maſter for the negligence of the ſervant, upon the principle that it is ſufficient to declare upon the legal effect of the act. THE COURT ſaid, that on reaſon and on principle, they ſhould have been inclined to ſupport the deciſion at *niſi prius*, but that the authority of the caſe of *Tubervillie* v. *Stamp*, could not be got rid of. That it may be ſtated in the declaration either way, though it is moſt convenient to ſtate the real cauſe of action on the record, as it actually happened. Rule abſolute.

Saunderſon *v.* Baker and Martin, Tr. 12 Geo. 3. C. B. 3 *Wilſ.* 309. 2 *Black.* 832.

An action of treſpaſs *vi et armis* will lie againſt the ſheriff for taking the goods of a wrong perſon under a warrant iſſued to a bailiff upon a writ of *fieri facias*. Upon a *fi. fa.* iſſued againſt one Beavor, the ſheriffs granted their warrant to Bollond, to levy 350 l. on her goods; and Bollond, under this warrant, entered into the plaintiff, Saunderſon's, lodgings, and took his goods, pretending the ſame to be Beavor's: on this, the plaintiff, Saunderſon, complained to the under-ſheriff, who ſaid, "Very well, Bollond (the bailiff) is a "raſcal: but we have ſecurity, and I don't care." There was no return made by the ſheriffs. In treſpaſs *vi et armis*, againſt the defendants, the ſheriffs, for breaking the houſe, and taking the goods, *De Grey*, CH. J. left it to the jury to ſay, whether the defendants had not recognized the act of their officer Bollond. The jury thought they had, and accordingly found for the plaintiff damages 350 l. A new trial was moved for, on the ground, that the verdict was contrary to evidence, and the direction contrary to law. For that the ſheriff is not anſwerable for his officer, when he acts contrary to his warrant (1); and here their warrant was to take the goods of Beavor; and having made no return, they have not adopted the illegal act of Bollond. *Gould*, J. I ſee no difficulty in this queſtion. Firſt, *as to the fact*: Here is a plain recognition of Bollond's act, by the deputy-ſheriff. Next, *as to the law*: In the caſe in 2 *Keble*, 352. treſpaſs was actually brought againſt an high-ſheriff: I have a manuſcript note of it: It was covenant by the high ſheriff againſt his under-ſheriff: and two breaches aſſigned, 1ſt, for an eſcape; 2dly, for executing on J.O. a *fieri facias*, ſued out againſt J.S. and returning *nulla bona*, of J.S. on which J.O. had brought treſpaſs againſt the high-ſheriff, and had

(1) 2 *Roll.* Abr. 552. 10 *Moor.* 667. *Latch.* 187. *Noy.* 90.

recovered

recovered: nor is this a new notion, in 13 *Hen.* 4. 2, action of falſe impriſonment lies againſt a ſheriff for his officers taking a falſe perſon. The high ſheriff and his officers are all one, *Bro.* Off. 24. and *Per tot. Cur.* The only queſtion is, whether the taking is wrongful; not who took the goods? *Blackſtone*, J. There are only two queſtions: 1ſt, Whether the ſheriff recognized the act of Bollond? The jury have found it ſo, and had evidence to ſupport their verdict. 2dly, Had the jury found it otherwiſe, ſtill the law makes the ſheriff anſwerable, for his officers, acting by colour of his warrant. That is the true diſtinction, the ſheriff and all his ſubſtitute, make but one officer. *Nares*, J. Both treſpaſs and falſe impriſonment lie againſt the ſheriff, for the act of his officer (1). I remember a caſe of Tyler and Johnſon, B.R. 1764. which was falſe impriſonment againſt the high ſheriff, for his bailiff's taking the plaintiff in Staffordſhire, and not in Worceſterſhire, which was tried at Stafford aſſizes; and it was held the action would lie. Rule diſcharged.

Ackworth v. Kempe, M. 19 Geo. 3. B.R. *Doug.* 40.

So, in this caſe, the goods of one *Wiſe* had been conveyed to the plaintiff *Ackwork*, by a bill of ſale, and had been actually removed from the houſe of Wiſe: afterwards, two writs of *fieri facias*, at the ſuit of different perſons againſt Wiſe, were delivered to the ſheriff of Suſſex, the preſent defendant, who granted warrants to his officer to execute them. The officer, in conſequence of the warrants, took the goods abovementioned in execution, and ſold them. Upon this Ackworth brought an action of treſpaſs *vi et armis* againſt the ſheriff, without joining the officer as a defendant. On the trial, the jury thought the fairneſs and conſideration of the bill of ſale were proved, and found a verdict for the plaintiff. A new trial was afterwards moved for, on the ground that the action would not lie againſt the ſheriff, becauſe his warrants being to take the goods of Wiſe, he had given no authority to his officer to take thoſe of any other perſon, and therefore was not anſwerable, if goods which did not belong to Wiſe had been taken. *Per* Lord *Mansfield*, In *Rolle's* Abr. 552 pl. 5. it is ſtated, that if a ſheriff take one man for another, falſe impriſonment lies againſt him; and although he ſays, if *a ſheriff* take, he means his bailiff; for ſheriffs never did execute proceſs in perſon. For all civil purpoſes the act of the ſheriff's bailiff is the act of the ſheriff. If there could be any doubt, it is cleared up by the caſe of *Saunderſon* v. *Baker* in C.B. The point appears to be extremely clear. Rule diſcharged.

---

(1) 11 *Hen.* 4. 90, 5 *Ed.* 4. 846. *Dalt. Sher.* 482. *Noy.* 27.

Aquilla Cole *v.* Hindſon *et al.* Ea. 35 Geo. 3. B.R. 6 *Ter. Rep.* 234.

So, where in treſpaſs for breaking and entering the plaintiff's houſe, and ſeizing, taking, and carrying away his goods, the defendants pleaded a juſtification, that the plaintiff, Aquilla Cole, being indebted to two of them for goods ſold and delivered, a *clauſum fregit* was ſued out againſt him by the name of *Richard* Cole, upon which he was ſummoned; that the plaintiff not appearing, a diſtingas iſſued out of the common pleas, commanding the ſheriff to diſtrain *Richard* Cole, meaning the ſaid *Aquilla* Cole; by virtue of which *Hindſon*, the officer entered and levied, &c. To this plea there was a general demurrer. In ſupport of the demurrer, it was contended, that the plea was bad; for the defendants were treſpaſſers in taking the goods of *Aquilla* Cole under a writ againſt Richard Cole; for though in *Crawford* v. *Satchwell*, 2 Str. 1218. it was determined, that, as the defendant had omitted to plead a miſnomer, he might be taken in execution under a *ca. ſa.* by a wrong name; becauſe having loſt the opportunity of taking advantage of the miſtake by a plea in abatement, he ſhould be concluded; yet here the plaintiff never appeared by his wrong, or indeed by any name, in the original action; ſo that he had loſt no opportunity of pleading in abatement. To this it was anſwered, that the plaintiff was concluded by the demurrer, having thereby confeſſed the truth of all the matters in the plea. Lord *Kenyon*, Ch. J. The defendants were not juſtified in ſeizing the goods of Aquilla Cole, under a diſtingas againſt Richard Cole; and the averment in the plea, that Aquilla and Richard are the ſame perſon will not aſſiſt them, as they have not alſo averred, that the plaintiff was known as well by one name as by the other. In the caſes cited from *Strange*, the party had appeared in the original action, and done an act to avow that he was ſued by the right name. *Lawrence*, J. concurred. Judgment for the plaintiff.

Ward *v.* Macauley and another, Mic. 32 Geo. 3. B.R. 4 *Ter. Rep.* 489.

But treſpaſs will not lie againſt the ſheriff for taking the furniture of a houſe, let ready furniſhed, under an execution iſſued againſt the tenant, notwithſtanding he has notice that the furniture is not the property of the tenant. The plaintiff in this action was the landlord of a houſe, which he let ready furniſhed; and the leaſe contained a ſchedule of the furniture. An execution was iſſued againſt the tenant, under which the defendants (ſheriff of Middleſex) ſeized part of the furniture, notwithſtanding the officer had notice that it was the property of the plaintiff. For this the plaintiff brought an action of treſpaſs againſt the defendants. At the trial, lord *Kenyon* thought that treſpaſs would not lie, and that the plaintiff ſhould have brought trover: a verdict, however, was taken for the plaintiff, with liberty for the defendants to move to enter a nonſuit, if the court ſhould be of opinion that the plaintiff could not recover in this form of action. It was afterwards moved to enter up a nonſuit. Lord *Kenyon*, Ch. J. The diſtinction between the actions of treſ-

paſs

paſs and trover is well ſettled; the former is founded on poſſeſſion, the latter on property. Here the plaintiff had no poſſeſſion. This remedy was by an action of trover, founded on his property in the goods taken. *Per Curiam*, Rule abſolute.

Badkin *v.* Powell, King, and Chancellor, M. 17 Geo. 3. B.R. *Cowp.* 476.

Treſpaſs *vi et armis* will not lie againſt the keeper of a pound merely for receiving a diſtreſs, though the original taking be tortious. This was an action of treſpaſs *vi et armis*, brought by the plaintiff againſt the defendants, for taking and detaining the plaintiff's cart and horſes. The plaintiff was a running duſt-man, and the defendant Powell a public ſcavanger. Powell and King detained the plaintiff's cart and horſes, as they were ſtanding in the ſtreet, under pretence of their being an eſtray, and within the city of London; and carried them to the green yard, of which the defendant, Chancellor, was the pound-keeper, who afterwards inſiſted upon being paid certain ſums of money, which the plaintiff was accordingly obliged to pay. Upon *not guilty* pleaded, the jury found a verdict for the plaintiff againſt all the three defendants: afterwards, upon ſhewing cauſe why a verdict ſhould not be entered in this caſe for the defendant, Chancellor; it was urged, 1ſt, That on the merits of the caſe he was a treſpaſſer; 2dly, That even ſuppoſing on the merits of the caſe he was no treſpaſſer; yet, by pleading the general iſſue, he had miſpleaded, and ought to have juſtified. Lord *Mansfield*, Firſt, as to the merits of the caſe; Chancellor, the keeper of the pound, had no concern in the taking or bringing the cart and horſes there. How then is he guilty of a treſpaſs? The pound is the cuſtody of the law; and the pound-keeper is bound to take and keep whatever is brought to him, at the peril of the perſon who brings it. There is no judgment, no direction, no written warrant or examination to be had by him, where is the treſpaſs committed by him? he does nothing to ratify it: but only takes the cattle as he is obliged to do, at the peril of the perſon who brings them. If wrongfully taken, they are anſwerable, not he. It would be terrible, if a pound-keeper were liable to an action for refuſing to take cattle in, and were alſo liable in another action for not letting them go. If he goes one jot beyond his duty, and aſſents to the treſpaſs, that may be a different caſe. [The caſes where a party concerned in any ſubſequent ſtage of the buſineſs is held liable to an action, are where he renders himſelf ſo *by aſſenting* to the original treſpaſs. *Per Aſton*, J.] But here is no aſſent to the treſpaſs; the pound-keeper has done nothing beyond his duty: when the cattle are once impounded, he cannot let them go without a replevin; or without the conſent of the party. Upon their being releaſed, he is entitled to legal fees: if he is guilty of extortion, there is another remedy.—This is a clear anſwer to the ſecond objection, that he has not pleaded

ſpecially, as it has been contended he ought to have done. No man is bound to juſtify who is not, *prima facie*, a treſpaſſer. A gaoler, if he has a perſon in cuſtody is, *prima facie*, guilty of an impriſonment; and therefore muſt juſtify [a priſoner cannot be delivered to him without a warrant: therefore he muſt ſtate the warrant. *Per Aſton*, J.] But here, by the plaintiff's own ſhewing, the pound-keeper had nothing to do with the taking. [A pound-keeper has only to put the cattle into the pound; and the inſtant they are in the pound, they are in the cuſtody of the law. *Per Aſton*, J.] The law thinks him ſo indifferent a perſon, that if the pound is broken, the pound-keeper cannot bring an action, but it muſt be brought by the party who diſtrained. It would be attended with terrible inconveniencies, if he was anſwerable for a wrongful taking by the perſons who bring the cattle to him: therefore, there muſt be judgment for the defendant, Chancellor, in this caſe. *Aſton*, *Willes*, and *Aſhhurſt*, Juſtices, concurred.

Oxley *v.* Watts, M. 26 Geo. 3. B.R. 1 *Ter. Rep.* 12.

But treſpaſs will lie for working an eſtray, although the original taking be lawful. This was an action of treſpaſs for taking a horſe: juſtification as an eſtray: replication, that after the taking mentioned in the declaration, the defendant worked the ſaid horſe, and ſo became a treſpaſſer, *ab initio*. It was moved to ſet aſide a verdict that had been obtained for the plaintiff. But, *Per Cur.* the ſubſequent uſing is an aggravation of the treſpaſs in taking the horſe; for the uſing made him a treſpaſſer *ab initio*.

Gates *v.* Bayley, Tr. 6 Geo. 3 C.B. 2 *Wiſ.* 313.

But in theſe caſes, unleſs the plaintiff, on a plea of juſtification, replies, that the defendant abuſed the diſtreſs, the action cannot be ſuſtained. In treſpaſs, for taking and impounding the plaintiff's cattle, and keeping them in the ground ſo cloſely confined together, that by reaſon thereof one of the beaſts died, the defendant pleads, 1ſt, the general iſſue to the whole declaration, and thereupon iſſue is joined: 2dly, a juſtification that he took the cattle, damage feaſant, and impounded them. The plaintiff replies *de injuria ſua propria*, and thereupon iſſue is joined. The jury gave a verdict for the plaintiff, upon the general iſſue, with damages for the beaſt that died: upon the other iſſue, on the juſtification, they found for the defendant. It was afterwards moved, that judgment might be entered for the defendant, becauſe the jury had found for him on the juſtification, which covered the whole treſpaſs in the declaration: and by THE COURT, the juſtification is an anſwer to the whole treſpaſs in the declaration, which is only the taking and impounding; all the reſt, as the dying of the beaſt, is only aggravation: *if the plaintiff would have inſiſted, that the defendant had abuſed the diſtreſs, he ought to have replied, that after the ſaid diſtreſs, the defendant abuſed it ſo and ſo*; and

and have concluded with an averment, and this would not have been a departure, becauſe he who abuſes a diſtreſs is a treſpaſſer *ab initio*. Judgment for the defendant, *per tot. Cur.*

So, in treſpaſs for taking the plaintiff's hog, and converting it to his own uſe, the defendants pleaded, 1ſt, not guilty, upon which iſſue was joined: 2dly, that they took the hog damage feaſant, and impounded it: to this ſecond plea, the plaintiff repli d, that after the taking and impounding, the defendants converted the hog to their own uſe. To this replication there was a general demurrer, and joinder in demurrer. For the plaintiff, it was argued, 1ſt, That this being an action of treſpaſs, and not trover, the converſion of the hog, as laid in the declaration, was only matter of aggravation, and need not be juſtified in treſpaſs; the converſion being totally independent of the taking, and not a treſpaſs *vi et armis*. 2dly, That the defendant's ſecond plea having fully anſwered and juſtified the whole treſpaſs in the declaration, which was only *the taking, driving, and carrying away the hog* (the *converſion* thereof being only aggravation) it then became neceſſary for the plaintiff to ſhew and allege, that notwithſtanding the taking the hog, damage feaſant, and impounding the ſame were lawful, the defendants afterwards converted and diſpoſed thereof to their own uſe, and thereby became treſpaſſers *ab initio*; and the whole court being of that opinion, were about to give judgment for the plaintiff; but on the motion of the defendants' counſel, leave was given to withdraw the demurrer upon payment of coſts.

Dye *v.* Leatherdale, and Simpſon, M. 10 Geo. 3. C.B. 3 *Wilſ.* 20.

So, where the defendant in treſpaſs for taking and carrying away the plaintiff's halter, and converting the ſame to his own uſe, pleaded, 1ſt, the general iſſue; 2dly, a juſtification under a preſcriptive right to diſtrain for toll. On the juſtification, the jury found for the defendant; but on the general iſſue, the plaintiff had a verdict. A motion was afterwards made to enter up judgment for the plaintiff, notwithſtanding the defendant had proved this juſtification, becauſe it did not cover the whole treſpaſs, namely, the converſion. But the court held, that as the defendant's plea had fully anſwered the giſt of the action, which was the taking, the converſion thereof being only aggravation, it became neceſſary for the plaintiff to reply, that the defendant afterwards converted, &c. and thereby became a treſpaſſer *ab initio*.

Fiſherwood *v.* Cannon, H. 5 Geo. 3. C.B. cited 5 *Ter. Rep.* 297.

Treſpaſs cannot be ſuſtained againſt a party for ſeizing a ſhip *as forfeited*, under the navigation act, by alleging that the defendant did not proceed to condemnation. In treſpaſs for taking the plaintiff's ſloop, or veſſel, with a cargo of log-wood and mahogany, the defendant, who was governor of the Bay of Honduras, pleaded, that the cargo being, by virtue of the navigation act, 12 *Car.* 2. c. 8. § 1. forfeited,

Wilkinga *v.* D ſpard, Hil. 33 Geo. 3. B.R. 5 *Ter. Rep.* 112

together with the ſaid ſloop or veſſel, and all its guns, &c.; the defendant did *ſeize, take, and carry away* the ſaid cargo and the ſaid ſloop or veſſel then carrying the ſame, *as forfeited* to and for the uſe of his ſaid majeſty, and of himſelf, the defendant: replication, that the defendant, after the ſaid ſeizing, taking, and carrying away the ſaid cargo and the ſaid ſloop or veſſel, *as forfeited* to and for the uſe of his ſaid majeſty, and of himſelf (the defendant) to wit, on ſuch a day, *without any ſentence of condemnation* of the ſaid cargo, and the ſaid ſloop or veſſel, being given or rendered by any court, *ſold and diſpoſed of the ſaid ſloop or veſſel, and cargo, and converted and diſpoſed thereof to his own uſe.* To this the defendant demurred. By THE COURT, the facts, as admitted on the record, are theſe: to an action of treſpaſs, for taking the plaintiff's ſhip and goods, the defendants have pleaded that the ſhip, &c. was *ſeized as forfeited.* This is not denied by the replication, but is admitted: the plaintiffs might have put that matter in iſſue, and then the facts might have been inquired into. The plaintiffs, however, contend, that the legality of ſeizure may come in queſtion on this record; but when it is admitted by the pleadings; as a fact, that the ſhip was ſeized as forfeited under the navigation act, the court cannot ſay, as a point of law, that ſhe was not ſeized for that purpoſe, and that the defendant is a treſpaſſer, merely becauſe it appears that he did not proceed to condemnation: *Judgment for the defendant:* BUT the court gave the plaintiffs leave to amend the pleadings, if they thought they could vary the facts.

Bonnel, *v.* Beighton and another, Ea. 33 Geo. 3. B R. 5 *Ter. Rep.* 182.

And if an act which authorizes the levying of a ſum of money on certain perſons gives an appeal to the ſeſſions, in all caſes where the parties think themſelves aggrieved, an objection to the aſſeſſment cannot be tried in an action of treſpaſs, but the party aggrieved muſt appeal. To treſpaſs for taking the plaintiff's goods, the defendants juſtified the granting a warrant of diſtreſs, as commiſſioners of the Duffield incloſure act (26 Geo. 3.) for nonpayment of the plaintiff's ſhare of the aſſeſſment on him as a proprietor. The plea ſtated, that by that act the commiſſioners were authorized to ſet out and make roads; and that it directed that the expences of making and repairing thoſe roads, and all other expences ſhould be borne by the owners and proprietors in certain proportions to be aſcertained by the commiſſioners in one general rate, and levied by their warrant of diſtreſs; and that it *gave an appeal to any perſon who ſhould think himſelf aggrieved by any thing done in purſuance of the act,* (except where the orders or determination of the commiſſioners were directed to be final) *to the general quarter-ſeſſions, at which the juſtices were authorized and required to hear and determine the matter of every ſuch appeal; and to make*

ſuch

ſuch order as to them ſhould ſeem meet, which was to be final and concluſive on all parties: the plea then ſtated, that the defendants acted as commiſſioners under the act, and made an aſſeſſment on the proprietors, by which aſſeſſment the plaintiff was rated in certain ſums, for his proportion of the charges, and that for nonpayment thereof, the defendants, in purſuance of the powers given to them by the act, granted a warrant of diſtreſs, under which the goods were taken. To this the plaintiff replied, that the defendants, by colour of the act, cauſed to be repaired and widened divers ancient roads and ways which the proprietors were not bound or liable to repair; and that great part of the charges in the plea mentioned, were incurred in ſo repairing and widening the roads laſt aforeſaid, and that the defendants, &c. of their own wrong ſeized and took the goods, &c. To this replication there was a demurrer; and the following cauſes were aſſigned, viz. that the plaintiff attempted to put in iſſue collateral matters; that the replication did not ſet forth which of the roads were out of the juriſdiction of the commiſſioners, or by whom or how they were to be repaired; that no material iſſue could be taken upon the replication, and that the ſame was evaſive and argumentative, and in other reſpects defective, &c. It was argued that the effect of the plaintiff's complaint was merely that he was aſſeſſed in too large a ſum, for which his remedy was by appeal to the ſeſſions. On the other ſide, it was admitted, that if the objection were merely to the quantum of the rate, the plaintiff's remedy was by appeal to the ſeſſions: but it was argued, that, as this was an exceſs of juriſdiction as to part, which was admitted by the demurrer, this action might be ſupported.—Lord *Kenyon*, Ch. J. This caſe cannot be diſtinguiſhed from the caſe of an aſſeſſment made by the overſeers of the poor, in which they ſometimes make improper charges, that ought not to be carried to the account of the pariſh; ſuch as the expences of feaſting and the like; but it never was pretended, that, on that account, the whole rate was to be conſidered as illegal, and its legality diſcuſſed in an action of treſpaſs. The legiſlature have eſtabliſhed a much more convenient forum, the quarter-ſeſſions, where thoſe queſtions may be canvaſſed, and where proper enquiry may be made whether or not certain ſums charged to the public have been properly expended, and ought to be allowed? This court has always diſclaimed entering into any queſtion reſpecting the quantum of the rate in an action of treſpaſs; and has ever referred the parties to the ſeſſions; to that tribunal which the legiſlature have ſpecially appointed for that purpoſe. So, in this caſe, for this purpoſe among others, juriſdiction is given to the quarter-ſeſſions, by way of appeal, that they may have a check and control over the expenditure of the public

money. The legiſlature have not enumerated all the diſtinct matters by which any perſon may be aggrieved; but the words are general: "If any perſon ſhall think himſelf "aggrieved by any thing done in purſuance of the act." And, therefore, in all caſes where a party thinks himſelf aggrieved by any thing done under the act, he may appeal to the ſeſſions; and, by way of greater caution, it is added, "which determination of the juſtices ſhall be final and con- "cluſive to all parties concerned." The plaintiff, therefore, has miſtaken his remedy; he ſhould have reſorted to the ſeſſions on the ground of an exceſs in the rate, inſtead of diſcuſſing the queſtion in an action of treſpaſs, where it is impoſſible to arrive at the real merits of the caſe. *Aſhhurſt*, J. was of the ſame opinion. *Buller*, J. In order to determine this diſpute between the plaintiff and the commiſſioners, the former ſhould have appealed to the ſeſſions; where, if he was right in his objection, ſo much of the charges might have been ſtruck out of the rate; but ſtill the rate would be valid as to the reſt. This action of treſpaſs cannot be ſupported, the plaintiff's remedy was by appeal. *Groſe*, J. of the ſame opinion.—Judgment for the defendants.

Bertie *v.* Pickering & *ux.* Tr. 9 Geo. 3. 4 *Burr.* 2455.

And in treſpaſs for taking goods, the declaration muſt ſpecify the particulars. This was an action of treſpaſs. One of the counts was for *taking goods* generally, *without ſpecifying* the particulars. A general verdict had been found for the plaintiff; and one penny damages. In ſhewing cauſe againſt a motion in arreſt of judgment: it was urged, that the particulars were ſpecified in *other counts* in the declaration; and after verdict, the objection could not be taken.—Lord *Mansfield*. The true reaſon (1) why in an action of treſpaſs for goods taken away, the particulars ought to be ſpecified, is, "that the defendant cannot juſtify, unleſs the "particulars are ſpecified;" for how can the defendant juſtify, unleſs the goods are ſpecified? how can he juſtify taking divers goods. *Yates*, J. concurred in this as the true reaſon. This is a general verdict; and, therefore, if one count is bad, the judgment muſt be arreſted. *Per Cur.* Judgment arreſted.

Bcot *v.* Cooper, Ea. 25 Geo. 3. B.R. cited 1 *Ter. Rep.* 535.

2. *Treſpaſs in reſpect to the realty.*] In an action of treſpaſs againſt an officer of exciſe for entering under a warrant of two commiſſioners, founded on the 10 Geo. 1. c. 10. into the plaintiff's houſe to ſearch for concealed goods, the court held that the defendants were not treſpaſſers, even though they found nothing in the plaintiff's

(1) See 2 lord *Raym.* 1410. where another reaſon is aſſigned, viz. that the recovery could not be pleaded in bar of another action for the ſame goods.

houſe,

houſe, the act itſelf being legal; but that the only remedy was by an action on the ca e for obtaining or executing the warrant from bad motives.

Where the plaintiff declared that the defendant, on ſuch a day, with force and arms, broke and entered the plaintiff's dwelling-houſe, and continued therein for ſix hours; and during the whole time, made a great noiſe, diſturbance, and affray; and wrenched and forced open his cloſet-doors, drawers, cheſts, cupboards, and cabinets, and the goods of the ſaid plaintiff, of the value of 500l. then and there found, toſſed, tumbled, and damaged, &c. To this there was a demurrer, and joinder in demurrer; and the cauſes aſſigned for demurrer were, that *the plaintiff had not particularly ſpecified the goods*, which by his ſaid declaration were ſuppoſed to have been toſſed, tumbled, damaged and ſpoiled; nor the number of cloſet-doors, drawers, cheſts, cupboards, and cabinets, ſuppoſed to be wrenched and forced open.—For the plaintiff it was argued, that the eſſential matter of fact, or treſpaſs alleged in the declaration, and for which the action was brought, was *the breaking and entering the plaintiff's dwelling-houſe*; and that the further deſcription, viz. the making a noiſe, diſturbance, and affray, the wrenching and forcing open the cloſet-doors, drawers, cheſts, cupboards, and cabinets, the toſſing, tumbling, damaging, and ſpoiling the goods, was not the foundation of the action, but only matter laid *by way of aggravation*, and to ſhew how enormous the treſpaſs was: and of this opinion were the whole court, who gave judgment for the plaintiff. Chamberlain *v.* Greenfield, Ea. 12 Geo. 3 C.B. 3 *Wilſ.* 292.

So, in an action of treſpaſs, the firſt count of the declaration was for breaking and entering the plaintiff's houſe (viz. the King's Theatre, or Opera Houſe) *and expelling, putting out, and amoving* him therefrom, by means of which the plaintiff was prevented from performing operas, &c. with other circumſtances of ſpecial damage; the ſecond count was for expelling, putting out, and amoving the plaintiff from the occupation of his houſe. The defendant, after pleading not guilty, juſtified the breaking and entering in the firſt count, under a writ of *fieri facias*, directed to them, as ſheriff of Middleſex, to levy for the debt of one Joſeph Hayling. They juſtified the expulſion in the ſecond count, under another *fieri facias*, at the ſuit of R. B. Sheridan, ſtating, that the *plaintiff was poſſeſſed of a certain intereſt in the reſidue of a certain term of years* then to come, and unexpired in the ſaid houſe; and that by virtue of the ſaid writ, they *ſeized and took* the ſaid intereſt of the ſaid plaintiff, and duly ſold and aſſigned the ſame to Harris, who afterwards entered, the door of the houſe being open, and peaceably and quietly expelled him. The plaintiff took iſſue upon the firſt plea, and demurred generally to the two laſt. On Taylor *v.* Cole, Ea. 29 Geo. 3. B.R. 3 *Ter. Rep.* 292.

the

the trial, at Weſtminſter ſittings, a verdict was entered generally on the whole record: and now, after argument on the demurrer, by *Buller*, J. (with whom the other judges agreed) the verdict cannot remain as it is at preſent; for it is taken *generally*; and only one act of treſpaſs was proved. I am not ſatisfied, that the jury could have found a verdict for any expulſion at all; for if Harris had acted illegally, that could not affect the ſheriff; who, when he had ſold the term, was *functus officio*. And even ſuppoſing the expulſion to have been by the ſheriff, yet there being but one act of expulſion proved, the plaintiff could not be entitled to a verdict on both counts; becauſe each imports to be a different treſpaſs; and the plea of not guilty goes to the whole declaration; therefore, the verdict ſhould have been thus, guilty of breaking and entering, &c. in the manner ſtated in the firſt count, and not guilty as to the ſecond. The caſe on this record would then ſtand thus: there are two counts, and only one act of treſpaſs was proved; the firſt ſpecial plea juſtifies one treſpaſs; and if two had been committed, the defendant might have applied that juſtification to which he pleaſed: but here only one treſpaſs was proved, which the defendant has juſtified, as the treſpaſs mentioned in the firſt count. To that plea there is a demurrer: then conſider whether that plea covers the whole count? I am of opinion it does. The firſt count is for breaking, entering, and expelling: the plea only juſtifies the breaking and entering, ſhewing a good cauſe for it; and that is a full anſwer to the firſt count; for *the breaking and entering are the giſt of the action, and the expulſion is only matter of aggravation.* If the plaintiff had wiſhed to take advantage of this expulſion, which was merely matter of aggravation, he ſhould have replied, and ſhewn the ſpecial matter in a new aſſignment to make the party a treſpaſſer *ab initio*. If then the firſt count be fully anſwered by the firſt plea, and that be good in point of law, there muſt be judgment for the defendant. As to the objection that has been taken, that the plea does not ſtate what intereſt the plaintiff had: what has been obſerved by my lord *Kenyon* is deciſive, namely, "it ſtates, that "the plaintiff *was poſſeſſed of a certain intereſt in the reſidue of* "*a term of years*. And the ſheriff, who had not the title-"deeds, could not exactly define what the preciſe intereſt "was: but he ſtates, that the plaintiff was in poſſeſſion of "a certain term; and it is impoſſible to ſuggeſt any poſ-"ſeſſion of a *certain term* that is not the ſubject-matter "of a ſeizure by the ſheriff under a *fieri facias*. This plea "does not ſtate that the ſheriff put the aſſignee into poſſeſ-"ſion, but only that he aſſigned to Harris, who afterwards "entered, and *peaceably and quietly expelled the plaintiff*. It "is true, that perſons having only a right, are not to aſſert

" that right by force; but here the queſtion is, whether a " perſon having a right of poſſeſſion, may not peaceably " aſſert it, if he do not tranſgreſs the laws of his coun- " try; and he certainly may, for a perſon who has a right " of entry, may enter peaceably; and being in poſſeſſion, " may retain it, and plead that it is his ſoil and freehold. " And this will not break in upon any rule of law, reſpect- " ing the mode of obtaining the poſſeſſion of lands." In a deed of aſſignment, the ſheriff need not ſpecify the particular intereſt which the party had (4 *Rep.* 74.): then if he can convey a title in general words, it is equally ſufficient to juſtify in the ſame general words in an action of treſpaſs. With regard to the laſt plea, I think it is bad, on this ground: it begins with juſtifying the expulſion, and yet does not admit it. And it is a rule in pleading, that the party juſtifying, muſt ſhew and admit the fact; but here the laſt plea does not admit that the defendant ever expelled the plaintiff at all: the plea ſtates, that the defendant entered, and ſold to Harris, who afterwards entered and quietly expelled, which does not affect the ſheriff. On the other point, namely, in what caſes the ſheriff would be juſtified in expelling the party under a *fieri facias*, I give no opinion, but it ſeems to me, that when there is a tenant in poſſeſſion, and the execution is againſt the landlord, whoſe term is to be ſold, the tenant cannot be turned out of poſſeſſion: but that is very different from the preſent caſe, where the debtor himſelf is in poſſeſſion. In ſuch caſe, I incline to think, that the ſheriff may turn him out of poſſeſſion. A verdict was then entered on the firſt count, and not guilty on the ſecond; and judgment for the defendant on the demurrer to the ſpecial plea, and for the plaintiff on the ſecond; ſo that eventually the plaintiff took nothing by his writ.

Afterwards the plaintiff brought a writ of error in the Exchequer Chamber; and on argument there, it was inſiſted, 1ſt, That the verdict on the general iſſue intitled him to judgment for the expulſion, as a treſpaſs, not covered by the juſtification, and that he was intitled to all the damages, the defendants becoming by the expulſion treſpaſſers *ab initio*; or, 2dly, That he was intitled to damages for the expulſion, and to have a *venire de novo*, to aſſeſs thoſe damages. By lord *Loughborough* (by whom the judgment of the court was given) the firſt point was not much laboured ſo the damages aſſeſſed by the jury, on a ſuppoſition that the defendant had broke and entered the houſe, and expelled the plaintiff, can never be the juſt meaſure of damages, when the principal part of the acts imputed to the defendants are found to be legal. On the ſecond point, it is evident that the plaintiff would be entitled to only nominal damages, if a new *venire* were awarded, for where the expulſion was ſtated as a ſubſtantive treſpaſs,

Taylor *v.* Cole *& al.* in Error in the Exchequer Chamber, H 31 Geo. 3. 1 *Hen. Black.* 555.

treſpaſs, the jury found the defendant not guilty; and one muſt ſuppoſe that they would have done the ſame on the firſt count, had the expulſion been ſtated as an actual independant treſpaſs. It is not neceſſary to conſider in what caſes expulſion may be a ſubſtantive treſpaſs; undoubtedly, to enter into a houſe, and to expel the poſſeſſor, may be diſtinct acts, and they may be alſo connected. But when the plaintiff charges them as parts of one treſpaſs, as is the caſe in this declaration, and the defendant ſets forth a juſtification to the principal act (the entry), it is juſt that the plaintiff ſhould, either by replication or new aſſignment, ſtate that he inſiſts on the expulſion as a ſubſtantive treſpaſs, ſuppoſing the entry ſhould be lawful. If he does not, it is juſt to conſider it only as matter of aggravation. The plaintiff complains that the defendant broke and entered his houſe, and expelled him; the defendant ſhews a juſtification of the entry: if the expulſion makes him a treſpaſſer *ab initio*, it takes away his juſtification, and therefore it ſhould be replied. If it be not replied, the plaintiff can take no advantage of it, for by demurring he admits that the whole treſpaſs is met by the plea. If the plaintiff would make the defendant a treſpaſſer *ab initio*, he muſt ſhew in reply that which makes him ſo. On theſe grounds, therefore, the judgment muſt be affirmed.

Reed *v.* Harriſon, Tr. Ter. 18 Geo. 3. C.B. 2 *Black.* 1218.

An action of treſpaſs will lie, if an officer, under an attachment againſt the goods, continues in poſſeſſion of the defendant's houſe, or keeps the goods therein, for a long and unreaſonable time, for he thereby becomes a treſpaſſer *ab initio*. In treſpaſs for breaking and entering the plaintiff's houſe, and taking his cattle and goods, the defendant pleaded *firſt*, not guilty: *ſecondly*, a juſtification under an attachment iſſued againſt the plaintiff's goods, to compel him to appear, and put in good bail to anſwer a plaint levied in the court at Newcaſtle upon Tyne, or to ſurrender his body in diſcharge of his goods; by virtue of which attachment, the officers continued in poſſeſſion of the plaintiff's premiſes, for the ſafe cuſtody of the goods ſo attached, according to the cuſtom of the court from 17th July, 1775, to the 1ſt of Jan. 1776, when the plaintiff in that action having recovered final judgment, a precept in the nature of a *fi. fa.* was iſſued; and on the 17th of Jan. executed: after which there was another precept, in the nature of a *venditioni exponas*, under which the goods were ſold. To this plea, the plaintiff demurred, and aſſigned ſeveral cauſes of demurrer in reſpect to matter of form; but on the argument, it was chiefly objected, *in point of ſubſtance*, 1ſt, That the defendant could not juſtify continuing in poſſeſſion of the plaintiff's premiſes, from July to January. 2dly, That the goods attached ought to have been removed; and not kept on the premiſes by the officer. That in a diſtreſs for rent, they could not be

be lawfully kept there above five days, and ſtaying longer, made the diſtrainer a treſpaſſer *ab initio*, *Stra.* 717. And though that is now altered by the ſtat. 11 *Geo.* 2. with reſpect to diſtreſſes, yet the common law remains unaltered in regard to attachments. The counſel for the defendant, after a few days conſideration, acquainted the court that he thought theſe objections, in point of ſubſtance, were too ſtrong to be got over: ſo there was, without any oppoſition, judgment for the plaintiff.

So, to an action of treſpaſs, for breaking and entering the plaintiff's dwelling-houſe, and continuing there, againſt the plaintiff's conſent, a long while, and until the plaintiff was obliged to pay him 2l. 2s. 6d.; the defendants pleaded a juſtification; in which they ſtated, that one J.K. ſued out a *clauſum fregit*, directed to the ſheriff of Middleſex, by which the ſheriff was commanded, that if J.K. ſhould give him ſecurity to proſecute his ſuit, then the ſheriff *ſhould put, by ſurety and ſafe pledges, the plaintiff*; ſo that he ſhould be before his majeſty's juſtices at Weſtminſter, &c. That the writ was delivered to the ſheriff, and a warrant thereon iſſued; by virtue of which the defendant, Beaumont, the officer named therein, and the other defendant in his aid, entered the plaintiff's houſe, in order *to put, by ſurety and ſafe pledges, the plaintiff*; and that for that purpoſe, they continued in the houſe, and "until the plaintiff was obliged to pay, and "did pay to the defendants the ſaid money, *as, and by way* "*of ſurety for his appearance.*" On a demurrer to this plea and joinder in demurrer, the court ſaid that the plea was bad; for even if the defendants could juſtify attaching goods or money, under ſuch a writ as the preſent, which they ſaid it was not neceſſary to determine, and which they cautiouſly avoided deciding, they could not juſtify continuing in the plaintiff's houſe until he paid the money demanded: but they gave the defendants leave to amend, on payment of coſts.

Moore *v.* Beaumont *& al.* Hil. 35 Geo. 3. B.R. 6 *Ter. Rep.* 137.

If any one gleans in an harveſt-field, without the conſent of the occupier of the land, it is a treſpaſs, for which an action may be maintained; for *a right* to glean cannot be claimed by any perſon at common law. In treſpaſs for breaking and entering certain cloſes, and taking and carrying away corn; the plea was a juſtification, that the ſaid cloſes had been ſown with wheat, barley, &c. that the crop was reaped; and after it was carried off the land, the defendant being *a poor neceſſitous and indigent perſon*, entered *to glean and gather*, &c. the gleanings of the crop. To this there was a general demurrer; and after argument there was judgment for the plaintiff.

Worlidge *v.* Manning, Ea. 26 Geo. 3. C.B 1 *Hen. Black.* 53, 51.

So, alſo, in treſpaſs for breaking and entering certain cloſes, and taking and carrying away corn, &c. done by the wife,

Steel *v.* Houghton *& ux.* Tr. 28 Geo. 3. C.B 1 *Hen. Black.* 51.

wife, the plea was a juſtification that the premiſes, had been ſown with barley, and the crop reaped and carried off the land; wherefore, the defendants *being pariſhioners and inhabitants of the pariſh, legally ſettled therein*; and being poor, neceſſitous, and indigent perſons, entered to glean and gather, &c. the gleanings of the crop. To this there was a general demurrer; and, after argument, there was judgment for the plaintiff.—BY THE COURT *(contra Gould*, J.) When the claim of a right to glean was firſt brought before the court, it was laid *indefinitely* to be in *poor, neceſſitous, and indigent perſons:* it was then decided againſt the claim, 1ſt, Becauſe it was thought inconſiſtent with the nature of property, which imports excluſive enjoyment; 2dly, Deſtructive of the peace and good order of ſociety, and amounting to a general vagrancy; 3dly, Incapable of enjoyment, ſince nothing which is not inexhauſtible, like a perennial ſtream, can be capable of univerſal promiſcous enjoyment.—This right is now claimed by poor perſons *legally ſettled*; but in this form it is equally liable to objection. It is our province to take notice of all general cuſtoms; and this is uſually not attended with much difficulty, as the evidence of ſuch cuſtoms is to be found in our books, and is matter of general practice. Now, if this cuſtom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice, but in ſome diſtricts it is wholly unknown, and in others variouſly modified and enjoyed. Such a cuſtom as would ſupport this plea, muſt be univerſal, and every where the ſame, otherwiſe it is void for its uncertainty. If it exiſts only in particular counties or diſtricts, it is partial, and no part of the general cuſtoms of the realm.—The practice of gleaning was originally eleemoſynary: but it is the wiſe practice of the law not to conſtrue acts of charity, though continued and repeated for never ſo many years, in ſuch a manner as to make them the foundation of legal obligations. If A. and his anceſtors have from time immemorial repaired a bridge or a high-way, there is no obligation on him to continue the repair, unleſs he is ſo bound by the tenure of lands, or the like. In reſpect to its being a Jewiſh inſtitution, the anſwer is, that the law of Moſes is not obligatory on us, except ſo far as we have thought proper to adopt it; there are many precepts of the goſpel which the law of England does not enforce as obligations. Charity to the poor is a Chriſtian duty, but it muſt be voluntary, and cannot be compelled.—If there actually be a right, there muſt alſo be a remedy if that right be infringed. Now, if the owner were, by ſetting fire to the ſtubble, or flooding it, to prevent the poor from gleaning, they could have no remedy. So, if a *rich* man were to

to glean in a harveſt field, to the excluſion of the poor; or if a farmer were to give permiſſion to his brother, or friend of another pariſh to glean his fields, the poor could have no remedy in law, for what they might think a prior right. As to authorities, we find the firſt mention of gleaning in the *trials per pais*; but it is a mere extrajudicial opinion of lord chief juſtice Hale at *niſi prius* only, "that by the cuſ-"tom of England, the poor have a right to glean." The next author who mentions it, is lord chief baron Gilbert; who, in copying the above paſſage, with a marginal reference, ſays that the poor *are allowed*, to glean, which implies a licence and permiſſion, rather than a right. Mr. Juſtice *Blackſtone* has received the ſame paſſage into his commentaries, not as a clear and undeniable rule of law, but with expreſſions of diſtruſt and doubt; and in the caſe of the *K. v. Price* (1), Mr. Juſtice *Yates* ſays, "as to the right of "leaſing, it will be time enough to determine that point "when it comes directly in queſtion." As to the argument, that the farmer having abandoned the leaſings of his crop, the poor are entitled to them: we ſay, by the law of England, no property can be loſt by abandonment, for the owner may at any time reſume the poſſeſſion. But, ſuppoſing a right could ariſe by abandonment, there can be none while

(1) This caſe of the K. v. Price came before the court of King's Bench, on a motion for an information againſt the defendant, who was a Berkſhire juſtice of peace, for a miſdemeanor in oppreſſively ſending to gaol ſome poor inhabitants of the pariſh of Childery, for FELONY, in gleaning a field belonging to a farmer of that pariſh *(which they inſiſted they had a right, by law, and by the cuſtom and uſage of that pariſh to do)*.—The field of barley was partly cut, but not carried in, a third part of it being on the ground; nor indeed completely raked and cocked, when theſe gleaners took it away. Oath was made by the farmer, before the juſtice, *that theſe people had* STOLEN *his barley in the ſtraw*. And he now ſwore, *that he had forbidden them, and yet they took it by handfuls, and that he had ſuffered the loſs of about twenty buſhels of barley, by their carrying it off, two days together*. The court were all of opinion that the juſtice in this caſe, ſo far from acting with any deſign of oppreſſion or malice, or any bad intention, had behaved with lenity and tenderneſs; and they ſaid it would be very wrong to puniſh a juſtice of the peace by the extraordinary method of an information, when he has acted fairly, honeſtly, and impartially; and therefore diſcharged the rule, with coſts.—By Lord *Mansfield*. Stealing under the colour of leaſing or gleaning is not to be juſtified. The charge is *ſtealing* the barley; there was no conteſt between the farmer and the poor about leaſing; his only objection, and his forbidding, is confined to the ſtealing it. *Yates*, J. As to the right of leaſing, it will be time enough to determine that point when it comes directly in queſtion; but here the farmer had not abandoned his corn, or carried it off: and he has ſworn that they ſtole it. *Aſton*, J. and *Hewitt*, J. The right of leaſing is no part of the preſent queſtion. This is a charge of direct ſtealing. 4 *Burr.* 1926.

the

the property remains on the ſoil of the owner. It might with as much reaſon be urged, that a man had abandoned the property of his horſe, who having right of common, had turned him to paſture. The inconvenience ariſing from this cuſtom being conſidered as a right by the poor, would alſo be infinite: and in doubtful caſes, arguments from inconvenience are of great weight: it would open a door to fraud; becauſe the labourers would be tempted to ſcatter the corn, in order to make a better gleaning for their wives, children, and neighbours. It would encourage endleſs diſputes between the occupiers of lands and the gleaner: it would raiſe the inſolence of the poor, and leave the farmer without redreſs. During harveſt, the poor employ their time in gleaning, to the great detriment of huſbandry: in many places, the farmer ploughs the land, while the ſhocks of corn are upon the ground. Is the cultivation of the land to ſtand ſtill while the labourers are gleaning? It has been ſaid, that the poor ought to have a ſhare of benefit at the time of general rejoicing; but they receive from the advanced price of labour, a recompence in proportion to their induſtry; and to ſanction this uſage, would introduce fraud and rapine, and intail a curſe on the country.

Ball v. Herbert, Ea. 29 Geo. 3. B.R. 3 *Ter. Rep.* 253.

An action of treſpaſs will lie againſt a perſon for towing a veſſel on the banks of a navigable river, unleſs it has been cuſtomary to do ſo; for, at common law, the public have no right to tow veſſels on the banks of rivers. This was treſpaſs for breaking and entering the plaintiff's cloſe, being part of an artificial bank adjoining to the river Ouze, and treading down the graſs with men and with horſes, and fixing lines, &c. to certain barges, and drawing and towing thoſe barges. The plea was, that the river Ouze had been immemorially a public king's highway, and navigable river, where the tide flows and reflows: that the cloſe in which, &c. hath been immemorially part of the banks of the ſaid river: that the defendant was poſſeſſed of the boats, barges, and lighters in the declaration mentioned, laden with goods and merchandize, and paſſing up and down the river, by reaſon whereof he entered, &c. and drew and towed his ſaid boats, &c. To this there was a general demurrer, and joinder. The general queſtion was, whether, at common law, the public have a right to tow veſſels, on the banks of either ſide of a navigable river? BY THE COURT, this is claimed as a common-law right (1), and common-law rights

(1) It was in the argument urged, that the right might be ſupported

rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the univerſal and immemorial uſage throughout the country. Now the right in queſtion is not to be collected from the unanimous current of authorities; and as to the general uſage throughout the kingdom, of which the court is obliged to take notice, that clearly does not exiſt; the right is not claimed on one ſide or the other as is moſt convenient, but on both ſides of the river; but that is directly contrary to common experience, for if we look at any of the great public rivers, we ſhall find that it is not uſed, although it would be highly convenient to the perſons uſing the navigations; on the contrary, the navigators are obliged at ſeveral places to paſs from one ſide of the Thames to the other, with great inconvenience and delay; that is the caſe by the Duke of

---

ed on making a reaſonable compenſation * to the owner of the land. But lord *Kenyon*, CH. J. and *Aſhburſt*, J. ſaid that the defendant had by his plea claimed a common-law right, *without making any compenſation*; and that if he had only a *qualified right*, he ſhould have adapted his plea to it: for if he were to obtain judgment, it would aſcertain his right to the extent claimed on the record, namely, *a general right without any compenſation*. *Buller*, J. did not agree herein, but ſaid that this is not like the caſe of toll-thorough. The diſtinction which has been made between toll-thorough and toll-traverſe, is not where the queſtion ariſes on a defence merely, but where the right itſelf of taking toll has come in queſtion. And the diſtinction taken is, that the party who claims toll-thorough muſt ſhew a conſideration for it, becauſe it is againſt common right; but in the caſe of toll-traverſe, no conſideration need be ſhewn, becauſe that is not againſt common right: then if the defendant is right in ſaying, that by the common law he has a right to go on the banks of navigable rivers, he need not ſhew any conſideration, and the owner of the land would not be intitled to any ſatisfaction, till after the defendant had uſed the towing-path. Cuſtoms which are conſiſtent, may be pleaded againſt each other, and the party pleading a general cuſtom need not ſhew any modification of it, which is not inconſiſtent with the right claimed by him, as in *Kenchin* v. *Knight*, 1 *Wilſ.* 253. where the defendant pleaded a cuſtom to put ſwine upon a common; and the plaintiff replied; not unleſs they were rung, without traverſing the cuſtom ſet up in the plea; and the replication was held good on demurrer, becauſe the cuſtoms were not inconſiſtent. Now if any ſubject has a right to tow on the banks, making a reaſonable ſatisfaction, it is not neceſſary for the party to plead ſuch ſatisfaction, becauſe that claim ariſes afterwards. And if it were otherwiſe, it would be attended with manifeſt inconvenience; becauſe the ſum not being aſcertained, it would be a perpetual diſpute between the owners of the barges and the land owners, how much ſhould be paid, which would be deſtructive of the right of the public, and the navigation would be ſtopped till the quantum was aſcertained. *Groſe*, J. gave no opinion hereon. 3 *Ter. Rep.*

* Lord *Hale*, in his Tracts by *Harg.* p. 85 (who, after commenting upon the ſubject, ſeems to have formed an opinion againſt the right) ſays, that where private intereſts are involved in the queſtion, they ſhall not be infringed without a ſatisfaction being made to the parties, and on this paſſage the above argument was urged.

Montague's gardens, between Richmond and Kew, and in various other parts; ſuch is the right on that river, the *quantum* of which is aſcertained by the uſage; that there is ſuch a cuſtom on moſt of the navigable rivers, no perſon doubts, but ſtill *the right is ſolely founded on the cuſtom*: here the claim is ſet up without any cuſtom at all.—It is therefore now clearly ſettled, that the right of towing depends upon uſage, without which it cannot exiſt; and that there is not any general common-law right of towing.

Gundry *v.* Feltham, Tr. 26 Geo. 3. B.R. 3 *Ter. Rep.* 334.

Although a perſon may follow a fox, with hounds, over the grounds of another, yet treſpaſs will lie if he unneceſſarily trample down the hedges, or do more than is abſolutely needful. In treſpaſs for breaking and entering the plaintiff's cloſes with horſes, dogs, &c. and for beating and hunting for game therein, and for breaking down and deſtroying the hedges of the plaintiff; the pleas were, 1ſt, the general iſſue; on which iſſue was taken: 2dly, a juſtification as huntſman to one *Humphry Strut*, eſq. which ſtated, that the defendant *ſtarted and found* one of thoſe deſtructive and hurtful vermin and beaſts of prey, naturally inclined to do miſchief, called *foxes*, in and upon certain lands near to the ſaid cloſes, in which, &c. and cauſed the dogs to hunt, follow, and purſue the ſaid fox, and that becauſe the ſaid fox fled, and *ran out of* and from the ſaid lands, where he had been found, *into and over the ſaid cloſes, in which, &c.* he, the ſaid defendant, did *in the purſuit of, and to hunt, take, kill, and deſtroy* the ſaid fox, and *as the only way and means for ſo doing*, with one of the ſaid horſes, and with the ſaid hounds and dogs, *follow and go after the ſaid fox*, into the ſaid cloſe, in which, &c. &c. To this there was a general demurrer, and joinder in demurrer. By the Court, By all the caſes (1) as far back as in the reign of Hen. viii. it is ſettled, that a man may *follow* a fox into the grounds of another. It is not neceſſary in this caſe to enter into the exceptions which have been made to that general rule, becauſe this demurrer diſputes the general propoſition: the queſtion on this record is, Whether the defendant be juſtified *in following the fox at all*, over another man's grounds? The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This caſe does not determine that a perſon may unneceſſarily trample down another perſon's hedges, or maliciouſly ride over his grounds: if he do more than is abſolutely neceſſary, he cannot juſtify it; and ſuch circumſtances are a proper ſubject for a new aſſignment.—Judgment for the defendant.

---

(1) *Poph.* 162. *Laton*, 119. *Cro. Jac.* 321. 2 *Bulſt.* 60.

A merely

A merely accidental, involuntary treſpaſs may be juſtified, but a voluntary one cannot. This was an action of treſpaſs, for entering the plaintiff's cloſe, with guns and dogs, and killing the plaintiff's deer. The defendant pleaded not guilty, and a verdict was found for the plaintiff, with 30s. damages. The evidence to prove the defendant's treſpaſſes were, that they entered with guns and dogs into a cloſe of the plaintiff's, adjoining to his paddock, and were *not* going along a foot-path; that their dog (not the dog of another following them by chance) happened to eſcape from them, and run into the plaintiff's paddock, and there pulled down, and killed one of the plaintiff's deer. A motion was made for a new trial, as Mr. *Baron Adams*, the judge who tried the cauſe, was of opinion, though he did not direct to that purport, that the jury ought not to have found the defendant guilty, it being an accident, that happened without their intention, and contrary to their inclination. THE COURT thought, that in caſes of this nature, it muſt depend very much upon particular circumſtances appearing in evidence, whether the perſons who owned the dogs which, in their company, did the miſchief, were or were not treſpaſſers? That the jury, in this caſe, who were to judge *quo animo*, they entered the plaintiff's cloſe, conſidered it as an intentional treſpaſs, and not as a merely involuntary accident; and the judge, though he might think otherwiſe, did not direct them which way to find the verdict, but left it to them. And Lord *Mansfield* added, that the damages being ſmall, it was not worth while to ſet the verdict aſide, upon payment of coſts, and put the parties to the expence of a new trial. *Yates*, J. anſwered an objection, that the proper action would have been for keeping a dog, uſed to bite and run down deer, by ſaying, that it might not have been in the plaintiff's power to prove that, and it would be too hard to put this proof of his ill qualities upon the plaintiff. *Aſton*, J. mentioned a caſe appoſite to this ſubject, which turned upon the diſtinction between voluntary and involuntary treſpaſſes, viz. *Millen* v. *Fandrye*, *Poph.* 161. In that caſe the defendant drove ſome ſheep out of his land, and the dog purſued them into another man's land, which had no hedge to divide it from the defendant's grounds, which were contiguous; the defendant, as ſoon as the ſheep were out of his own land, called in his dog, and chid him. THE COURT there held, that treſpaſs did not lie, it being an involuntary treſpaſs; whereas a treſpaſs that may not be juſtified, ought to be done voluntarily; and they thought he might lawfully drive the ſheep out of his own land with his dog, but that the nature of a dog was ſuch, that it could not be recalled, and withdrawn ſuddenly, and

Beckwith v. Shordike and Hatch, Ea. 7 Geo. 3. 4 *Burr.* 2092.

in an inſtant, and that therefore it was an involuntary treſpaſs; but this caſe he ſaid could not be conſidered as an accidental involuntary treſpaſs. Rule diſcharged.

Houghton *v.* Butler, Tr. 31 Geo. 3. B.R. 4 *Ter. Rep.* 364.

If to an action of treſpaſs, for pulling down and carrying away a gate, the defendant plead a right of way, and that the gate being wrongfully erected acroſs the ſame, he took it down and depoſited it in a convenient place, near to where it had been erected *for the uſe of the plaintiff*; to which the plaintiff reply, that after the breaking down, &c. the defendant *converted the ſame to his own uſe*. Proof that the defendant laid it on his own ſide of the premiſes, which joined to the plaintiff's cloſe, by the place where it had been erected, and from whence the plaintiff might have taken it whenever he pleaſed, will not ſuſtain the replication; for the plaintiff does not deny the facts ſtated in the plea, but replies a ſubſequent converſion; and in ſuch a caſe it is incumbent on him to prove ſome treſpaſs, which is not covered by the plea, and that is not done by ſuch evidence as above.

Martin *v.* Keſterton, Ea. 16 Geo. 3. C.B. 2 *Black.* 1089.

In treſpaſs for breaking and entering, and doing damage, *in ſeveral cloſes*, of the plaintiff, at Lambeth, the defendant demurred, for that the number of cloſes was not ſet forth in the declaration, nor were they named or ſufficiently deſcribed therein, whereby the defendant was unable to collect the ſuppoſed cauſe of action, or make any anſwer thereto. Joinder in demurrer. By the court (*Nares*, J. doubting) Upon a writ of *quare clauſum fregit*, the plaintiff may declare either *generally* for breaking his cloſe at A, or may name the cloſe in his count, as for breaking and entering his cloſe, called Blackacre, in A, or may otherwiſe certainly deſcribe the ſame, if he declares *generally*, and the defendant pleads the general iſſue, the plaintiff may give evidence of a treſpaſs in any part of the townſhip of A. But for the advantage of the defendant, and to enforce the plaintiff to aſcertain the place exactly, a method has been deviſed of permitting the defendant to plead what is called *the common bar*, that is, to name any place, *as Broomfield* (true or falſe is immaterial) in A, as the place where the ſuppoſed treſpaſs happened, and then to allege that ſuch place ſo named is the defendant's own freehold, and as the plaintiff can prove no treſpaſs in Broomfield, this drives him to a new aſſignment of the *locus in quo*, by naming the place in certain, as a cloſe called Blackacre, to which the defendant muſt then plead afreſh; as therefore, the plaintiff has a right to uſe this circuity, and to delay himſelf by declaring generally, if he be ſo adviſed, the demurrer is bad.

The counſel for the defendant, perceiving the opinion of the majority of the court to be againſt his client, moved for leave

leave to withdraw the demurrer, without payment of coſts, and to plead not guilty, and a tender of amends; afterwards, on ſhewing cauſe, it was objected, that the plaintiff being intitled to judgment, the amendment could not be without coſts; and that the pleas of not guilty, and a tender were inconſiſtent. By the Court, This has been allowed, Tr. 32 *Geo.* 2. *Barnes*, 366. as well as many other ſeemingly inconſiſtent pleas. A tender is a very conſcientious plea, and ought to have every indulgence. But as to coſts, the court were divided: *De Grey*, CH. J. and *Blackſtone*, J. thought, that as the law was with the plaintiff, he was intitled to the coſts of the demurrer. *Gould*, J. and *Nares*, J. were for diſcouraging ſuch general declarations, by allowing no coſts.—As, therefore, no rule could be made for leave to withdraw the demurrer, but on payment of coſts, the court being equally divided; and as the conſequence of that muſt have been judgment for the plaintiff, the court at length unanimouſly agreed to make the rule abſolute, on payment of coſts.

It was ſaid by *Wilmot*, CH. J. that if a man turn his cattle into black-acre, where he has no right, and they ſtray into my field for want of fences, he cannot excuſe himſelf, or juſtify for his cattle treſpaſſing in my field. ANONYMOUS, Tr. 10 Geo. 3. C.B. 3 *Wilſ.* 126.

3. *Treſpaſs in reſpect to incorporeal rights.*] It was ſaid by *Bathurſt*, J. and not denied by the reſt of the court, that if a man who has a right of common upon the lord's waſte, for cattle levant and couchant on his land, ſurcharge the common, the lord cannot for that cauſe diſtrain; for the lord cannot judge thereof: and it was ſaid by *Blackſtone*, J. that where a man turns in his cattle under ſome colour of right of common, the lord cannot diſtrain, but if it appears he has no right at all, he may diſtrain. ANONYMOUS, Tr. 10 Geo. 3. C.B. 3 *Wilſ.* 126.

A commoner cannot juſtify cutting down trees planted by the lord on the waſte, although there be not a ſufficiency of common left; but his remedy is by action on the caſe, or by aſſize. In treſpaſs for cutting down the trees of the plaintiff, the plea was, that the trees grew in a certain common field; and that the defendant was intitled to common of paſture for his ſheep, levant and couchant, throughout the ſaid common field, and becauſe the trees had been wrongfully planted, and were wrongfully growing upon the ſaid common field, incumbering the ſame, and damaging it ſo that the defendant could not, without cutting down the ſame, enjoy his common of paſture; he, the defendant, cut down the ſaid trees, &c. Replication, that the ſaid common field was parcel of the contiguous manors of *Somerville* and *Bray*, and of the waſtes thereof; that the plaintiff is lord of the manors, and that he planted the trees, &c. To this there was a demurrer and joinder. The queſtion depended on two conſiderations: 1ſt, Whether the lord had a right to plant trees on the waſte, notwithſtanding a right of com- Sadgrove *v.* Kirby, M. 36 Geo. 3. B.R. 6 *Ter. Rep.* 483;

mon in others? And, 2dly, Whether, ſuppoſing he had no ſuch right, the commoner could juſtify cutting them down? By the Court, the juſtification ſet up by the commoner in this caſe, cannot be ſupported. The diſtinction ſeems to be this: if the lord of a manor make a hedge round the common, or do any other act that entirely excludes the commoner from exerciſing his right, the latter may do whatever is neceſſary to let himſelf into the common: but if the commoner can get at the common, and enjoy it to a certain extent, and his right be merely abridged by the act of the lord; in that caſe, his remedy is by an action on the caſe, or by an aſſize; and he cannot aſſert his right by any act of his own. As the lord of a manor may do any act on the common, provided he do not contravene the rights of the commoners; therefore, *prima facie*, he has a right to plant trees there: by the ſtatute of Merton (20 *Hen.* 3. c. 4.) he may approve againſt his commoners, leaving ſufficiency of common; and ſuch an act does not ſeem, *prima facie*, to contravene the rights of the commoners. If he may incloſe, *à fortiori*, he may plant trees on the common; but if he do either of theſe acts to exceſs, and do not leave a ſufficiency, the commoners may bring an action againſt him. But in order to maintain ſuch an action againſt the lord, the commoner muſt ſhew that there is not a ſufficiency of common left. Planting trees may be for a benefit to the common; they may afford ſhelter to the cattle there: and it will be taken for granted, that the lord may plant trees, until the commoner ſhews that ſuch planting prevents his enjoying his right of common, in ſo ample and beneficial a manner as he is entitled to. In this caſe, though the trees were ſtanding on the common, there was ſome common left; and if a commoner complain that there is not a ſufficiency of common left, it is not reaſonable that he ſhould cut down the trees. He ought to bring his action againſt the lord for abridging his right.

Folkard *v.* Hemmett and others, Sitt. at. Ea. 16 Geo. 3 C.B. 5 *Ter. Rep.* 417.

The right of commoners in a common may be ſubſervient to the enjoyment of the common by the lord.—In an action by a commoner againſt a ſtranger for digging up the ſoil, and erecting ſeveral buildings, whereby the plaintiff could not enjoy his common in ſo ample a manner, &c. the defence was, a grant of the ſoil to the defendant by the lord, with the conſent of the homage, in fee, at the will of the lord, according to the cuſtom, rent and fine: at the trial, the grant and admiſſion were duly proved; and evidence was given of the exerciſe of theſe rights, from 1599 to the trial (in ſome years ten inſtances) none of the rolls were more than twenty years older. Evidence was likewiſe given, that the ground in queſtion was but of little uſe, being covered with furze-buſhes. *De Grey*, CH. J. directed the jury (a ſpecial one) as follows: The plaintiff muſt prove himſelf to be in poſſeſſion of a right of common, and that this

this right has been prejudiced: any prejudice, in the minuteſt degree, is ſufficient. The defendants juſtify under the uſage, not a cuſtom, but a reſerved right of the lord. There are two conſiderations: 1ſt, If this uſage be true? 2dly, If true, whether legal. As to the firſt, the defendants have proved the uſage by the court-rolls: as to the ſecond, it is a matter of law; a queſtion of novelty and importance. The reaſon of ſuch a reſervation by the lord might be its vicinity to London. The jury thought the land was of no value, and, conſequently, that the plaintiff was not damaged, and they found a verdict for the defendants.

So, to an action of treſpaſs for breaking and entering the plaintiff's cloſe, *the pleas* were, 1ſt, not guilty; 2dly, a juſtification in right of an ancient meſſuage in Stalmine to take turbary for fuel, in, upon, and throughout Stalmine-moſs, in Stalmine; and, 3dly, a juſtification in right of an ancient meſſuage and lands in Stalmine for common of paſture in and throughout Stalmine-moſs. *Replication*, that the cloſes in which, &c. are parcel of Stalmine-moſs: that Stalmine-moſs is lying within the manor of Stalmine: that there are divers ancient meſſuages, as well as defendant's, which immemorially have had common of turbary in and upon the ſaid waſte or common (except ſuch parts as have been incloſed and approved, as hereinafter mentioned) and alſo common of paſture thereon (except on ſuch parts as aforeſaid); that within the manor of Stalmine there hath been a cuſtom for the owners of the ſaid waſte or common, from time to time, as occaſion hath required, to ſet out and aſſign to the owners and occupiers of the ſaid ancient meſſuages and lands, upon their requeſt, certain reaſonable parts of the ſaid waſte, called moſs-dales, to be by them held in ſeveralty, excluſive of all others, for digging and getting turves therein, and in no other parts of the ſaid waſte; *and when and ſo often as the turbary of ſuch moſs-dales, ſo aſſigned and ſet out, hath been got and cleared therefrom by ſuch digging and getting of turves. The owners of the ſaid waſte have incloſed and approved to themſelves all ſuch moſs-dales, ſo cleared*, commonly called *the following ground*; and to hold the ſame, ſo incloſed, at their pleaſure, in ſeveralty, for ever afterwards, freed and diſcharged from all common of turbary and paſture thereon. It then ſtated, that A. and others were ſeized of the waſte, and incloſed, and approved the cloſes in queſtion, being moſs-dales, cleared as aforeſaid, and demiſed the ſame to the plaintiff. *The rejoinder* traverſed the cuſtom, and iſſue was taken thereon: at the trial, to prove that the cleared moſs-dales were to be held by the lord, free from common, ſeveral counterparts of old leaſes were produced from among the manuſcripts of the lord of the manor; in which *the following ground* appeared to have been demiſed by the lord, but there was no proof of

Clarkſon *v.* Woodhouſe, M. 23 Geo. 3 B R. 5 *Ter. Rep.* 412.

any enjoyment under them. The oldeſt was dated 1670, the lateſt 1702. Upon theſe, and other evidence, a verdict was found for the plaintiff, eſtabliſhing the cuſtom. It was objected at the trial, and afterwards on a motion for a new trial, that the leaſes ought not to be received, becauſe unaccompanied with proof of enjoyment. THE COURT were clearly of opinion, that the leaſes might be given in evidence; they only ſhew the exiſtence of a fact, viz. that at the time of the dates of the deeds, the lord granted the land after the moſs was taken away. There can be no objection to the deeds, unleſs they be forged. The lord had the proper cuſtody of the counterparts, and of the originals after the leaſes were expired; ſo that they are from the proper repoſitory. They are ſo old, that nobody can ſpeak to poſſeſſion under them. The judge was ſatisfied with the evidence; therefore the rule for a new trial muſt be diſcharged. Afterwards, ſeveral objections were taken in arreſt of judgment, only two of which were conſiderable: the firſt was, *that the premiſes alleged to be entitled to the right of common were not deſcribed as within the manor, and ſhould therefore be intended to be without it; and that a cuſtom laid within a manor, and extending to tenants without, was bad.* By the Court, the objection is, that it is a void cuſtom, becauſe it is to regulate this right which may belong to perſons out of the manor, becauſe many perſons may live in Stalmine out of the manor: but there will appear no colour for it, if we conſider the difference between a cuſtom and a preſcription. Where an individual has enjoyed a right time out of mind, without being able to trace the original foundation of his right, a grant is preſumed; and, therefore, if the occupier of a certain meſſuage has enjoyed it, he muſt claim it by preſcription. But where the claim depends on a general rule of property, within certain limits, it is alleged as a cuſtom, or *lex loci*. All local or real property muſt be governed by ſuch law: it has no relation to perſons out of the limits. Property in England, Ireland, Jerſey, and elſewhere, muſt be enjoyed according to the laws of each. So this moſs, though granted to perſons out of the manor, muſt be enjoyed ſubject to the laws of the manor. Where land is deviſeable, according to the cuſtom in a borough, it is ſo, though the perſon holding it lives out of the borough, as in the caſe of Gavelkind. *The ſecond objection was, that the cuſtom was unreaſonable, becauſe in deſtruction of the right claimed, and repugnant to it.* By the Court, there is no foundation for the objection, when it is underſtood what the repugnancy is that deſtroys a cuſtom; namely, ſuch an one as ſhews that it did never exiſt. It is a contradiction in terms; being that which prevents a man taking any benefit of his right: as if a man ſay, I can ſhut it up when I will; that is ſaying

you

you have no right. But this is a qualification of the right; ſuppoſe it introduced at the ſame time with the grant, the grantor might qualify it, it is not an unreaſonable matter of agreement or grant; therefore there is nothing unreaſonable or repugnant in the other objections.

So, where the declaration ſtated that the plaintiff was poſſeſſed of a meſſuage and land in the townſhip of Worthy, by reaſon whereof he ought to have common of paſture upon the whole of a common called the Upper Moor, for all his cows levant and couchant; and that the defendants cut and carried away turf, and dug holes and clay, and carried away clay. And there was another count for a ſimilar treſpaſs upon another common: the defendant pleaded the general iſſue. At the trial, the defendant proved his right of common; and that about twenty-five years ago, the defendant, who claimed under a leaſe from the lord, to dig clay on the common, began to dig potting clay there; that the Upper Moor conſiſted of about ten acres, the herbage of about four acres of which was deſtroyed by the digging: that the other common contained about two acres: that the pits dug were very large, and were not filled up again after the clay was taken out. It was alſo proved, that in 1741, there were the marks of ſimilar pits which had before been dug on the common, over which the graſs had grown again. It was further proved, that the common, even if no pits had been dug, was not ſufficient for the number of commoners.—On the part of the defendants, it appeared that clay had been dug by the lord for ſeventy years paſt, and ſold by him during that time: that from time to time brick kilns had been erected there; and that the pipe-makers had, by licence of the lord, got clay and dreſſed it there, without any hinderance or complaint made by the commoners of any of theſe acts: and the lord's tenants had been rated to the land-tax and poor-rates, for above twenty years paſt, in reſpect of the clay-pits in the common which they rented of him.—The jury found a verdict for the plaintiff. It was afterwards moved for a new trial, on the ground that the verdict was againſt law and evidence; and the only queſtion was, whether the evidence ſupported the verdict for the plaintiff? By the Court; this caſe does not fall within the ſtatute of Merton, but depends altogether on immemorial cuſtom as to the extent of the ſeveral rights claimed by the lord and the commoners. Where there are two diſtinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the queſtion is, which of the two rights is ſubſervient to the other? It may be either the lord's right which is ſubſervient to the commoner's, or the commoner's which is ſubſervient to the lord's. In general, one ſhould

Bateſon *v.* Green, & *al.* Mic. 26 Geo. 3. B.R. 5 *Ter. Rep.* 411.

ſhould ſay, that the lord's is the ſuperior right, becauſe the property of the ſoil is in him; but if the cuſtom, eſtabliſhed by evidence, ſhew that it is ſubſervient to the commoners, then he cannot uſe the common beyond that extent; otherwiſe he ſubjects himſelf to an action for the exceſs; but here the evidence ſhews that the commoner's right to the enjoyment of the common has always been ſubſervient to the lord's, for he has always dug the common, when, where, and in what manner he pleaſed, to the deſtruction of the herbage, without any diſpute on the part of the commoners. If indeed it had appeared that the lord had only a right to dig clay for his own uſe, or had any other limited right of that kind, then indeed his digging for the purpoſe of ſale would have been an exceſs, for which he would have been anſwerable: but all the evidence tends to eſtabliſh a general right; and therefore there ought to be a new trial. Rule abſolute.

Dunſtan *v.* Treſider and another, M. 33 Geo. 3. B.R. 5 *Ter. Rep.* 2.

In treſpaſs for breaking and entering the plaintiff's cloſe, the plea was, that the *locus in quo* was parcel of the manor of Helſtone; and that *an ancient meſſuage*, and twelve acres of land, were immemorially parcel, and a cuſtomary tenement of the ſaid manor; and that there is a cuſtom in the ſaid manor, that, from time whereof, &c. the cuſtomary tenant of the ſaid tenement, for all the time aforeſaid, has had right of common, &c. the replication traverſed the cuſtom. On the trial, the plaintiff proved that the tenement was built within the laſt twenty years, and was not built on the ſite of any ancient meſſuage. The defendant's counſel objected to this evidence, inſiſting that the antiquity of the meſſuage was admitted by the replication, which only traverſed the cuſtom: but the judge being of opinion, that the antiquity of the meſſuage alſo formed a part of the cuſtom, and was involved in the iſſue therupon, in the manner in which it was pleaded, received the evidence, and the plaintiff obtained a verdict: and this THE COURT, on a motion for a new trial, held to be right, as the evidence diſproved the cuſtom, which was traverſed.

Grimſtead *v.* Marlowe, Tr. 32 Geo. 3. B.R. 4 *Ter. Rep.* 717.

A right to take a profit in *alieno ſolo*, cannot be ſet up under *a cuſtom*, it can only be claimed by *preſcription*. To treſpaſs for breaking and entering the plaintiff's cloſe, the defendant pleaded, that the *locus in quo* was part of a certain ancient common field; and then juſtified *under a cuſtom*, that every inhabitant occupying, reſiding, and dwelling, in any ancient meſſuage or tenement within the pariſh of L. for the time being, from the time whereof, &c. hath been uſed and accuſtomed to have common of paſture, &c. The right was claimed in another plea by a cuſtom for every occupier of a meſſuage or land within the pariſh of L. To theſe pleas there was a general demurrer. By the Court, where

where a plaintiff in poſſeſſion brings an action on the caſe againſt a wrong doer, it is ſufficient to declare againſt him generally, without diſcloſing any title. But where it becomes neceſſary to juſtify under a right in a plea, ſuch right muſt be ſet out formally; the right which is claimed in this caſe is to take a profit in *alieno ſolo*, but that cannot be claimed by cuſtom (1). There may be a cuſtom for an eaſement, as a right of way in *alieno ſolo*; but for a profit *à prendre*, the party muſt preſcribe in a *que* eſtate, viz. that he and all thoſe whoſe eſtate he hath in the houſe have uſed to have common; and an objection to the claiming ſuch a right *by cuſtom* is, that it cannot be releaſed; whereas if it be annexed to the fee, it may. The court, however, gave the defendant leave to amend.

D'Ayrolles v. Howard, Ea. 3 Geo. 3. B.R. 3 *Burr.* 1385.

In treſpaſs, by the lord againſt a commoner, for ſpoiling and deſtroying his peat, and filling up the holes, the defendant juſtified under a right of common; and becauſe he was hindered from enjoying his common in ſo ample a manner, by reaſon of the heaps of peat, that he removed them and filled up the holes: the plaintiff replied, *de injuria ſua propria* generally: and on iſſue joined, would have given in evidence that there was *a ſufficiency of common left:* but it was held that he could not, it not being within the iſſue, which was confined to the facts ſtated in the plea.

Carter and another, *v.* Murcott and another, Hil. 8 Geo. 3. B.R. 4 *Burr.* 2162.

An excluſive privilege of fiſhing in a navigable river, or an arm of the ſea, may be claimed by preſcription, and for a diſturbance of ſuch right, treſpaſs will lie. This was an action of treſpaſs for breaking and entering the plaintiff's cloſe, called the River, or the River Severn. The defendant pleaded, that it is a navigable river; and alſo that it is an arm of the ſea, wherein every ſubject has a right to fiſh. The plaintiff, without traverſing theſe allegations, replied, that this was part of the manor of Arlingham; that Mrs. Yates was ſeized of that manor; and preſcribes for a ſeveral fiſhery there: iſſue being joined thereon, a verdict was found for the plaintiff: it was afterwards moved, in arreſt of judgment, that every one has a right to fiſh in a navigable river, or in an arm of the ſea. By the Court, In *rivers not*

(1) See Gateward's caſe, 6 *Rep.* 596. and *Hardy* v. *Hollyday*, Ea. 5 Geo. 3. cited by *Buller*, J. 4 *Ter. Rep.* 718. In deciding the laſt caſe, the court ſaid, that the inhabitants of a vill or place, *cannot allege or plead that there is a certain ancient laudable cuſtom* within ſuch a vill or place, to have an intereſt or profit *à prendre* out of another's ſoil, but that they muſt *preſcribe*, "that they, and all thoſe whoſe eſtate they "have, have uſed to have common:" or in a corporation, "that the "town of C. was a corporation out of mind; and that the corpora-"tion, for themſelves and every burgeſs, had common," &c. for that ſuch a right cannot be claimed by cuſtom.

navigable,

navigable, the proprietors of the land have the right of fiſhery on their reſpective ſides; and it generally extends *ad filum medium aquæ*. But in *navigable rivers*, the proprietors of the land on each ſide have it not; the fiſhery is common, it is *primæ facie* in the king, and is public. An excluſive privilege of fiſhing may however be claimed, although it be in a navigable river, or arm of the ſea: but if any one claims ſuch excluſive privilege, he muſt ſhew a right; and if he can ſhew a right by preſcription (1), he may then exerciſe an excluſive right: though the preſumption is againſt him, unleſs he can prove ſuch a preſcriptive right; for it cannot be preſumed, it muſt be proved: here it has been claimed and found. Judgment for plaintiff.

Seymour and others. *v.* Lord Courtenay and others, M. 12 Geo. 3. B.R. 5 *Burr.* 2814.

And a grant of a ſeveral fiſhery may be ſubject to particular reſervations or exceptions. This was an action of treſpaſs for diſturbing the plaintiff's ſeveral fiſhery. At the trial, the plaintiffs were nonſuited, on an exception to the ſufficiency of the evidence: which was, that the plaintiffs had only proved a grant of the fiſhery from lord Clifford, with the exception of an oyſtery; and alſo a reſervation of a right to lord Clifford, the grantor, of taking fiſh for the ſupply of his own table; which, it was contended, was ſo far from proving a right to a ſeveral fiſhery, that it was directly contrary to the idea of it; a ſeveral fiſhery being excluſive of the right of all other perſons. It was afterwards moved to ſet aſide this nonſuit, without payment of coſts, and that they might have a new trial. By the Court, In order to conſtitute *a ſeveral fiſhery*, it is requiſite that the party claiming it ſhould ſo far have the right of fiſhing, independant of all others, as that no perſon ſhould have a co-extenſive right with him in the ſubject claimed (for when any perſon has ſuch co-extenſive right, then it is only a free fiſhery) but we think that a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner (a thing may be granted, and yet a part of it reſerved: a cloſe may be granted, excepting an acre; woods, except certain timber; advowſons, except particular preſentations; and ſo of all other inheritances (2)): Here, lord Clifford, being the general owner, demiſed to the plain-

(1) A preſcription implies a grant; and an excluſive right muſt be derived from the grant of the crown in whom that excluſive right originally reſided. But the preſcription ſhould be as old as the reign of Henry II. for the charters of king John and Henry III. avoid all ſuch grants from the beginning of the reign of Richard I. and prohibit the fencing of rivers in future; ſo that no grant of a free fiſhery ſhall be good, if made ſince that time. *Dav. Rep.* p. 57. a. 4 *Burr.* 2165. *Salk.* 137. 2 *Black. Com.* 39.

(2) So laid down by the counſel for the plaintiff in argument.

tiffs,

tiffs, reſerving a particular ſpecies of fiſhing, viz. the oyſtery, which in its nature is to be exerciſed in a particular mode. A reſervation is equal to a grant; therefore it brings it to the ſame queſtion as if the plaintiffs, being the general owners, had granted the ſole right of fiſhing for oyſters to lord Clifford. And taking that to be the caſe, we think the plaintiffs would ſtill have had a ſeveral fiſhery, to all intents and purpoſes, except as to the taking of oyſters; which is no part of the preſent diſpute: and as to the liberty reſerved to Lord Clifford of taking fiſh for his own table, that is a mere limited liberty, and not co-extenſive with the right of the plaintiffs, who can take fiſh at all times, and for all purpoſes: if this is not a ſeveral fiſhery, it would not be any ſpecies of fiſhing that the law knows. It could not be a free fiſhery; becauſe no perſon has a co-extenſive right with the plaintiffs; and as to its being a common fiſhery, that is not pretended. Nonſuit ſet aſide, without coſts, and a new trial ordered.

The mayor and commonalty of Orford v. Richardſon and another, Mic. Ter. 32 Geo. 3 B.R. 4 *Ter. Rep.* 437.

In treſpaſs for fiſhing in the plaintiff's free fiſhery, and alſo in their ſeveral fiſhery in Orford haven, Suffolk; THE PLEA was, that Orford haven, from time immemorial, hath been and is an arm of the ſea, in which *every ſubject* of this realm hath had, and ſtill ought to have, the liberty of free fiſhing. REPLICATION, that the corporation of Orford are a corporation by preſcription, and alſo by charter granted by Queen Elizabeth; and that the corporation have immemorially had and enjoyed, and ſtill ought to have and enjoy the excluſive liberty of dredging and fiſhing for oyſters in the ſaid place, &c. at all ſeaſonable times of the year, *without this, that in the ſaid arm of the ſea, in which, &c. every ſubject had, and ought to have had the liberty of free fiſhing.* REJOINDER, that the place in which, &c. hath been immemorially an arm of the ſea, in which every ſubject has a right of free-fiſhing, *without this*, &c. traverſing the preſcriptive right claimed by the plaintiffs in the replication. DEMURRER, becauſe the plaintiffs, in their replication, traverſed a material and iſſuable point of the defendants' plea; and by that traverſe, tendered to the defendants a material iſſue: but the defendants, in their rejoinder, did not take iſſue upon that traverſe, or join in iſſue with the plaintiffs thereupon, but paſſed by and took no notice thereof, and traverſed another part of the plaintiffs' replication, and thereby attempted to put in iſſue another matter; and a matter alleged by the plaintiffs by way of inducement only to the traverſe ſo made and taken by the plaintiffs, and thus attempted to introduce great uncertainty, confuſion, and unneceſſary length of pleading, &c. BY *the Court*, The defendants' counſel has endeavoured to ſupport the ſecond

traverſe on two grounds: firſt, becauſe the traverſe tendered by the plaintiffs is a matter of law; and, ſecondly, becauſe it is immaterial. The firſt is anſwered, by ſaying that this is to be ſupported by evidence, and is not mere matter of law. And as to the other ground, the rule of pleading is, that if the firſt traverſe tendered be immaterial, the adverſe party may add another traverſe. Then with regard to the materiality of the plaintiffs' traverſe, the fair queſtion might have been as well tried on the firſt as on the ſecond traverſe; for one party is to prove that this is an arm of the ſea, in which, *prima facie*, every ſubject has a right to fiſh. The other is to eſtabliſh a preſcriptive right, which deſtroys the general right; and if the point in litigation come directly to be tried on either of theſe iſſues, it muſt be tried on that traverſe which is firſt tendered: there cannot be any doubt here, but that the merits of this caſe might have been fairly tried on the firſt traverſe. It is like the caſe of a traverſe, where the life or death of another perſon is to be put in iſſue: if the firſt traverſe tendered be that the party is dead, iſſue muſt be taken on that; or *vice verſa*; becauſe either of theſe traverſes will bring the ſame queſtion to trial. The court, therefore, gave judgment for the plaintiffs.

Richardſon and another *v.* the mayor and commonalty of Orford, in the Exchequer-chamber, in Error. Tr. 33 Geo. 3. 2 *Hen. Black.* 182.

Afterwards, on a writ of error brought in the exchequer-chamber on this judgment, the aſſignment of error was, "that judgment ought to have been given for the defendants, becauſe the *locus in quo* being admitted upon the record to be an arm of the ſea, the traverſe of the plaintiffs was a traverſe of a mere inference of law, and therefore immaterial, and becauſe the traverſe tendered by the defendants was a traverſe of the preſcription of the plaintiffs, whereon alone the title of the plaintiffs to the fiſhery, and conſequently to maintain this action depends, and therefore was the only material traverſe to be taken and tendered." The caſe was twice argued, from an unwillingneſs to adopt, without great deliberation, a deciſion contrary to that of the court of King's Bench, rather than from any difficulty in the queſtion. After which, *Eyre*, Ch. J. ſaid, in the name of the court; that the firſt traverſe was of the right of *all the king's ſubjects* to fiſh in the arm of the ſea, ſtated by the defendants: now this was clearly a bad and immaterial traverſe; for it was not only a traverſe of an inference of law, but it was ſo taken; that if at the trial it had been proved that it was the ſeparate right of others, and not of the plaintiffs, the iſſue muſt have been found for the plaintiffs, not only without their being obliged to prove either poſſeſſion or right, but when, in fact, they had neither poſſeſſion nor right. That an immaterial traverſe might be paſſed over, and the matter of inducement traverſed

ed, which had been properly done in this caſe by the defendants. The judgment of the court of King's Bench was therefore reverſed.

The Mayor of Norwich *v.* Swann, Mic. 17 Geo. 3. C.B. 2 *Black.* 1116.

Treſpaſs will lie for ſetting tables in a market-place, for the ſale of goods thereon, without leave of the owner of the ſoil. To treſpaſs for breaking and entering the plaintiff's cloſe, and placing thereon divers tables, ſtools, baſkets, pots, pans, and other utenſils, the defendants pleaded, 1ſt, not guilty; 2dly, a juſtification, for that the *locus in quo* is an open market, and that he placed the tables, &c. there, in order to expoſe them to ſale. The plaintiffs replied, that the *locus in quo* was their freehold, and that the defendant, of his own wrong, and without licence, placed his goods thereon. To this the defendant demurred generally, and the plaintiff joined in demurrer. By the Court, right of market and right of ſoil are things totally diſtinct. Men may have a right to go to market, but not to meddle with, or incumber the ſoil. Toll cannot be due for ſetting forth theſe tables and ſtools, with their furniture, becauſe that muſt be preſcribed for. Pickage it cannot be, becauſe the ground is not broken. But it is ſettled in the Northampton caſe (2 *Strang.* 1238, 1 *Wilſ.* 107.) that no man can erect ſtalls in a market without leave of the owner of the ſoil; and we cannot criticiſe and diſtinguiſh between a table and a ſtall.

James *v.* David, Hil. 33 Geo. 3. B.R. 5 *Ter. Rep.* 141.

Agreement not to ſue, no bar to an action of treſpaſs.] To treſpaſs the defendant cannot plead, in bar, that the plaintiff and defendant agreed to ſettle all matters in diſpute, and to bind themſelves in a penalty not to ſue each other. This was treſpaſs for breaking and entering the plaintiff's cloſe; and the defendant pleaded, that, after declaration, and before plea pleaded in this cauſe, to wit, on ſuch a day, it was agreed by and between the plaintiff and the defendant, in reſpect of the action, which was that day completely ſettled, as follows: that the defendant was to pay 1l. 1s. &c. and further, that whatſoever diſputes and cauſes of diſputes, or any thing whatſoever that then was, or had been, or might be in being, touching ſuits or actions in law whatſoever, to the day of the date of the ſaid agreement, ſhould ceaſe and terminate for ever; and *the ſaid parties did further agree, to bind themſelves in the ſum of* 100l. whoever of the ſaid parties that would commence an action in law, or ſuits, or any trouble whatſoever in reſpect to any thing then in being to the then preſent day. The plea then ſtated, that the preſent action, and the action in law in the ſaid agreement mentioned, were one and the ſame; to this plea the plaintiff demurred. By the Court, the agreement diſcloſed in the plea is not a concluſive anſwer to the action. *Accord*, without ſatisfaction, cannot be pleaded: the diſtinction in the books is between accord and ſatisfaction, and arbitrement. In the firſt, the terms are, "accord *and* ſatisfaction;" the one without

without the other is not ſufficient: and there being no ſatisfaction pleaded here, this caſe comes within the principle of thoſe in which it has been held that a plea of accord, without ſatisfaction, cannot be ſupported. And *Per Aſhurſt*, J. ſuppoſing the propoſition were true, that whenever the agreement is ſuch for the breach of which an action might be maintained, yet it is incumbent on the party pleading it to ſhew, that an action could have been ſupported on it. In order to found an action on this agreement, the plaintiff muſt have ſtated, not only the agreement, but alſo that he tendered an obligation in 100l. ready executed, to the defendant; and that the defendant refuſed to execute, &c. but no action could have been ſuſtained on this contract, without that previous ſtep, which is not pleaded here. Judgment for plaintiff.

Hill and another *v.* Goodchild, Tr. 11 Geo. 3. B.R. in Error from C.B. 5 *Ter. Rep.* 2790.

4. *Damages in treſpaſs*.] Where a treſpaſs is *jointly* charged upon ſeveral defendants, and the verdict has found them all *jointly guilty*, the jury cannot afterwards aſſeſs ſeveral damages according to the degrees of guilt (1); therefore where in the common pleas, the plaintiffs in this action were declared againſt jointly in treſpaſs, *vi et armis*; and on the trial the jury found them guilty, and aſſeſſed damages againſt one for 1s. and againſt the other for 40s. and judgment was entered up accordingly; on error brought in the King's Bench, the judgment was reverſed. By the court, the preſent caſe does not call for an opinion upon thoſe caſes where the defendants are charged *jointly and ſeverally*, or where the defendants plead ſeverally, or where the defendants are found guilty of ſeveral parts of the ſame treſpaſs, or at a different time; or where a joint action is brought for two ſeveral treſpaſſes, and the damages are found ſeverally, as being ſeverally guilty: it is enough for us to found our preſent determination upon the preſent caſe, and the preſent caſe is, that the count is of a joint-treſpaſs, and the jury have found the defendants guilty of a joint-treſpaſs, and yet have ſevered the damages. We are of opinion, that in ſuch caſe the damages cannot be ſevered.

Appleton *v.* Smith, Hil. 2 Geo. 3. B.R. *Burr.* 1282.

5. *Coſts in treſpaſs*.] In an action of treſpaſs *vi et armis*, "for breaking and entering," the plaintiff's dwelling-houſe, and there making a great noiſe and affray, and diſturbance, and continuing in it two hours, and "until the "the plaintiff and his father, with another perſon were com-"pelled and obliged to give, and did give to the defendant "their promiſſory note for 6l. 17s. payable to him, the ſaid

(1) Though the real juſtice may be, that the damages ſhould be reſpectively aſſeſſed, in proportion to the real injury done by each defendant.

"defendant;"

" defendant." The jury found for the plaintiff, and gave him a guinea damages. The queſtion was, " Whether " the plaintiff ſhould have *full* coſts, or no more coſts than " damages?" By THE COURT, this caſe depends on the words, *and until the plaintiff, &c. were compelled, &c.* which words are barely an aggravation of the defendant's continuing in the houſe, and nothing more. On the firſt words, viz. " *breaking and entering the houſe*, the freehold *might* have come in queſtion; and as there is no certificate (1), the plaintiff can have no more coſts than damages.

So, where in an action of treſpaſs *quare clauſum fregit*; the firſt count ſtated, that the defendants broke and entered the plaintiffs' cloſe, and the graſs of the plaintiffs there then growing, with their feet, in walking, trod down, ſpoiled, and conſumed, and dug up, and got divers large quantities of turf, peat, ſods, heath, ſtones, ſoil, and earth of the plaintiffs, " and took, and carried away the ſame, " and converted and diſpoſed of the ſame to their own uſe." And there was another count, upon a ſimilar treſpaſs in another cloſe: the defendants pleaded the general iſſue to the whole declaration, and two ſpecial pleas to the ſecond count. On the trial, a verdict was found for the plaintiff, on the general iſſue, with 1s. damages; and for the defendants on the ſpecial pleas; and the judge had not certified. The queſtion was, whether the plaintiff was entitled to any more coſts than damages, under the ſtat. 22 & 23 *Car.* 2? By *the Court:* We have conſulted all the judges, and they are all of opinion, that this caſe is within the ſtatute, and that the plaintiff ought to have no more coſts than damages. The treſpaſs is laid to have been committed on the land, by digging, &c. and the aſportavit as part of the ſame act; and on the trial of the iſſue, the freehold might certainly have

Clegg v. Molyneux, Tr. 21 Geo. 3. 2 *Doug.* 780.

(1) By ſtat. 22 & 23 *Car.* 2. c. 9. § 136. in all actions of treſpaſs, wherein the judge at the trial of the cauſe ſhall not certify on the back of the record, that the freehold or title of the land was chiefly in queſtion, the plaintiff, in caſe the jury ſhall find the damages under 40s. ſhall not recover more coſts than damages.

The words of this ſtatute extend to no other perſonal actions than ſuch as relate to the freehold, or things fixed to the freehold, that is, only to ſuch caſes where the freehold may by preſumption come in queſtion. Therefore, in trover, or treſpaſs *de bonis aſportatis*, of goods not fixed to the freehold, the plaintiff ſhall have his full coſts: ſo, in treſpaſs *quare clauſum fregit*, and impounding his cattle, becauſe the impounding is a perſonal injury, but then the defendant muſt be found guilty of the impounding. *Bull. Niſi Pri.* 329.

So, alſo, there needs no certificate, where it actually appears on the face of the pleadings, that the title of the land is in queſtion, as where a view is granted. *Bull. Niſi Pri.* 330. Or if it be treſpaſs for breaking and entering a free warren, 2 *Black. Rep.* 1151.

come in queſtion. This is clearly diſtinguiſhable from an aſportavit of perſonal property, where the freehold cannot come in queſtion, and which therefore is not within the act; thus, after trees are cut down, and thereby ſevered from the freehold, if a treſpaſſer comes and carries them away, that caſe is not within the ſtatute, becauſe the freehold cannot come in queſtion. Here it might.

Adlem v. Grinaway, Ea. 34 Geo. 3. B.R. 6 *Ter. Rep.* 281.

So, alſo, in an action of treſpaſs, the declaration ſtated, that the defendant, *vi et armis*, flung and threw divers ſtones and brickbats, &c. at and againſt the windows of the plaintiff, belonging to his dwelling-houſe, and then and there broke to pieces, ſhattered, and deſtroyed divers panes of glaſs: to this the general iſſue was pleaded; and at the trial, the jury found a verdict for the plaintiff, with damages under 40s. The maſter having taxed the plaintiff his full coſts, it was moved that he might be directed to review his taxation. By *the Court:* Upon this record, the defendant might have given *liberum tenementum* in evidence, and ſhewn that this was his own houſe; and, conſequently, the title might have come in queſtion. Rule abſolute.

Redridge v. Palmer, M. 32 Geo. 3. C.B. 2 *Hen. Black.* 2.

In this action of treſpaſs, the declaration ſtated, that the defendant broke and entered a certain cloſe of the plaintiff, called the yard; and then and there broke down and proſtrated two wooden fences; and the materials thereof, to wit, 500 pales, &c. took and carried away, &c. The defendant pleaded firſt, not guilty; ſecondly, a plea of licence to all the treſpaſſes mentioned in the declaration. On the trial, a verdict was found for the plaintiff, with 1s. damages: and the judge did not certify: the prothonotary allowed full coſts to the plaintiff, and it was moved that he might review his taxation. BUT by the Court: The rule which has long prevailed both in this court and the King's Bench, is, that where there is a ſpecial plea of juſtification, and it is found againſt the defendant, the plaintiff is entitled to his full coſts.

Comer v. Baker, Tr. 34 Geo. 3. C B. 2 *Hen. Black.* 341.

So, to this action of treſpaſs *quare clauſum fregit*, with cattle, &c. there were ſeveral pleas; 1ſt, the general iſſue; 2dly, diſclaimer of title, that the treſpaſſes were involuntary, and tender of amends; 3dly, a diſtreſs taken, damage feaſant, for the ſame treſpaſs; 4thly, that the cattle eſcaped on account of the fences being out of repair; 5thly, a licence. To all the ſpecial pleas, except that of the licence, there were new aſſignments, and to the new aſſignments ſimilar pleas, and iſſues taken on them, on which a general verdict was found for the plaintiff, with 5s. damages; but the judge did not certify. The prothonotary taxed full coſts to the plaintiff, on the ground that wherever an iſſue on a ſpecial plea is found for the plaintiff, he is entitled to full coſts, though the damages be leſs than 40s. A rule

rule was afterwards obtained, to ſhew cauſe why the taxation ſhould not be reviewed? But the Court, on ſhewing cauſe, ſaid, that the practice was confirmed by the caſe of *Redridge* v. *Palmer*, which was decided upon great conſideration, and diſcharged the rule.

In treſpaſs, the plaintiff declared in one count for a treſpaſs on lands on a certain day, and on divers other days: the defendant pleaded two ſpecial pleas of juſtification on the particular day: the plaintiff, in two new aſſignments, replied, that the treſpaſs was committed on other days, and other occaſions. On both theſe, iſſues were taken, which were found for the plaintiff, with 1s. damages. A rule was obtained to ſhew cauſe why the maſter ſhould not be directed to tax the plaintiff his coſts on the ſpecial pleas? This was oppoſed on the ground that the caſe was ſimilar to where the plaintiff in his declaration complains of three ſeveral treſpaſſes, in three diſtinct counts: in which caſe, if the defendant plead two ſpecial pleas of juſtification to two of thoſe counts, and the plaintiff abandon them, the plaintiff is not intitled to the coſts of thoſe pleas, even though he ſhould ſucceed on the third. THE COURT denied the ſimilarity, and ſaid, that the plaintiff, perhaps with a view to have coſts, had taken in the whole complaint in one count: the defendant, by his plea, did not juſtify the whole; and therefore the plaintiff was obliged to make a new aſſignment. The maſter has no doubt in the caſe; and according to the conſtant practice, the plaintiff is entitled to all the coſts of the pleadings.

Gundry *v.* Sturt, Hil. 27 Geo. 3. B.R. 1 *Ter. Rep.* 636.

In treſpaſs for fiſhing in the plaintiff's fiſhery, there were *five* counts for different places in which the treſpaſs was ſaid to be committed; on not guilty, there was a verdict for the plaintiff on the third and fourth counts; and for the defendant on the firſt, ſecond, and fifth. The prothonotary having allowed the plaintiff coſts on all the counts, it was moved to review the taxation. By the Court: The practice is uniform, that where the plaintiff has a verdict on any one count, he is intitled to his entire coſts on the whole declaration: and this, although he may put many cauſes of action, totally different, into one action, and ſucceed only upon one of them. It may at firſt ſight ſeem hard, that a plaintiff ſhould have his whole coſts, when he fails nine parts in ten; but till the court ſhall, upon conſideration, make a new rule for this purpoſe, we are bound to follow the eſtabliſhed practice.

Norris *v.* Waldron, Ea. 18 Geo. 3. C.B. 2 *Black.* 1199.

And, if it appear from the pleadings, that the freehold *could not come* in queſtion, the plaintiff ſhall have full coſts.— This was a declaration in treſpaſs for breaking and entering the plaintiff's free warren, and chaſing, hunting, and killing game thereon. On not guilty pleaded, and trial by a ſpecial jury, the defendant was found guilty, with damages 6d. On a motion on behalf of the plaintiff to tax full coſts, THE

Lord Dacre *v.* Tebb, Ea. 17 Geo. 3. C.B. 2 *Black.* 1151.

COURT were of opinion, that the ſtatute is confined to ſuch actions of treſpaſs, where the ſoil or land is mentioned in the declaration, as the ſubject of the treſpaſs complained of; and that in actions inſtituted merely for breaking free warren, it is impoſſible the title of the ſoil can ever come in queſtion; for though both may concur in one perſon, yet the title to the free warren is always collateral, to that of the land; for a man may have a free warren in *alieno ſolo*.

Pallant *v.* Roll, Ea. 13 Geo. 3. C.B. 2 *Black.* 900.

Any man might have always brought an action of treſpaſs for hunting upon his grounds. For this injury, among others, the ſtatute of Glouceſter gave coſts as well as damages. But the ſtatute of *Car.* 2. to prevent vexation, lowered the coſts, and if leſs than 40s. are recovered, by that ſtatute, there can be no more coſts than damages: however, the ſtat. 4. & 5. *Will. & Mar.* c. 23. § 10. enacts, That if any inferior tradeſman, apprentice, or other *diſſolute perſon*, ſhall hunt, hawk, fiſh, or fowl, they ſhall be ſubject to the penalties, and may be ſued for their wilful treſpaſs, in coming on any perſon's land; and, if found guilty, the plaintiff ſhall recover full coſts.—In this, which was an action of treſpaſs, the declaration ſtated, that the defendant, "being a diſſolute perſon, neglecting his employment," and following hunting, and other game, and by no means qualified by law ſo to do, broke and entered the plaintiff's cloſe, &c. againſt the form of the ſtatute. On not guilty pleaded, there was a verdict for the plaintiff, with 1s. damages, ſubject to the opinion of the court upon the caſe, which ſtated in ſubſtance, that the defendant was a huntſman, and went out by his maſter's orders with the hounds, and beat over the plaintiff's grounds: that the plaintiff deſired the defendant to go off his land, which he refuſed; and at length found a hare, and hunted her over ſeveral pieces. By the Court: The ſtatute gives no new cauſe of action, the old right of action always exiſted, and does ſtill exiſt. The plaintiff complains of a treſpaſs, and ſues for the common-law remedy. He alſo ſtates collateral circumſtances, which under the ſtatute would entitle him to coſts upon a verdict for ſmall damages. If he proves theſe circumſtances he has his full coſts; if they are not proved, they are mere words of ſurpluſage, and the defendant ſtands exactly in the ſame ſituation as if the Stat. 4 & 5 *Will.* and *Mar.* had never been made. Poſtea to the plaintiff and verdict, by conſent that the defendant was not a diſſolute perſon, but guilty of the treſpaſs, damages 1s. coſts 1s.

Reynold *v.* Edwards, M. 35 Geo. 3. K.B. *Ter. Rep.* 11.

On the trial of this action, it appeared in evidence, that a treſpaſs was committed by the defendant in courſing over a cloſe belonging to the plaintiff, *who, four years before, had given a general notice to the defendant not to treſpaſs on his land.* It appeared alſo, that the defendant was anxious to avoid treſpaſſing on the plaintiff's grounds, and that he made

enquiries

enquiries reſpecting the plaintiff's boundaries. The judge, at the inſtance of the plaintiff, certified that the treſpaſs was wilful and malicious, in order to entitle the plaintiff to full coſts, under the ſtat. 8 & 9 *Will.* 3. c. 11. § 4. (1) conceiving that he had no diſcretion on the ſubject; nevertheleſs reſerving liberty to the defendant to move to ſet aſide that certificate, if the court ſhould be of opinion that the ſtatute was not compulſory on the judge. A motion to that effect was made; and it was argued, that the ſtatute did not extend indiſcriminately to all caſes of treſpaſs after notice, but that it was only intended to apply to wilful and malicious treſpaſſes. BUT the Court refuſed to grant the rule, ſaying, it was ſettled in *Swinnerton* v. *Jarvis*, Ea. 22 *Geo.* 3. C.B. after much argument, that *if it appears that the treſpaſs, however trifling, was committed after notice, the judge is bound to certify under the ſtatute*; and that it was proper to adhere to the rule.

And it ſeems that the judge has no diſcretion, even where the treſpaſs is a continuation of that committed before notice; for where the defendant and others were playing at cricket on the plaintiff's ground, and were warned to go off, notwithſtanding which they continued to play, and damages 30s. The judge (Baron *Perryn*) was applied to for a certificate, and *Swinnerton* v. *Jarvis* was cited. The judge at firſt was of opinion, that there being *no new treſpaſs*, but a continuation of the former, that it differed from that caſe; but afterwards, having conſulted *Heath*, J. he ſaid the point had been determined, and that the judge had no diſcretion.

Gely v. Day, Wint. ſum. aſs. 1783. *Eſpin. Dig.* 424.

(1) By the ſtat. 8 & 9 *Will.* 3. c. 11. § 4. it is enacted, that in all actions of treſpaſs in any of the courts of record at Weſtminſter, wherein, at the trial of the cauſe, it ſhall appear, and be certified by the judge, under his hand, on the back of the record, that *the treſpaſs upon which any defendant ſhall be found guilty was wilful and malicious*, the plaintiff ſhall recover not only his damages, but his full coſts of ſuit.

III. Actions founded on Contract.

1. *The Action of Account.*

Godfrey *v.* Saunders, Ea. 10 Geo. 3. C.B. 3 *Wilſ.* 74, 94, 113.

In an action of account, it is a rule in pleading, that whatever matter can be pleaded in bar, muſt be ſo pleaded, and cannot afterwards be pleaded before auditors; and the reaſon is, to avoid trouble and charge to the parties, for you ſhall not lie by and plead before auditors, what you might have before pleaded in bar. Another rule in pleading in this action is, that if the party is once chargeable and accountable, he cannot plead in bar, except in the caſe of a releaſe, or *plene computavit*; and theſe exceptions are, becauſe a releaſe, and having fully accounted, are total extinctions of the right of action; which the court is to judge of, and even in theſe two caſes, they muſt be pleaded ſpecially, and cannot be given in evidence on the plea of *ne unques* receiver; a third rule is, that nothing can be pleaded before auditors contrary to what has been pleaded before, and which has been found by verdict; becauſe it would introduce either contrary verdicts, or two verdicts of the ſame, which is abſurd.

And if a defendant has paid over as a truſtee, he has executed a truſt, and then it is a bar to the action, he never was accountable.

2. *The Action of Aſſumpſit.*

2 *Burr.* 1012. 4 *Burr.* 2134. 2 *Ter. Rep.* 370. 4 *Burr.* 1986. *Doug.* 138.

Implied aſſumpſit.] The action for money had and received is a kind of equitable action, founded on the principles of juſtice, by which money which ought not in juſtice to be kept, may be recovered: it is a very beneficial action, and therefore much encouraged; and the courts have of late years much extended it; but it lies only for money, which, *ex æquo et bono*, the defendant ought to refund: the plaintiff can recover no more than he is in conſcience and equity entitled to: for it is conſidered like a bill in equity; and in order to recover money in this form of action, the party muſt ſhew that he has equity and conſcience on his ſide, and that he could recover in a court of equity. The defence is any equity that will rebut the action; for the charge and defence in this kind of action are both governed by the true equity and conſcience of the caſe.

2 *Burr.* 1012. 1 *Ter. Rep.* 287.

Therefore, if money, which there was no ground to claim in conſcience, be paid under a miſtake, the party may recover it back again by this kind of action.

Thus,

Thus, where the plaintiff was a broker, with a commiſſion from foreign correſpondents, *del credere* (1), and the bankrupt had been an underwriter, and ſubſcribed policies filled up with the plaintiff's name, for the plaintiff's foreign correſpondents, who were unknown to the bankrupt: it appeared on a ſpecial verdict in an action brought by the plaintiff againſt the defendants, as aſſignees of the bankrupt, for money had and received; that loſſes, to the amount of 661l 9s. 10d. had happened on theſe policies before the bankruptcy. And that the plaintiff being ſuch broker *del credere* had, after the bankruptcy, paid the amount thereof to his foreign correſpondents: that the plaintiff was made debtor by the bankrupt for the amount of the premiums on the above policies, viz. 1356l. the whole of which the plaintiff paid to the aſſignees, under a miſtaken idea, *not knowing that he was intitled to deduct thereout the amount of the loſſes paid by him to his foreign correſpondents, on account of the bankrupt.* The plaintiff had proved the 661l. 9s. 10d. under the commiſſion againſt the bankrupt; but, diſcovering his miſtake, received no dividend, and gave the aſſignees notice of ſuch miſtake, cautioning them againſt making any dividend, until he was paid the ſum of 661l. 9s. 10d. which he had paid over to his correſpondents. The queſtion was, whether the plaintiff was entitled to recover in this action? and the court were clearly of opinion that he was; and there was accordingly judgment for the plaintiff.

Biſe v. Dickaſon, & *al.* aſſ. of Barcelhag 11. 36 Geo. 3. B.R. 1 *Ter. Rep.* 285.

And if money *be paid by miſtake* to an agent, who places the ſame to the account of his principal, *but does not pay it over*, an aſſumpſit for money had and received to the uſe of the perſon ſo paying it by miſtake, will lie againſt the agent. This was an action for money had and received, brought by the plaintiff to recover back from the defendant, a ſum of 2100l. paid to him as due upon a policy of inſurance, *as agent* for the parties inſured, who were reſident at New York: this ſum the plaintiff had paid, thinking the loſs was fair, and the defendant paſſed the whole ſum in his account with his principals, and gave credit to them for it againſt a ſum of 3000l. in which they ſtood indebted to him: afterwards notice was given by the plaintiff to the defendant, that it was a foul loſs. At this time nothing had happened to alter the ſituation of the defendant, or to make it different from what it was when the loſs was adjuſted, he had accepted

Buller v. Harriſon, Hil. 17 Geo. 3. B.R. *Cowp.* 565.

(1) A commiſſion *del credere*, is an undertaking by the broker, in conſideration of an additional premium to inſure his principal againſt any loſs or contingency which may happen, by reaſon of thoſe with whom he may deal or tranſact the buſineſs committed to his management, 1 *Ter. Rep.* 112.

no freſh bills, advanced no ſum of money, nor given any new credit to his principals; but affairs between them and him remained preciſely in the ſame ſituation: the queſtion was, whether this action could be maintained againſt the defendant *as agent* of the inſured? which depended on this, whether the defendant's having placed this money to the account of his principals, in the manner before ſtated, was equivalent to a payment of it over? By Lord *Mansfield*, and the court: In general, the principle of law is clear, that if money be miſpaid to an agent expreſly for the uſe of his principal, and the agent has paid it over, he is not liable in an action by the perſon who miſpaid it; becauſe it is juſt that one man ſhould not be a loſer by the miſtake of another, and the perſon who made the miſtake is not without redreſs, but has his remedy over againſt the principal; on the other hand, it is juſt, that as the agent ought not to loſe, he ſhould not be a gainer by the miſtake; and, therefore, if after the payment ſo made to him, and before he has paid the money over to his principal, the perſon corrects the miſtake, the agent cannot afterwards pay it over to his principal, without making himſelf liable to the real owner for the amount: but the preſent caſe turns upon this, that the agent was preciſely in the ſame ſituation at the time the miſtake was diſcovered, as before. The jury were embarraſſed on the queſtion, whether this was *a payment over*; to many purpoſes it would be; but it has been argued, that this is not *a mere placing to account*, but a *making reſt*; and if it were, it would not vary the caſe a ſtraw: there was no new credit, no acceptance of new bills, no freſh goods bought or money advanced; in ſhort, no alteration in the ſituation which the defendant and his principals ſtood in towards each other, when the loſs was adjuſted: if there had been any new credit given, it would have been proper to have left it to the jury to ſay, whether any prejudice had happened to the defendant by means of this payment; but here no prejudice at all is proved, and none is to be inferred: under theſe circumſtances, the defendant has no defence in point of law; and in point of equity and conſcience, he ought not to retain the money in queſtion.

Sadler *v.* Evans, Mic. 7 Geo 3. B. R. 4 *Burr.* 1986. *Bull.* N.P. 133.

But an action for money had and received, will not lie againſt a known agent or receiver, for money paid *voluntarily* to ſuch agent, for the uſe of his principal, unleſs he has paid it over after notice not to do ſo: but ſuch action muſt be brought againſt the principal only. This was an action for money had and received to the plaintiff's uſe, and was brought with intention to try the right of Lady Wi dſor to a quit rent of 1s. and to another ſum of 6d. for miſes: o the opening of the cauſe at the trial, it was ſtated by the counſel for the plaintiff, that the defendant

dant was Lady Windſor's receiver, and had demanded the 1s. and 6d. of the plaintiff as ſuch; that the plaintiff paid the 1s. and 6d. to the defendant, and took a receipt for them, by which the defendant acknowledged to have received them for the *uſe* of Lady Windſor: that, in fact, theſe ſums were not due to Lady Windſor, and, conſequently, this action well lay againſt the defendant, into whoſe hands they were paid. BUT the judge *(Baron Perrott)* was of opinion, that under theſe circumſtances, the action did not lie againſt the defendant; that nothing could be more abſurd than to make the collector or receiver of another perſon liable to an action for every payment that was voluntarily made to him, and to leave him to be defended or deſerted by his principal, as ſuch principal ſhould think fit. That it was, in his opinion, yet ſtill more abſurd, as he did not ſee how a verdict given in this cauſe, could ever be received in evidence for or againſt the right, which might in a future cauſe come to be tried; that if this action lay, in ſuch a caſe as this, it would lie againſt every attorney who, by his client's directions, ſhould demand and receive money as due to his client, which the ſuppoſed debtor might voluntarily pay, and afterwards think fit to diſpute. He thought, that if the 1s. and 6d. had been paid over to Lady Windſor, the plaintiff might eaſily prove it; and if it was not paid over, yet the payment to her receiver was payment to her; and therefore, the action ought to have been brought againſt her. He therefore nonſuited the plaintiff; afterwards, it was moved to ſet this nonſuit aſide. But THE COURT were unanimous, that upon the facts ſtated as above, the plaintiff ought not to recover againſt the defendant, and that the action ought to have been brought againſt Lady Windſor herſelf, and not againſt her agent. Lord *Mansfield* ſaid, he kept clear of all payments to third perſons, but where it is to *a known agent*; in that caſe, the action ought to be brought againſt the principal, unleſs in ſpecial caſes, as under notice, or *mala fide*.

So a legatee may be compelled to refund, if a legacy be paid and debts appear, whether he hath given ſecurity to refund or not, for it is the caſe of payment upon a miſtaken ground. Atkins *v.* Hill, Ea. 15 Geo. 3. B.R. *Coup.* 287.

So, alſo, if money be paid upon a conſideration which happens to fail, the party may recover it back again by this kind of action. 2 *Burr.* 1012.

Thus, in an action of aſſumpſit for goods ſold and delivered, money paid, laid out, and expended, and money had and received, there was a verdict for the plaintiff, ſubject to the opinion of the court, whether the plaintiff was entitled to recover under the circumſtances of the caſe, which were theſe:— Shove *v.* Webb, Ea. 27 Geo. 3. B.R. 1 *Ter. Rep.* 732.

theſe:—The plaintiff had purchaſed of the defendant, an annuity of 25l. to be paid during the defendant's life; and for ſecuring the payment thereof, had taken a bond and warrant of attorney, and alſo an aſſignment of half-pay from the defendant. The conſideration for granting this annuity was a debt of 46l. 19s. 9d. antecedently contracted by the defendant for goods ſold and delivered, and a ſum of 71l. 17s. 6d. paid to him by the plaintiff in money: upon the regiſtering of this contract under the annuity act, the conſideration was ſtated to be the ſum of 118l. 17s. 3d. paid in money, notwithſtanding part of it was for goods ſold. The court of common pleas for that reaſon ſet aſide and vacated the ſecurity, and the queſtion in this action was, whether, as the ſecurity was ſet aſide, the party could reſort back to the original debt, the fairneſs of which was not impeached, and maintain his action for the recovery of it? By the Court; The ſecurity is ſet aſide, not on account of any fraud or defect in the contract itſelf, but upon a formal defect in making the memorial, at leaſt it was an innocent miſtake of the law; and that being the caſe, when the ſecurity was vacated, the original contract revived, and as the goods muſt be taken to have been *bona fide* ſold, the plaintiff is entitled to recover for them. In regard to the money paid as part of the conſideration, as the ſecurity is not ſet aſide for any fraud in the tranſaction, but merely for a miſtake or omiſſion in form, it becomes unconſcientious in the party to retain it; and it is therefore recoverable on the count for money had and received to the plaintiff's uſe.

Cripps v. Reade, Ea. 36 Geo. 3. B R. 6 *Ter. Rep.* 606.

So where aſſumpſit was brought for money had and received, to recover a ſum of 40 guineas, which had been paid by the plaintiff to the defendant, for the purchaſe of a leaſehold eſtate; it appeared that the defendant claimed the eſtate in queſtion, as adminiſtrator to a perſon who had taken out letters of adminiſtration, to the former poſſeſſor of the eſtate, but in a wrong name. On the ſale, the leaſe itſelf was delivered to the plaintiff, but there was no aſſignment or other conveyance, from the defendant; who ſaid that "the premiſes were his right and property, to do as he liked with; and if any thing happened he would ſee the plaintiff righted." Afterwards, the nephew of the former poſſeſſor took out adminiſtration to him by the right name, and recovered poſſeſſion of the premiſes, by ejectment; upon the trial, a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonſuit, and a motion for that purpoſe having been afterwards made, THE COURT were clearly of opinion, that as the money was paid under a miſtake, and on a miſapprehenſion by both parties, that the defendant was the legal repreſentative of the leſſee, which it afterwards turned out that he

he was not, the action for money had and received would lie to recover it back.

But in the above caſe. it is to be obſerved, that the whole paſſed by parol; if there had been a regular conveyance, it would have been otherwiſe, as appears from the following caſe:—In an action of aſſumpſit for 2000l. had and received to the plaintiff's uſe; the defendant pleaded the general iſſue, and the ſtatute of limitations. The plaintiff replied, that the writ was ſued out on Auguſt 22, 1780, that on 18th February, 1773, the defendant affirmed that there was an indenture of mortgage, dated 24 June, 1768, made or mentioned to be made, between H. and S. of the one part, and W. H. (the defendant's uncle) of the other part, for ſecuring 1200l. with intereſt: that W. H. died, and the defendant was his adminiſtrator; that the plaintiff relying on theſe aſſertions, advanced 1200l. to the defendant, on his executing an aſſignment of the ſaid mortgage, in which aſſignment the defendant covenanted with the plaintiff, that neither the ſaid W. H. nor the defendant had done any act to encumber the mortgaged eſtate; whereas the aſſertions of the ſaid defendant and the recitals, in the ſaid aſſignment were falſe, inaſmuch as there never was any ſuch indenture of mortgage (1), nor the ſum of 1200l. due to the defendant, as adminiſtrator of W. H. on ſuch ſecurity, or in any other manner; and that neither the premiſes nor any part thereof paſſed by the aſſignment to the plaintiff, nor did any eſtate, right, or title therein, or to the ſaid 1200l. veſt in him: that by fraud and impoſition, and by means of the ſaid falſe aſſertions and recitals, the plaintiff was induced to pay the ſaid 1200l. and at the time was ignorant of all the matters aforeſaid, and did not diſcover them, till within the ſpace of ſix years next before ſuing out the writ: to this replication, the defendant *demurred* generally. By the court: There may be caſes which fraud will take out of the ſtatute of limitations, but here every thing alleged in the replication may be true, without any fraud on the part of the defendant; he is an adminiſtrator, who finds a mortgage deed among the papers of his teſtator, without any arrears of intereſt, and parts with it, *bona fide*, as a marketable commodity: if he had diſcovered the forgery, and had then got rid of the deed, as a true ſecurity, the caſe would have been very different. He did not covenant for the goodneſs of the title; but only, that neither he nor the teſtator had incumbered the eſtate. *It was incumbent on the plaintiff to look to the goodneſs of the title.*

Bree v. Holbeach, Ea. 21 Geo. 3. B.R. *Doug.* 655.

(1) It was diſcovered that the mortgage-deed was a forgery.

So,

Burrough v. Skinner, Tr. 10 Geo. 3. 5 *Burr.* 2639.

So, where the defendant, who was an auctioneer, ſold to the plaintiff an intereſt in land, and the plaintiff paid him a depoſit in reſpect of ſuch purchaſe; but afterwards, upon the diſcovery of an objection to the title, and alſo of certain circumſtances which ought to have been diſcloſed at the time of the bidding, declined going on with the contract, and brought this action to recover back from the auctioneer, the depoſit of 50l. which he refuſed to return: at the trial, there was a verdict for the plaintiff, and afterwards, on a motion for a new trial, the court were unanimouſly of opinion, that the action lay againſt the auctioneer; and ſaid: The money had not been paid over to the principal, but if it had been ſo, yet the objection appeared to have been made before it either was or ought to have been ſo paid over; for the auctioneer is a ſtakeholder, a mere depoſitary, and ought not to part with a depoſit, till ſuch time as the ſale be finiſhed and completed, and it appear in the event to whom it properly belongs.

Flureau v. Thornhill, Ea. 16 Geo. 3. C.B. 2 *Black.* 1078.

But upon a contract for a purchaſe, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, the purchaſer is not intitled to any damages for the fancied goodneſs of the bargain, which he ſuppoſes he has loſt. For where the plaintiff bought at an auction a net-rent of 26l. *per annum*, for 32 years, for 270l. and paid a depoſit of 54l. it afterwards appearing on looking into the title, that the defendant could not make it out, the plaintiff demanded a return of his depoſit money, with intereſt and coſts, and further inſiſted on an additional ſum for damages, on the loſs of ſo good a bargain: the latter the defendant refuſed to do; and on this action being brought, he paid the depoſit and intereſt, into court: at the trial, the jury found a verdict for the plaintiff, contrary to the judge's directions, allowing 20l. for damages: afterwards a new trial was moved for and granted. THE COURT being clearly of opinion that theſe contracts are merely conditional, frequently expreſſed, but always implied, that the vendor has a good title, and if he has not, the return of the depoſit with intereſt and coſts, is all that can be expected.

Stratton v. Raſtall and another, Ea. 28 Geo 3. B.R. 2 *Ter. Rep.* 366.

Alſo, though money paid upon a conſideration which fails, may be recovered back in this kind of action, yet it can only be recovered from the party by whom it was actually received, and not from one who joined as a ſurety only. —This was an action of aſſumpſit, for money had and received by the defendant and one W. Avarne (who was outlawed at the ſuit of the plaintiff) to the uſe of the plaintiff, and for money lent and paid; upon the trial, a verdict was found for the plaintiff, ſubject to the opinion of the court, on a caſe ſtated; and the facts were theſe: In October

ber, 1780, the plaintiff purchaſed an annuity of 100l. for the joint lives of the defendant Raſtall and Avarne, and the life of the ſurvivor, for 575l. and for the ſecuring the payment thereof, the defendant and Avarne gave a joint bond and warrant of attorney; and alſo executed a deed of grant and demiſe of certain lands; upon the back of which deed, the defendant Raſtall and Avarne, ſigned a joint receipt for the conſideration money. *Neither the bond, nor warrant of attorney, nor indenture, was inrolled within the time preſcribed by the ſtatute, reſpecting the grants of life annuities, whereby the ſame became void*; afterwards, the plaintiff having brought this action, the defendant, Raſtall, filed a bill in chancery againſt the plaintiff, impeaching the grant of the annuity, for want of conſideration, and praying an injunction againſt further proceedings in the preſent action: the plaintiff put in his anſwer to this bill, in which he admitted, that he underſtood that *the whole of the purchaſe money was intended to be applied to the uſe of Avarne only, and that the defendant Raſtall was only a ſurety for Avarne*; but did not know whether the whole was actually received by Avarne only: but he ſaid he would not have purchaſed the annuity, or advanced the 575l. unleſs upon the ſecurity of the defendant Raſtall, and of the aſſignment made by him. *Aſhhurſt*, J. was of opinion, that the action was well brought. But by *Buller*, J. It was clearly underſtood at the trial, that Avarne, in fact, received the whole of the conſideration money, and on this caſe it muſt be taken, that the plaintiff was only a ſurety: now, on ſtrict principle of law, if the contract became void, by the act of the plaintiff, he has no ground to recover back the money, for the neglect of a plaintiff cannot raiſe a debt in a defendant; it here formed no part of the contract, and if he can recover at all, it muſt be on equitable principles: but as againſt a ſurety, the contract cannot be carried beyond the ſtrict letter of it: then can the plaintiff recover againſt this defendant on equitable principles? It appears that the money was advanced for the uſe of Avarne, and that he only was benefited by it; but there is no equity in ſaying, that a perſon *who has only lent his name by way of ſecuring the payment of the annuity, ſhall be anſwerable for the conſideration money* of that annuity, for which he has not pledged his ſecurity, and from which he has received no benefit whatever. Could the plaintiff recover this money againſt this defendant in a court of equity? The caſe of the *Attorney General* v. *Randall* and others, 2 *Eq. Caſ.* abr. 742. is very ſtrong to ſhew that he could not, and that equity diſtinguiſhes between the perſons who join in a receipt, and him who actually receives it; there, though a receipt had been ſigned by three truſtees, yet the chancellor decreed, that the one only who

had, in fact, received the money, ſhould be accountable for it: the receipt in this caſe is not concluſive againſt him, as he was only a ſurety, and, in fact, received no part of the conſideration money. In conſcience, he only who received the money ought to be obliged to pay it back; and a court of equity would enquire, in this caſe, whether the party had received the money or not. Now, if a court of equity would give this plaintiff no relief, we ought not to permit him to recover in a court of law, in an action founded upon equitable principles. *Groſe*, J. The money is not received by the defendant to the uſe of the plaintiff, nor lent to the defendant, but advanced to Avarne, and the defendant, for the benefit of Avarne, in conſideration of an annuity, ſecured by bond to the plaintiff: then it is neither money lent to be repaid, nor received for the uſe of the plaintiff: ſo that in ſtrict law, the evidence does not prove either count of the declaration. In reſpect to equitable principles, it appears plainly, that in fact the defendant has had no benefit from this money, Avarne had the whole; then Avarne ſhould be anſwerable for the whole. It is true that the defendant conſented to become ſurety for Avarne, but he was ſurety for the payment of the annuity, and not for the repayment of the conſideration-money; and he entered into a ſecurity which the plaintiff has deſtroyed: but this raiſes no equity againſt the defendant, who has received no benefit in favour of the plaintiff, who is alone in fault; and therefore the action cannot be ſupported. Poſtea to the defendant.

2 *Burr.* 1012. So, alſo, if money be got through *impoſition* (expreſs or implied) or *extortion*, or *oppreſſion*, or an *undue advantage* taken of the plaintiff's ſituation, contrary to laws made for the protection of perſons under thoſe circumſtances, it may be recovered back again in this action.

Robſon *v.* Eaton, M. 26 Geo. 3. B.R. 1 *Term Rep.* 62. Thus, where the defendant was actually indebted to the plaintiff; and one Davis having procured a forged power of attorney, went to an attorney of the name of Hodgſon, and authorized him to bring an action in the court of common pleas, in the name of the plaintiff, which he accordingly did under ſuch forged authority. And the defendant, as the action was in the plaintiff's name, and it appeared from the record, that Hodgſon was the attorney put in by the plaintiff, paid the money into court, which Hodgſon took out, and paid over to Davis, who was never heard of afterwards. On an aſſumpſit afterwards being brought to recover this money again, THE COURT were clearly of opinion, that the payment made under the above circumſtances, could not be conſidered as a payment to the plaintiff; and that the defendant was ſtill liable to him: but that the defendant might take his remedy againſt the attorney, who

who truſted to the warrant of attorney; and that Davis, who committed the forgery, was liable to him.

So, where the defendants, who had a houſe both in America and London, drew two bills in America of the ſame tenor and date on their houſe in London, in favour of the plaintiffs; one of them being loſt, came to the hands of a third perſon, who forged the payee's indorſement, and received the amount of it from the defendants: afterwards the real payees ſued them on the other bill, and the payment of the forged one was held to be no diſcharge, and the plaintiffs recovered the amount of it. Cheap v. Harley & al. cited 3 *Ter. Rep.* 127.

So, alſo, aſſumpſit for money had and received, will lie by the true owner of money or notes againſt a third perſon, into whoſe hands they have come *mala fide*, provided their identity can be traced and aſcertained. This was an action of aſſumpſit for money lent and advanced, money laid out and expended, and money had and received. On the trial, a verdict was found for the plaintiff, ſubject to the opinion of the court on the following caſe, viz. one *Wood* being a clerk to the plaintiff, who was a brewer, and receiving money from the plaintiff's cuſtomers, and alſo negotiable notes for the plaintiff's uſe in the ordinary courſe of buſineſs, paid ſeveral ſums with the ſaid money and notes, at different times, to the amount of 459l. 4s. 4d. to the defendants upon the chances of the coming up of tickets in the State Lottery of 1772, contrary to the lottery act of that year. The plaintiff's and *Wood*'s, ſureties, had releaſed him. The queſtion was, whether *Wood* ought to have been admitted as a witneſs to prove the above caſe; and ſuppoſing his evidence admiſſible, whether the plaintiff was intitled to recover in this action? By the Court: As to the firſt queſtion, there can be no doubt but that *Wood* was an admiſſible evidence. In *Buſh* v. *Rawlins*, in debt, upon the ſtatute 2 *Geo.* 2. c. 24. againſt bribery, a man who had taken the bribery-oath, was held a competent witneſs to prove that he himſelf had been bribed. In reſpect to the next queſtion, this is a verbal action, in the nature of a bill in equity; and if, under the circumſtances of the caſe, it appears that the defendant cannot in conſcience retain what is the ſubject-matter of it, the plaintiff may well ſupport this action. There are two ſorts of prohibitions enacted by poſitive law, in reſpect of contracts. 1ſt, To protect weak or neceſſitous men from being over-reached, defrauded, or oppreſſed: then the rule in *pari delicto, potior eſt conditio defendentis* does not hold; and an action will lie, becauſe, where the defendant impoſes on the plaintiff, it is not *par delictum*. The next ſort of prohibition is founded upon general reaſons of policy and public expedience: there, both parties offending, are Clarke v. Shee and Johnſon, M. 15 Geo. 3. B.R. *Cowp.* 197.

equally

equally guilty: *par eſt delictum, et potior eſt conditio defendentis.* The prohibition of the lottery-act is of this ſort; and in this caſe, no doubt but the defendant and the witneſs *Wood* were equally guilty: but the plaintiff does not ſue as ſtanding in the place of *Wood* his clerk; for the money and notes which *Wood* paid to the defendants, are the identical notes and money of the plaintiffs. Where money or notes are paid *bona fide*, and upon a valuable conſideration, they never ſhall be brought back by the true owner; but where they come *mala fide* into a perſon's hands, they are in the nature of ſpecific property, and if their identity, can be traced and aſcertained, the party has a right to recover: it is of public benefit and example that he ſhould: but otherwiſe, if they cannot be followed and identified; becauſe there it might be inconvenient, and open a door to fraud. Here the plaintiff ſues for his identified property, which has come to the hands of the defendants iniquitouſly and illegally, in breach of the act of parliament, therefore they have no right to retain it; and, conſequently, the plaintiff is entitled to recover.

Smith *v.* Barrow, Ea. 28 Geo. 3. B.R. 2 *Ter. Rep.* 476.

One partner may maintain an action for money had and received againſt the other partner for money received to the ſeparate uſe of the former, and wrongfully carried to the partnerſhip-account. The plaintiff and his father had been in partnerſhip together, during which time, one *Keate* became indebted to them in 531l. the father died, leaving the plaintiff his ſole executor; after the death of the father, the plaintiff took the defendant into partnerſhip, and *Keate* became indebted to thoſe two in the further ſum of 30l. *Keate* afterwards aſſigned his effects to truſtees, for the benefit of his creditors; two dividends were made by the truſtees: the firſt, which was made to the plaintiff and defendant, was divided between them according to their ſeveral properties, viz. the proportion of the dividend on the firſt debt of 531l. to the plaintiff's ſeparate uſe; and the proportion of the dividend on the ſecond debt of 30l. in moieties between them. After this, the truſtees tranſmitted a bill of exchange to the plaintiff and defendant in their joint names, and the defendant alone received the money under the partnerſhip-firm. The plaintiff's proportion of this ſecond dividend, ſo far as related to the original debt of 531l. was 79l. 14s. 6d. for which this action for money had and received was brought. A rule was obtained to ſhew cauſe why the verdict, which had been obtained by the plaintiff, ſhould not be ſet aſide, on two grounds: 1ſt, Becauſe the action ought to have been brought by the plaintiff as executor, or ſurviving partner: 2dly, Becauſe the remittance being made to Smith and Barrow, it appears to have been received on a partnerſhip tranſaction;

tranſaction; and one partner cannot maintain this action againſt another, becauſe a receipt by one is a receipt by both. But, by the Court, This action is not only properly brought, but it could not have been brought in any other form; for, if the action had been brought by the plaintiff as ſurviving partner, it would have been neceſſary for him to have ſhewn that he and the deceaſed partner had a joint cauſe of action; but there never was a joint cauſe of action in the plaintiff and his late partner againſt this defendant: and it is immaterial to look back to ſee how three perſons were concerned, if, as between the plaintiff and the defendant, the latter has received a ſum of money for the uſe of the former; with reſpect to the other objection, it appears that the defendant has received a ſum of money partly on the plaintiff's own ſeparate account, and partly on the partnerſhip-account; the former of which he wrongfully carried to the partnerſhip-account; but that being his own act, and it being againſt the truth and juſtice of the caſe, he ought not to be permitted to ſet up the partnerſhip as a defence to this action. If the plaintiff had received this money, he would have been intitled to have ſet apart for his ſeparate uſe, the whole ſum, except that part which belonged to the partnerſhip-account; then the circumſtance of the defendant's having received it cannot alter the right.

The rule is, *in pari delicto, potior eſt conditio defendentis:* and there are ſeveral other maxims of the ſame kind. Where the contract is executed, and the money paid *in pari delicto*, this rule certainly holds, and the party who has paid it cannot recover it back: for inſtance, in bribery, if a man pays a ſum of money by way of a bribe, he can never recover it in an action, becauſe both plaintiff and defendant are equally criminal. Browning *v.* Morris, Ea. 18 Geo. 3. B.R. *Coupt.* 792.

So alſo in this caſe, which was an action for *money had and received*, it appeared that the plaintiff and defendant were both lottery-office keepers, and during the drawing of the lottery, entered into an agreement, mutually to inſure the number of a ticket with each other; upon condition that he whoſe number ſhould be drawn on the day next following the agreement, ſhould receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he choſe the price of an undrawn ticket; and received the amount from the plaintiff; the next day, each inſured another number upon the ſame terms, and ſo the contract was continued from day to day: it afterwards happened that the plaintiff's number was drawn, when the defendant, inſtead of complying with the terms of the agreement, as the plaintiff had done, refuſed to give the plaintiff either an undrawn ticket, or the value of it. Neither of them had any tickets in their poſ-

ſeſſion, which rendered the contract illegal, and againſt the ſtatute. The queſtion was, whether the plaintiff was intitled, in diſaffirmance of the contract, to recover back the ſum which he had paid upon this illegal tranſaction? By lord *Mansfield*. The plaintiff is himſelf a lottery-office keeper, and brings this action, not for money paid by him to the defendant for inſuring, but for money paid by him to the defendant, in conſequence of his having inſured the defendant's ticket: ſo that the plaintiff is not only in *pari delicto*, but alſo ſtands in the light and under the deſcription of that ſpecies of inſurer from whom the ſtatute meant to protect the unwary. A nonſuit was entered.

But where contracts or tranſactions are prohibited by poſitive ſtatutes, for the ſake of protecting one ſet of men from another ſet of men; the one from their ſituation and condition, being liable to be oppreſſed or impoſed upon by the other; there, the parties are not in *pari delicto*; and, in furtherance of theſe ſtatutes, the perſon injured, after the tranſaction is finiſhed and completed, may bring his action, and defeat the contract:—For inſtance, by the ſtatute of uſury, taking more than 5 *per cent.* is declared illegal, and the contract void; but theſe ſtatutes were made to protect needy and neceſſitous perſons from the oppreſſion of uſurers and monied men, who are eager to take advantage of the diſtreſs of others; whilſt they, on the other hand, from the preſſure of their diſtreſs, are ready to come into any terms, and with their eyes open, not only break the law, but complete their ruin. Therefore the party injured may bring an action for the exceſs of intereſt.

Jones v. Go-ſhtly, Ea. 16 Geo. 3. C.B. 2 *Black* 1073. *Coup.* 793.

So, the ſtatute reſpecting lottery-tranſactions is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not converſant in calculations, are drawn in by the office-keepers. In theſe caſes, the court will not aſſiſt the party who makes the illegal contract to recover any money he may win of the office-keeper; but he ſhall have his action for all the money which the office-keeper has got from him. This was aſſumpſit for money had and received to the plaintiff's uſe; and it appeared that the plaintiff had inſured lottery-tickets at the defendant's office, and paid premiums thereon, to the amount of 64l. 17s. The plaintiff was, upon the whole, a winner; and there was a balance due to him from the defendant of 90l. this the defendant refuſed to pay, on the ground that the inſurance was illegal; and he alſo refuſed to return the premiums. On the trial, there was a verdict for the plaintiff for 64l. 17s. which it was afterwards moved to ſet aſide, on the ground that the plaintiff was *in pari delicto*. But the Court were unanimouſly of opinion that the verdict was right, and *Blackſtone*, J. ſaid, that the contract on which the plaintiff paid his

his money was not criminal, but merely *void*; and therefore having advanced his premium, without any conſideration, he was entitled to recover it back.

So, alſo, in an action of aſſumpſit brought againſt the defendants as partners and keepers of a lottery-office, to recover back a ſum of money paid by the plaintiff for inſuring tickets in the lottery of 1781. At the trial, the plaintiff was nonſuited, on the ground, that both parties being engaged in an illegal tranſaction, a court of juſtice could not be called upon to the aid of either. A rule having been obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, lord *Loughborough*, after the caſe had been argued, and time taken to conſider of it, declared that the three other judges *(contrary to his opinion)* thought the caſe of *Jaques* v. *Golightly* good law, and fit to govern the preſent. Jaques v. Withy and Reid, Tr. 28 Geo. 3. 1 *Hen. Black.* 65.

So, where an action had been brought ſome time before by the preſent defendant, as indorſee of a promiſſory note for 150l. againſt the preſent plaintiff as the maker: in which cauſe interlocutory judgment had been ſigned, and a writ of inquiry executed; after which the cauſe was compromiſed, by *Cobden*'s paying part, and giving a warrant of attorney to confeſs judgment for the reſidue of the 150l. In the interval, between the time when the warrant of attorney was given, and the time when the money became due, according to the defeaſance thereof, *Kendrick* told his attorney that he was glad it was ſettled, for that he had only given 10l. in cash, and his promiſſory note for it; and that he knew it was a lottery tranſaction. This action was now brought to recover back the money ſo paid, on the ground of want of conſideration; and that that was known to *Kendrick* at the time he took the note. An objection was taken at the trial, that this action was in effect to put the ſame ſum in litigation a ſecond time, which had been recovered in the former action by *Kendrick* againſt *Cobden*: But lord *Kenyon* over-ruled it on the ground that the money had been paid under a compromiſe, and not under the judgment of a court. Cobden v. Kendrick, M. 32 Geo. 3. B.R. 4 *Ter. Rep.* 432.

Another inſtance that occurs, is the clauſe in the ſtatute 5 *Geo.* 2. c. 24. § 17. to prevent bad practices from bankrupts who have not obtained their certificate; and who, for the ſake of obtaining it, will come into any terms, and cauſe their friends to come into any terms which a hard creditor may chooſe to impoſe. The ſtatute prohibits "taking any money or ſecurity from the bankrupt himſelf, "or any perſon on his behalf, as the conſideration for "ſigning his certificate." Suppoſe a creditor refuſes, unleſs the bankrupt conſents to give him a ſum of money, the bankrupt gets the money from a friend or relation; and the creditor, in conſequence, ſigns the certificate. The bank- *Cowp. Rep.* 792.

rupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may, notwithſtanding, bring his action, and recover the money back.

Smith v. Bromley, Sitt. Guildh. aſ. Ea. 1760. cited 2 *Doug.* 696. *Bull.* N.P. 133.

Thus, in an action for money had and received to the plaintiff's uſe, it appeared that the plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commiſſion againſt him; but afterwards finding no dividend likely to be made, refuſed to ſign his certificate: but, on frequent application, and earneſt intreaties made by the bankrupt to one *Oliver*, a tradeſman in town, who was an intimate friend of the defendant, who lived in Cheſhire, he got *Oliver* to write to the defendant ſeveral times; and he at laſt prevailed on the defendant to ſend him (*Oliver*) a letter of attorney empowering him to ſign the certificate, which *Oliver* would not do, unleſs the bankrupt, or ſome body for him, would advance 40l. and give a note for 20l. more; and which, on *Oliver's* ſigning the certificate for the defendant, the plaintiff (who was the bankrupt's ſiſter) paid, and gave to *Oliver* accordingly, who thereupon gave her a receipt for the money, promiſing to return it if the certificate was not allowed by the chancellor: the certificate was allowed, and *Oliver* had paid the 40l. over to the defendant. This action was brought to recover back the 40l. and the jury found a verdict for the plaintiff, with 40l. damages, under the direction of lord *Mansfield*, who ſaid it was iniquitous and illegal in the defendant *to take*, and therefore it was ſo *to detain* this 40l. if a man makes uſe of what is in his own power to extort money from one in diſtreſs, it is certainly illegal and oppreſſive; and whether it was the bankrupt or his ſiſter that paid the money, it is the ſame thing. The taking money for ſigning certificates is either an oppreſſion on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itſelf, before any proviſion was made againſt it by the ſtatute: for, if the bankrupt has conformed to all the law requires of him, and has fairly given up his all, the creditor ought in juſtice to ſign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud, or concealment, the creditor ought not to ſign for any conſideration whatever. If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compaſſion of his family. If it is the money of the bankrupt himſelf, it is giving one creditor his debt to the excluſion of the others, and a fraud upon them. It is argued, that as the plaintiff founds her claim on an illegal act, ſhe ſhall not have relief in a court of juſtice. But *ſhe* did not apply to the defendant or his agent to ſign the certificate *on an improper or illegal conſideration*.

But

But *as the defendant inſiſted upon it*, ſhe in compaſſion to her brother, paid what he required. *If the act is in itſelf immoral, or a violation of the general laws of public policy*, there the party paying ſhall not have this action; for where both parties are equally criminal againſt ſuch general laws, the rule is, *potior eſt conditio defendentis*. But there are other laws, which are calculated for the protection of the ſubject againſt the oppreſſion, extortion, and deceit of others; if ſuch laws are violated, and the defendant takes advantage of the plaintiff's condition or ſituation, there the plaintiff ſhall recover. The preſent is the caſe of a tranſgreſſion of a law made to prevent oppreſſion either on the bankrupt or his family, and the plaintiff is in the caſe of a perſon oppreſſed, from whom money has been extorted, and advantage taken of her ſituation and concern for her brother. Upon the whole, it is neceſſary for the better ſupport and maintenance of the law to allow this action; for no man will venture *to take*, if he knows he is liable *to refund:* where there is no temptation to the contrary, men will always act right.

And, though the ſecurity be given for the benefit of *all* the creditors, it will make no difference. In a ſpecial action on the caſe for non-performance of an agreement; the firſt count of the declaration, after reciting, that the plaintiffs, as aſſignees of *Gardiner*, were intitled to the equity of redemption of 1490l. bank-ſtock, which was in mortgage to one *Lane*, for ſecuring a ſum of money lent by him to the bankrupt; and that the defendant was deſirous that this equity of redemption ſhould be aſſigned to *Lane* by the plaintiffs, and that they ſhould execute to *Lane* a general releaſe of all claims and demands, which they as aſſignees had upon him.—Stated the agreement to have been: "That on *Gardiner's* having his certificate confirmed by the lord chancellor, and the plaintiffs aſſigning to *Lane* the equity of redemption of the ſaid ſtock mortgaged to *Lane*, and alſo executing to him a general releaſe, the defendant ſhould pay, and promiſed to pay (four months after the certificate ſhould be confirmed by the chancellor, and on the plaintiffs aſſigning the equity of redemption, as aforeſaid, to *Lane*, and executing and delivering ſuch general releaſe) the ſum of 611l. to the plaintiffs *for the benefit of the creditors of the bankrupt.*" Then, after ſtating, that, in conſideration of the promiſe and undertaking of the plaintiffs to perform all their part of the agreement, the defendant promiſed, and undertook to fulfil his part of it, the plaintiffs averred, "That, afterwards, on 19th July, 1774, the bankrupt's certificate was allowed and confirmed by the lord chancellor; and four months afterwards, viz. on

Jones and another, aſſig. of Gardiner *v.* Barkley M 22 Geo. 3. B.R. 2 *Doug.* 695. n. [3].

" 20th November 1774, they offered to the defendant to " aſſign the equity of redemption, and to execute and de- " liver a general releaſe to *Lane*, and tendered a draught of " an aſſignment and releaſe, and offered to execute and deli- " ver ſuch aſſignment and releaſe; but that the defendant " *abſolutely diſcharged the plaintiffs* from executing the ſame, " or any aſſignment or releaſe whatſoever. Yet the ſaid de- " fendant not regarding his ſaid promiſes, &c. did not, four " months after the ſaid certificate had been confirmed by the " chancellor, nor at any time ſince, pay the ſaid 611l. to the " plaintiffs." On the trial of the cauſe on the general iſſue, a verdict was found for the plaintiff, with 611l. damages, but ſubject to the opinion of the court, on a motion for a nonſuit. When the rule for a nonſuit came to be argued, the facts appeared to have been as follows: an agreement, as ſtated in the declaration, was entered into, and ſigned by the defendant: afterwards *Gardiner*'s certificate was allowed; and a year after that allowance, the attorney for the plaintiffs, by their direction, prepared a draft of an aſſignment and releaſe, and in company with one of the plaintiffs, tendered it to the defendant for his peruſal, telling him the plaintiffs were ready, and would execute it if he approved of it. The defendant returned the draft, ſaying, it was needleſs for them to give themſelves any trouble, for that *Lane* (who was the bankrupt's father-in-law, and for whom the defendant acted as an attorney) would never pay the money. The witneſs who proved the tender, ſaid upon his croſs-examination, that *Carr, who was one of the plaintiffs*, was a moſt obſtinate creditor, and by much the largeſt; that his debt was 1200l. and he perſuaded him to ſign, by telling him, that if he did not, the money would never be received. As ſoon as he had ſigned, the certificate was allowed. At the trial, an objection was taken, that this was an agreement to ſecure the payment of money due from the bankrupt, in order to induce a creditor to ſign his certificate, and therefore void under the ſtatute. Lord *Mansfield*, at the trial, thought this caſe not within the ſtatute, becauſe the 611l. to be paid to the plaintiffs was not for the ſeparate uſe of *Carr*, but *for the benefit of all the creditors*. His lordſhip, however, after the argument on the rule for a nonſuit, ſaid what ſtruck him in this caſe at Guildhall was, that the agreement was with the aſſignees acting for *all* the creditors, and the benefit to go to all the creditors. I thought, between a friend of the bankrupt and all the creditors, any agreement might be made; they might agree to ſuperſede the commiſſion, they might agree to compound. But upon fuller conſideration, I am ſatisfied: and we are ALL of opinion that this caſe is within the letter of the ſtatute, and within the reaſon

reaſon of it. Great corruption and oppreſſion might ariſe from a combination of all the creditors, to exact conditions for ſigning the certificate. Nonſuit entered.

So in aſſumpſit on a promiſſory note given by the defendants to the plaintiffs; the circumſtances were, that the defendants being conſiderably indebted to the plaintiffs and other creditors, and being inſolvent, aſſigned over all their effects in truſt, to pay 11s. in the pound to all their creditors, to which they all conſented except the plaintiffs, who refuſed to ſign the deed, or receive any compoſition, unleſs the defendants would give a note for the remaining 9s.; the defendants accordingly gave them the note in queſtion to that amount, and then the plaintiffs ſigned the deed; the defendants made a ſubſequent promiſe to pay it; and this the plaintiffs relied on: a verdict was however found for the defendants; and on a rule to ſhew cauſe why a new trial ſhould not be granted, THE COURT were of opinion, that the verdict was right, and ſaid, If a bankrupt, or an inſolvent, after becoming free from his engagements, having no reſtraint on his mind, voluntarily give ſecurity for a former demand, which is only due in conſcience, ſuch ſecurity may be enforced in a court of law. But the contract in the preſent caſe is a fraud on the reſt of the creditors: that note preceded the execution of the deed, the defendants were abſolutely in the power of the plaintiffs at the time when this note was given; they took an undue advantage of the diſtreſſed ſituation of the defendants. If this note had been obtained by actual compulſion, there is no doubt but that it would be void. Now this is equivalent to it; then if the ſecurity was void at its creation, no ſubſequent promiſe can ſet it up again. Here the note was void on the ground of fraud, and any ſubſequent promiſe muſt be a *nudum pactum:* for the debt was annihilated by the deed of compoſition; and the plaintiffs had conſented to take a ſmaller ſum than their original debt.

Cockſhott & *al.* *v.* Bennet & *al.* M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 763.

So in aſſumpſit upon promiſes, the caſe was that the defendant having become inſolvent, had by deed of truſt, dated April 26, 1787, aſſigned all his effects to truſtees, for the benefit of his creditors, who were to ſign it by a given time: the plaintiffs refuſed to ſign the deed, unleſs their whole debt was ſecured to them, upon which an agreement was entered into by the plaintiffs and the defendant, that the plaintiffs ſhould ſign the deed and receive the dividend under it, and that for payment of the reſt, the defendant undertook to recommend cotton to the plaintiffs for ſale, the profits of which ſhould in three years diſcharge the remainder of the debt; and in caſe of loſs or deficiency, that the defendant ſhould make it good: it then appeared, that a loſs had, in fact, happened on the ſale of the cotton; for which,

Jackſon & *al.* *v.* Lomas, Hil. 31 Geo. 3. B R. 4 *Ter. Rep.* 166.

and the original debt, this action was brought: it was determined, that the action would not lie, for it was intended by the creditors, who had ſigned the deed, that on the defendant's aſſigning over all his property to his creditors, that he ſhould become a free man; but the plaintiffs having executed the deed on a private agreement, ſecuring to themſelves a further advantage, it was a coercion on the defendant himſelf, and a fraud on the other creditors, which brought this caſe within the principle of *Smith* v. *Bromley*, and *Cockſhott* v. *Bennet*.

Nerot *v.* Wallace and others, aſs. of Reily and Collins, in Error, B.R. Hil. 29 Geo. 3. 3 *Ter. Rep.* 17.

So in an action upon the caſe, in the court of common pleas, the declaration ſtated, that on the laſt examination of the bankrupt *Collins*, he being charged by the plaintiff with having received ſeveral ſums of money, which he had not accounted for, when the commiſſioners were about to examine him, as to the diſcloſure of theſe matters, in conſideration that the plaintiff would forbear from proceeding in ſuch examination before the commiſſioners, the defendants undertook to pay all ſuch monies, as the bankrupt had received and not accounted for: in an action on theſe promiſes, the plaintiff had judgment in the court of common pleas, and now error was brought in B. R. where the judgment was reverſed on two grounds: FIRST, becauſe the conſideration for this promiſe was void, as *being contrary to the ſpirit of the bankrupt laws*; and, SECONDLY, becauſe it was void, as the promiſe was obtained by the aſſignees who had a power over the plaintiff in error; whoſe friendſhip for the bankrupt was worked upon, ſo that the contracting parties were not upon equal terms. As to the 1ſt, the promiſe made by the aſſignees, which was the conſideration of the defendants promiſe, was not in their power to perform; becauſe the commiſſioners had nevertheleſs a right to examine the bankrupt: and no colluſion of the aſſignees, could deprive the creditors of the right of examination, which the commiſſioners would procure them: the aſſignees did not ſtipulate only for their own acts, but alſo that the commiſſioners ſhould forbear to examine the bankrupt: but clearly they had no right to tie up the hands of the commiſſioners by any ſuch agreement, and if any propoſal of that ſort had been made to the commiſſioners, they, as acting in a public duty, would have been guilty of a breach in that duty in acceding to it. The legiſlature has anxiouſly provided, that the creditors ſhall have the full examination of the bankrupt, as to the ſtate of his effects, and the diſpoſition of them. By the ſtat. 5 *Geo.* 2. c. 30. the bankrupt is bound to give that ſatisfaction; and there are other parts of that act material to be attended to; the ſec. 12. provides that the bankrupt ſhall not be entitled to a certificate in certain caſes, if he has given 100l. to any child in marriage, without

out having ſufficient at that time to pay his creditors, or if he has gamed to a certain amount, or loſt 100l. by any ſtock tranſactions; now, if in this caſe, the bankrupt came within any of theſe proviſions, it cannot be permitted to the aſſignees, or to a friend of the bankrupt to protect him from that inquiry, and to impoſe on the great ſeal, in obtaining his certificate under circumſtances, which the legiſlature has ſaid ſhall preclude him. On this record, the court cannot ſee what the real ſituation of the bankrupt was, but only that great pains have been taken to conceal it, this is therefore contrary to the policy of the bankrupt laws: 2dly, if the ſituation of the contracting parties be conſidered, the caſes of *Smith* v. *Bromley*, and *Cockſhott* v. *Bennett*, go the length of determining that this action cannot be maintained, for the parties to the contract were not upon an equality; one perſon ſhall not have it in his power to take an undue advantage of another, who is actuated by motives of friendſhip, and who therefore cannot reſiſt the temptation laid in his way.

So where the defendant being about to ſucceed the plaintiff in a houſe, which the plaintiff had before occupied, and wiſhing to have the furniture, the plaintiff agreed to leave it, if the defendant could get a friend to advance the money, as ſhe had not the money herſelf. She accordingly applied to a friend of the name of *Welch*, who accordingly treated with the plaintiff reſpecting the price; and finally agreed to purchaſe them for the defendant for 70l. and took a bill of ſale of them to himſelf, wherein that was expreſſed to be the conſideration: it appeared, however, that there was a private agreement between the plaintiff and defendant unknown to *Welch*; that the defendant ſhould pay the further ſum of 30l. over and above the 70l. to be paid by *Welch:* and ſhe accordingly gave two promiſſory notes for 15l. each; on one of which the preſent action was brought, and the plaintiff called witneſſes to prove that the goods were worth more than 70l. independent of the convenience to the defendant of purchaſing them on the ſpot. Lord *Kenyon*, at the trial, was of opinion, that the plaintiff was not entitled to recover, upon the ground that the private agreement between theſe parties was a fraud upon *Welch*, who paid this money in advancement of the defendant, in confidence that the ſum paid by him was the whole conſideration; the jury, however, found a verdict for the plaintiff: but this was afterwards ſet aſide by the Court, and a new trial awarded, it being manifeſtly a verdict againſt the juſtice of the caſe, and the judge's direction: for they reſolved, that the private agreement was a groſs fraud upon *Welch*, in order to induce him to advance his money, and which if he had known, he would not probably have done; and that as this fraud was practiſed

Jackſon v. Duchaire, H. 30 Geo. 3. B.R. 3 *Ter. Rep.* 551.

tiſed by the plaintiff, he could not recover, according to the rule *ex dolo malo non oritur actio:* and *Aſhhurſt*, J. ſaid, that even if it were to be conſidered that *Welch* had purchaſed goods for himſelf of greater value than 70l. and had only paid 70l. himſelf, then it would appear that the defendant had no conſideration whatever for her notes.

Trueman v. Fenton, Hil. 17 Geo. 3. B.R. *Cowp*, 544.

But a bankrupt, after a commiſſion of bankruptcy ſued out, may, in conſideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend under the commiſſion, make ſuch creditor a ſatisfaction in part or for the whole of his debt, by a new undertaking or agreement; and aſſumpſit will lie upon ſuch new promiſe or undertaking.—This was an action on a promiſſory note, bearing date February 11, payable to one *Joſ. Trueman* (the plaintiff's brother) three months after date, for 67l. and indorſed by him to the plaintiff. The declaration contained other counts for goods ſold, money had and received, and on an account ſtated. The defendant pleaded, 1ſt, Non-aſſumpſit; 2dly, That on 19th January he became bankrupt; and that the debt for which the ſaid note was given, was due to the plaintiff before ſuch time as he the defendant became bankrupt, and that the note was given to *Joſ. Trueman*, for the uſe of, and for ſecuring to the ſaid plaintiff his debt ſo due. On the trial of the cauſe, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court, Whether the facts proved ſupported the merits of the defendant's plea? And the facts proved were briefly theſe: the defendant, on December 15, accepted two bills, for 63l. 9s. each, in favour of the plaintiff, for goods ſold and delivered, one at ſix weeks, and the other at two months after date. Having accepted ſuch bills, he afterwards, on 19th January, became bankrupt; and the plaintiff, who had paid the bills away, took them up when they became due, the plaintiff did not prove or claim any debt or ſum of money under the commiſſion: and the defendant, who had before propoſed to give the plaintiff a ſecurity for part of the debt, if he would take up the bills, and cancel or deliver them up. Afterwards, on 11th February, called on the plaintiff, and voluntarily propoſed to ſecure to him the payment of 67l. in ſatisfaction of his debt: the plaintiff agreed to accept ſuch ſum of 67l. in ſatisfaction and diſcharge thereof, and took from the defendant the above note for 67l. payable to his brother; at the ſame time delivering up to the defendant to be cancelled the two firſt mentioned acceptances. The defendant's plea was bad in point of form, becauſe the original debt under the acceptances, was not due at the time of the bankruptcy; and the merits of the plea were, that the debt was *then* due. But lord *Mansfield* on the trial ſuggeſted, that it was wrong to entangle juſtice in

in matters of form, and to turn parties round upon frivolous objections, when it could be avoided; and he recommended it to the counſel to give up the objection in point of form, and to take the opinion of the Court, Whether, according to the facts and truth of the caſe, the defendant could have pleaded his certificate in bar of the debt in queſtion? and if this had been refuſed, he declared that he ſhould have left it to the jury upon the merits. After the caſe had been argued on the general ground, the Court gave judgment for the plaintiff: PER CUR. In this caſe, there is no fraud, no oppreſſion, no ſcheme whatſoever on the part of the plaintiff to deceive or impoſe on the defendant; and as to colluſion with reſpect to the certificate, where a creditor exacts terms of his debtor, as the conſideration for ſigning his certificate, and obtains money, or a part of his debt for ſo doing, the aſſignees may recover it back in an action, but that is not the caſe here: ſo far from it, the tranſaction itſelf excluded the plaintiff from having any thing to do with the certificate. No man can vote for or againſt the certificate till he has proved his debt. Here the plaintiff delivered up the two drafts, bearing date prior to the act of bankruptcy, and by agreement accepted one for little more than half their amount, bearing date after the commiſſion of bankruptcy ſued out; moſt clearly, therefore, he could not have proved that note under the commiſſion; and if not, he could have nothing to do with the certificate.—That brings it to the general queſtion, *Whether a bankrupt, after a commiſſion of bankruptcy ſued out, may not, in conſideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commiſſion, make ſuch a creditor a ſatisfaction in part, or for the whole of his debt, by a new undertaking and agreement?*—A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his receiving an old debt by a new promiſe, it muſt be founded on the ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conſcience, notwithſtanding he has obtained his certificate; and there is no honeſt man who does not diſcharge them, if he afterwards has it in his power to do ſo. Though all legal remedy may be gone, the debts are clearly not extinguiſhed in conſcience. The courts of equity have gone very far upon theſe principles: where a man deviſes his eſtate for payment of his debts, a court of equity ſays (and a court of law, in a caſe properly before them, would ſay the ſame) all debts barred by the ſtatute of limitations, ſhall come in and ſhare the benefit of the deviſe; becauſe they are due in conſcience. Therefore, though barred by law, they ſhall be held to be revived and charged by the bequeſt: the ſlighteſt acknowledgment has been held ſufficient to revive a promiſe at law,

ſo

ſo as to take it out of the ſtatute of limitations; ſuch as ſaying, *prove your debt, and I will pay you--I am ready to account, but nothing is due to you*; and much ſlighter acknowledgements than theſe. So in the caſe of a man who, after he comes of age, promiſes to pay for goods or other things, which during his minority (one cannot ſay he has contracted for; becauſe the law diſables him from making any ſuch contract), but which he has been fairly and honeſtly ſupplied with, and which were not merely to feed his extravagance, but reaſonable for him (under his circumſtances) to have; ſuch promiſe, ſhall be binding upon him, and make his former undertaking good. Now what was the tranſaction in the preſent caſe: the bankrupt appears to have defrauded the plaintiff, by drawing him in, on the eve of a bankruptcy, to ſell him ſuch a quantity of goods on credit. On the other hand, the plaintiff relinquiſhes all hope or chance of benefit from a dividend under the commiſſion, by forbearing to prove his debt, gives up the ſecurities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full ſatisfaction of his whole demand; is that againſt conſcience? is it not, on the contrary, a fair conſideration for the note in queſtion? He uſes no threats, no menace, no oppreſſion, no undue influence; but the propoſal firſt moves from, and is the bankrupt's own voluntary requeſt, the ſingle queſtion then is, *Whether it is poſſible for the bankrupt, in part or for the whole, to revive the old debt?* As a caſe of conſcience, the plaintiff is intitled: whenever a party waves his right to come in under the commiſſion, it is a benefit to the reſt of the creditors. A bankrupt may be, and is held to be diſcharged by his certificate, from all debts due at the time of the commiſſion; but ſtill he may make himſelf liable by a new promiſe. If he could not, the proviſion in the ſtat. 5 Geo. 2. c. 30. § 11. by which every ſecurity for the payment of any debt due before the party became bankrupt, *as a conſideration to a creditor to ſign his certificate*, is made void, would be totally nugatory.

Boſt *v.* Barber, M. 23 Geo 3. B.R. 1 *Doug.* 101 [†42].

So, where an inſolvent debtor, who had been diſcharged under the inſolvent act of 1781, gave a note for a debt which had accrued before his diſcharge, it was held to be good.

Stevenſon & *al.* *v.* Mortimer, Ea. 18 Geo. 3. B.R. *Coxyp.* 805.

In an action for money had and received, brought by the plaintiffs, *as owners* of a boat employed in carrying chalk and lime coaſtways: it appeared that the action was brought to recover the whole or part of certain *ſums paid by the maſter* of the boat, who was the plaintiff's ſervant, to the defendant, a cuſtom-houſe officer, as his fees due upon taking out a cocquet and bond, under an idea that it was requiſite for this boat. The queſtion intended to have been tried

was,

was, Whether a cocquet was neceſſary to be taken out under the ſtat. 13 & 14 *Car.* 2. c. 11, § 7. for goods carried coaſtways. But before the trial, *the plaintiffs gave notice, that they alſo meant to go upon the ground of the defendant having taken exorbitant fees.* The judge who tried the cauſe nonſuited the plaintiffs, on the ground that as the ſtatute impoſed the duty of taking out a cocquet upon the maſter, the action was wrong brought, in the name of the owners. It was moved to ſet this nonſuit aſide: and by the Court, There is not a particle of doubt: *qui facit per alium, facit per ſe; where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back.* The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent. If money is paid to a known agent, and an action brought againſt him for it, it is an anſwer to ſuch an action, that he has paid it over to his principal. The ſtatute lays the burthen of taking out the cocquet on the maſter from neceſſity, and makes him perſonally liable to penalties if he neglects: but ſtill he is intitled to charge the neceſſary fees upon his doing ſo to the account of his owners. There can be no doubt of the relation in which the maſter ſtood to the plaintiffs, for he was a witneſs, and ſwore that the money was paid by order of the plaintiffs; therefore they are very well warranted to maintain the action. If the parties had gone to trial upon an apprehenſion, that the only queſtion to be tried was, whether this was a caſe within the ſtatute, and conſequently whether any fee was due, the plaintiff could not have been permitted to ſurprize the defendant at the trial by ſtarting another ground: an action for money had and received, is governed by the moſt liberal equity: neither party is allowed to entrap the other in form; but here the plaintiff gave notice, that he meant to inſiſt that too much was taken; and therefore both came to the trial with equal knowledge of the matter in diſpute. Rule for new trial abſolute.

A general *indebitatus* aſſumpſit will lie for copy-hold fines. In aſſumpſit for copy-hold fines: The declaration contained, beſides ſeveral ſpecial counts, in the common form, for ſo many fines aſſeſſed on ſeveral tenements, a general *indebitatus aſſumpſit*, ſtating, that the defendant being a tenant of divers other cuſtomary tenements, was indebted to the plaintiff in 78l. 5s. for reaſonable fines due and payable by the ſaid defendant to the ſaid plaintiff, for and on the admiſſion of the defendant into the laſt-mentioned cuſtomary tenements, and being ſo indebted, promiſed to pay, &c. The defendant demurred ſpecially, and aſſigned for cauſes, that it was not alleged that the tenements were from time immemorial, cuſtomary tenements, demiſeable, &c. that it was not alleged

Whitfield v. Hunt, Hil. 24 Geo. 3. B.R. 2 *Doug.* 727. [†155].

that within the ſaid manor, there had been a cuſtom to pay a fine on admiſſion; that it was not ſhewn by whom the admiſſion was made, nor that any aſſeſſment was made; that the cuſtom of the manor was not ſet out, nor how many fines were due, and what each fine amounted to, nor how the ſame were aſſeſſed, nor what fine was due for each tenement. *Buller*, J. ſaid the queſtion was only, whether a general *indebitatus aſſumpſit* will lie for copyhold fines, and that it had been expreſsly decided that it will, in a caſe of the *Duke of Devonſhire* v. *Craddock*, C.B. H. 27 *Geo.* 2. (1).

Evelyn *v.* Chicheſter, Tr. 5 Geo. 3. B.R. 3 *Burr.* 1717.

In an action of *indebitatus* aſſumpſit, the plaintiff declared, as executor to his father for 150l. aſſeſſed for a fine for the admiſſion of the defendant to a cuſtomary eſtate. On the trial, it was proved, that the father of the plaintiff was lord of the manor; that on preſentment of the death of the defendant's father, who died ſeized of the eſtate, proclamations were made for the defendant to come in and be admitted: that afterwards the defendant was admitted to the eſtate in perſon, and the guardianſhip committed to Sir R. N. and J. L. they rendering an account; and upon ſuch admiſſion, a fine was duly aſſeſſed of 150l. The defendant was, at the time of his admiſſion, of the age of ſix years or thereabouts. The father of the plaintiff lived about ſixteen years after the ſaid admiſſion, and then died: and about two years after the defendant came of age. This action was brought againſt him by the plaintiff as executor of his father for the ſaid fine; the defendant and his guardians, or their undertenants having been in poſſeſſion of the premiſes from the time of his admiſſion to the time of commencing the action. The jury were of opinion that the fine was reaſonable, it being the like ſum as was aſſeſſed for a fine on the laſt admiſſion of the defendant's father; and they found a verdict for the plaintiff, ſubject to the opinion of the Court, on the following queſtion, viz. "Whether this action will lie "againſt the defendant, he being a minor at the time of the "fine being aſſeſſed." By the Court, debt perhaps would not lie, becauſe an infant cannot wage his law: but aſſumpſit will lie, as the infant continued to occupy and enjoy the eſtate; for in 2 *Bulſt.* 69. it is ſaid, if a leaſe be made to an infant, and he occupies and enjoys, he ſhall be charged with the rent. An infant alſo may contract for neceſſaries, and he could not have received the rents and profits of this copyhold, without admittance; and he muſt previouſly pay the fine for ſuch admittance: but here he has affirmed

(1) See alſo the caſe of *Grant* v. *Aſtle*, under the title VENIRE DE NOVO.

the

the whole tranſaction, he has enjoyed two years ſince he came of age.

In aſſumpſit, the only count in the declaration which was material was for ſeveral fines for admiſſion to ſeveral copyholds; the declaration ſtated a cuſtom for every cuſtomary tenant to pay a reaſonable fine upon his admiſſion to be aſſeſſed by the lord, &c. that the firſt tenement was of a large annual value, viz. of the annual value of 23l. 8s. 9d. that the lord had aſſeſſed 46l. 17s. 6d. as a fine for the defendant's admiſſion to this tenement, and that this ſum was a reaſonable fine (1). On the trial of the cauſe, the jury upon the evidence, thought that the ſum of 46l. 17s. 6d. ſtated to have been aſſeſſed as a fine, on the admiſſion to the firſt of the eight tenements, exceeded two years value, and that the fine ought only to have been 46l. 4s. 3d. that being the full amount of two years value. *Aſhhurſt*, J. who tried the cauſe, was of opinion, that the plaintiff could not have a verdict for that ſmaller ſum, but muſt recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counſel, however, inſiſting ſtrongly that he might recover according to whatever the jury ſhould find the two years' value to be, a verdict was found for the plaintiff by conſent on that ground, with liberty to enter the verdict for the defendant, if the Court ſhould think that the plaintiff was bound to prove the exact ſum laid. The caſe was afterwards argued on the queſtion, Whether the plaintiff could, in this caſe, recover a ſmaller ſum than the fine aſſeſſed? By the Court, The lord ſays, in his declaration, that he has aſſeſſed 46l. 17s. 6d. for a fine; and that this ſum was reaſonable, and brings his action for that preciſe ſum. The queſtion for the jury was, whether 46l. 17s. 6d. was a reaſonable fine, and they found it was not, therefore the plaintiff is not entitled to recover. The evidence did not ſupport the declaration; for the plaintiff has no right to any thing but the ſum aſſeſſed; the duty ariſes upon the aſſeſſment; and *that*, by the evidence, is proved to have been illegal and void; therefore the caſe ſtands as if no aſſeſſment had ever been made; and conſequently the plaintiff's right to demand a fine is not yet complete: therefore there muſt be judgment for the defendant.

Aſſle v. Grant, Ea. 23 Geo. 3. B.R. 2 *Doug.* 730. [4].

Alſo, a general *indebitatus* aſſumpſit will lie for tolls. This was an action of aſſumpſit for petit cuſtoms: the plaintiff, in the twelve firſt counts of the declaration, claim-

Seward v. Baker, Hil. 27 Geo. 3. B.R. 1 *Ter. R.* 616.

(1) This cauſe came on to be tried on a *venire de novo*, and the counts in the declaration are more particularly ſtated in the caſe of *Grant* v. *Aſſle* in Error; which caſe ſee under the title VENIRE DE NOVO.

ed

ed several duties by prescriptive right under the mayor and burgesses of Southampton. The five last counts stated generally, that the defendant was indebted in a certain sum for tolls and duties, and that he promised to pay, &c. To these counts the defendant demurred, and shewed for cause that it did not appear what tolls or duties were meant to be claimed; nor what tolls or duties are payable in particular for any specific goods imported; or how or why they became payable; nor that any goods liable to the tolls or duties had been imported by the defendant: and that the plaintiff hath not in these counts shewn any right or title in himself to demand or receive the tolls, nor averred that they are reasonable; and for that these counts are much too general, &c. By THE COURT, It has been the constant practice to declare in this manner, first by a special, and then by a general count. The objections have been artfully divided in the special causes; but the real question is, Whether a general *indebitatus assumpsit* will lie for tolls? and on that point, the cases are all one way. If an actual promise had been made, there could have been no doubt, but that this form of declaring would have been proper. Then if an actual promise would maintain this action, an implied one will likewise do so: the declaration is therefore good in form; for the Court cannot see on the record, whether there has been an express or implied promise. The great objection which has been raised is, that this claim is against common right; and, therefore, that the plaintiff's title must be plainly shewn; but there are many cases where that is not necessary, such as the case of a fine for an admission to copyhold lands; there the plaintiff's title as lord, is not set forth in the declaration; and yet it has always been held, that an *indebitatus assumpsit* will lie for fines. So also *indebitatus assumpsit* will lie for the profits of an office. And yet in these cases, the Court are not conformed on the record what the plaintiff's title is: neither is it within the defendant's knowledge on what title he means to rely. Judgment for plaintiff.

Mayor of Yarmouth *v* Eaton, Tr. 3 Geo. 3. B.R. 3 *Burr.* 1402.

In an action upon the case on assumpsit, the declaration contained ten counts; which in substance amounted to no more than this, that the plaintiffs and those whose estate they have, have had and received, and been used and accustomed, and have a right to have and receive a certain toll upon exportation of corn and grain from their port of great Yarmouth to parts beyond sea: and that the defendant exported certain quantities of corn and grain, without paying the toll. The defendant demurred specially to the six first counts; and also to the ninth, and to the seventh, eighth, and tenth, he pleaded the general issue non-assumpsit. The plaintiffs joined in demurrer, upon the other seven counts. The argument turned upon the cause of demurrer to the first

count

count (which ſame cauſe was alſo aſſigned in the ſix other demurrers) this ſpecial cauſe of demurrer was, "That the "plaintiffs had not ſhewn or alleged in the ſaid firſt ſix "counts of the above declaration, or in any of thoſe counts, "*any benefit which the ſaid corporation performs, or are bound* "*to perform to the public*, or any cauſe or conſideration "whatſoever, upon which their pretended preſcription is "founded." The ſingle queſtion on this demurrer was, therefore, whether it was incumbent upon the plaintiff in this action on aſſumpſit, to ſet forth in his declaration a conſideration for the toll demanded? By the Court, This is a very plain caſe: the plaintiffs ſet out that they have a right, by preſcription, to the port-duties of Yarmouth: the declaration ſhews a preſcriptive title, time out of mind, for theſe port-duties. The making a port is itſelf a conſideration. The conſideration is ſelf-evident: viz. the benefit and convenience to the merchant and ſubjects: it ſpeaks for itſelf. It is not neceſſary to ſhew that this corporation are owners of the ſoil, or repair it: it may never require repair: it is not now neceſſary to ſhew repairs of a pew in a church, becauſe it may ſcarce ever want repairing; and, beſides, there is a precedent in point, eſtabliſhed by a judgment of the court of common pleas upon ſolemn argument, and after conſidering all the former caſes and precedents, in the caſe of the corporation of *Exeter* v. *Trinlet*, Tr. 32 & 33 *Geo.* 2. 2 *Wilſ.* 95. in that caſe the title to the toll was ſet out preciſely as it is here, and the defendant demurred generally to the declaration. The caſe was twice or thrice argued upon this very objection now taken here, that no conſideration for the duty was ſet forth, and all the objections then taken, which were the ſame as are now taken, were over-ruled; and it was holden, that if it had gone to a trial, the plaintiff muſt have proved a title; and that a liberty to bring goods into a port *is in itſelf a good conſideration* for the toll. This precedent alone would be ſufficient, if the reaſon of the thing was not ſo ſtrong as it is. This is not like the caſe of toll-thorough (1).

A private act of parliament gave power to commiſſioners to divide common fields, and to make ſuch orders and regulations as they ſhould think fit; they awarded that all proprietors of land allotted to them, which had been ploughed or manured ſince any corn had been reaped, ſhould pay to the perſon who had manured or ploughed it, 4s. an acre: general *indebitatus* aſſumpſit was held to lie for it. Bell *v.* Burrows, Ea. 5 Geo. 3. C.B. *Bull.* N.P. 129.

(1) Toll-thorough, is a ſum payable for paſſing through a town, in the highway; which by common law and common right, is free to every body: in that caſe therefore it is neceſſary to allege a ſpecial conſideration.

Stephens and another *v.* Coſtor and another, Tr. 3 Geo. 3. B. R. 3 *Burr.* 1408. 1 *Black.* 413, 423.

In an action upon the caſe on aſſumpſit for wharfage and cranage, due to the plaintiffs as wharfingers and poſſeſſors of Brooks' wharf, in London, for ſundry parcels of malt brought to and unloaded at their wharf; there was on the trial, at Guildhall, a ſpecial caſe reſerved, by which it appeared as follows: By an order of privy council, 1ſt of May, 1674 (after reciting the ſtatute 22 *Car.* 2. c. 11. which enacts, that a public wharf or quay ſhall be left along the river ſide, from the Temple to London Bridge, forty feet wide, and that no veſſels ſhall lie before the ſame, longer than ſhall be neceſſary for the lading or unlading of goods, without conſent of the ſeveral wharfingers: and that the rates for cranage and wharfage on the River Thames ſhall be aſſeſſed and allowed by his majeſty and privy council; and no others be taken: and that wharfingers ſhall not, under a penalty, refuſe to ſuffer any goods or merchandize to be landed or ſhipped) his majeſty king Charles II. did appoint certain rates to be taken, for all goods *brought unto, ſhipped off, laden or unloaden at Brooks' wharf:* and according to that order, the rate for malt was 6d. per ſcore. The plaintiffs were wharfingers, and poſſeſſed of *Brooks'* wharf, and entitled to the ſaid rates. The defendants were conſignees of a loading of malt, which was brought in a weſt-country barge to *Brooks'* wharf, and unloaded a ſmall part of her cargo upon the ſaid wharf; and while ſhe lay faſtened there, the other part of the cargo was taken out and put on board lighters, and never landed on the wharf. The queſtion was, Whether the defendants were liable to pay the wharfinger according to the rates mentioned in the order of council, for ſuch part of the cargo as was put on board the lighters, and never landed on the wharf? By the Court, Wharfage is due for landing on the wharf, and cranage for the aſſiſtance of the crane: and a duty for wharfage and cranage cannot be due where the party has not had the uſe of the wharf or the crane: anchorage or moorage are very different things. If an injury has been done to the wharfingers, by lying before their wharf, or by faſtening the veſſel to it without right, or in any other way whatever, they may have their remedy in another method; but not under this act of parliament, which relates only to wharfage and cranage, and gives the duty for them only. It has been argued on the part of the wharfingers, that *at* the wharf muſt bear a different meaning from *upon* the wharf, and that every veſſel coming *to* the wharf, and landing ſome of its goods *upon* it, and putting other part on board a lighter, is liable to the duty for that other part which is only put on board the lighter. But they may as well contend, that a veſſel coming and lying before the wharf, without ever mooring or faſtening to it, ſhould be liable to wharfage. Clearly, the preſent caſe was neither within the idea of the act of parliament, or the order

der of council, nor would the legiſlature have given the ſame duty for *this* (if they really meant to give any) as they gave for landing the goods *upon* the wharf: they would certainly have given a ſmaller duty for this alone, becauſe the duty muſt ſtill be paid again whatever wharf they ſhall at laſt be landed upon: but it is ſaid, that "the owner of the goods or "veſſel has the benefit of the wharf given him by the act, "even againſt the will of the wharfinger; that the wharfin-"ger cannot hinder him from coming to it, and lying at "it; nor even from mooring and faſtening to it; and that "there is no reaſon why he ſhould receive all theſe advan-"tages, without making a compenſation to the owner, "who is obliged to repair and attend his wharf." The anſwer to this is, that the wharfinger has his remedy for all this: if the veſſel ſhould colourably come and lie before his wharf, or moor or faſten to it, without intention of loading or unloading upon it; or if it ſtays there longer than is neceſſary to load and unload, without the conſent and permiſſion of the wharfingers (1), (and this colourable coming thither, with an unfair intention, muſt depend upon circumſtances; and is a matter of fact to be tried by a jury) an action upon the caſe will lie for it: and a jury will conſider it in damages. But if there were, in fact, ſuch inconveniences as have been ſuggeſted, yet arguments *ab inconvenienti* will not hold againſt the expreſs words and meaning of an act of parliament; and both the words and meaning are here extremely plain and clear; neither was it in the diſcretion of the Council to aid it, they could not vary or extend the act: they could only take it as they found it, and purſue it: it was not in their power to impoſe a duty. We are all of us clear that the plaintiffs are not entitled to recover: a non-ſuit muſt be entered (2).

So, where under the ſtat. 22 *Geo.* 2. c. 40. the truſtees of Ramſgate harbour, being bound to keep it in repair, have a power to impoſe a duty of 6d. a ton on every ſhip l ading, diſcharging, or ſailing *from*, *to*, or *by Ramſgate*, or coming into the harbour there: And this action was brought to recover 3l. 10s. aſſeſſed on the defendant's ſhip as ſailing *by* Ramſgate. It was found, by a ſpecial verdict, "that the "veſſel had ſailed four leagues SE. of the Goodwin "Sands, and did not put into the Downs, or ſail in ſight "of Ramſgate; and that the ſhips paſſing in that courſe, "have, though very rarely, received aſſiſtance from the "Ramſgate pilots, Deal being equally near." On this finding, there was judgment for the defendant; for, *per Cur.*

Pole v. Johnſon, Tr. 11 Geo. 3. C B. 2 *Black.* 764.

(1) Sect. 45 of the act. (2) See *Syeds* v. *Hay*, in p. 150. *ſupra*.

The duty is not confined to ſuch ſhips as actually come into the Downs: but the true meaſure of exacting it, is, whether the ſhip comes into ſuch a ſituation as to be in a probable capacity of receiving aid from the harbour of Ramſgate? which does not appear to be the preſent caſe.

Boyter v. Dodſworth, Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 681.

An action for money had and received, will not lie to recover gratuities given to a perſon who has intruded into an office, unleſs they be the certain, known, and accuſtomed fees annexed to the office.—This was an action for money had and received, brought to recover back fees received by the defendant, to the uſe of the plaintiff as belfry-ſexton and church-ſexton of the cathedral of *Saliſbury:* the plaintiff claimed under two patents from the treaſurer of the church, confirmed by the dean and chapter. At the trial, the plaintiff having proved theſe patents, and ſtated, that the defendant had lately intruded into theſe offices, *and had received ſeveral ſums of money from ſtrangers to whom the church had been ſhewn. Buller*, J. called on the plaintiff's counſel to prove that there were certain known and accuſtomed fees annexed to the offices, and that the defendant had received fees, ſuch as the legal officer could himſelf recover in a court of law, from the perſons to whom the church was ſhewn. It being admitted that there were no ſuch regular fees, but that it was uſual for different perſons to give what ſums they pleaſed, the plaintiff was nonſuited. Afterwards, a new trial was moved for, but refuſed: for, by the Court, There is no ground on which this action can be ſupported: if there had been certain fees annexed to the diſcharge of certain duties belonging to this office, and the defendant had received them, an aſſize would have lain; and the action for money had and received, to recover fees has always been conſidered as being ſubſtituted in the place of an aſſize. But there is no pretence to ſay that an aſſize will lie for a gratuity, for money given, which the party might have refuſed to give, if he had pleaſed; and with regard to natural juſtice, the perſon who performs the duty is in juſtice intitled to the money given for ſuch duty; the ſums given for ſhewing the church are mere gratuities, and the law does not imply any promiſe by the defendant to reſtore to the plaintiff the money ſo received by the former for his own labour. If there had been regular fees due for the duties performed, and the defendant had intruded into the offices, the plaintiff might either have ſupported an action for money had and received, or for diſturbing him in his offices.

Watſon v. Turner and another, T. 7 Geo. 3. Sace. *Bull.* N.P. 129. 147.

If a defendant be under a moral obligation to do any act, and promiſes another payment for doing it, aſſumpſit will lie.—Thus, where an action was brought by an apothecary, againſt the overſeers of a pariſh, for the cure of a pauper, who

who boarded with her ſon, out of the pariſh, under an agreement made by him with the defendant, *Turner*, who was the only acting overſeer of the pariſh. The pauper was ſuddenly taken ill, and her ſon called in the plaintiff, who attended her for four months, and cured her. After the cure, *Turner* was applied to, and promiſed to pay the plaintiff's bill; it was held, 1ſt, That though there was no precedent requeſt from the overſeers, yet the promiſe was good, notwithſtanding the ſtatute of frauds; for overſeers are under a moral obligation to provide for the poor. 2dly, That as *Turner* was the only acting overſeer, the other was bound by the promiſe.

So, where aſſumpſit was brought for nurſing a baſtard child; and it appeared that it had not been put out by the defendant, who was its father, but by the mother's uncle; the defendant having afterwards promiſed to pay for it, it was held, that the action was well brought. For, by Lord *Mansfield*, the defendant was under an obligation to provide for the child: his bare approbation ſhould be conſtrued into a promiſe, and be ſufficient to bind him. Scott *v.* Nelſon, 4 Geo. 3. Sitt. Weſt. *Eſſin. Dig.* 95.

So alſo, where the defendant married the plaintiff's daughter, and ſome time after the marriage, went to Jamaica, leaving her and an infant child in England: during his abſence ſhe died: and this action was brought by her father againſt the huſband, to recover the money which he had expended, after her death, in diſcharging debts which ſhe had contracted while her huſband was in Jamaica (by living with her child in a manner ſuitable to her huſband's fortune, who was a very opulent planter in Jamaica), and in *defraying the expences of her funeral*, which was alſo proportioned to the huſband's fortune and ſtation, and amounted to 140l. 15s. The declaration was in the uſual form for neceſſaries and funeral expences, with the common money counts. The defendant paid 100l. into court, and pleaded non-aſſumpſit as to the reſidue. The facts above ſtated were proved by the plaintiff, and the counſel for the defendant demurred to the evidence. In ſupport of the demurrer, it was contended, that a ſufficient conſideration was not diſcloſed by the evidence to raiſe an aſſumpſit: for, though, in ſome particular caſes, the law will raiſe an aſſumpſit where a man is under an obligation of conſcience or equity to pay the ſum demanded; yet in this caſe, the defendant was neither bound in conſcience nor equity, to repay money laid out on his account, without either his conſent, knowledge, or requeſt. But the Court, though they inclined to the opinion that the debts of the deceaſed could not be recovered, were unanimouſly of opinion, that there was a ſufficient conſideration to ſupport this action for the funeral expences, though there was neither requeſt nor aſſent on the part of the defendant; Jenkins *v.* Tucker M. 29. Geo. 3. C B. 1 *Hen. Black.* 90.

fendant; for the plaintiff acted in diſcharge of a duty which the defendant was under a ſtrict legal neceſſity himſelf of performing, and which common decency required at his hands; the money, therefore, which the plaintiff paid on this account, was paid to the uſe of the defendant. A father alſo ſeems to be the proper perſon to interfere in giving directions for his daughter's funeral, in the abſence of her huſband, the defendant was clearly liable to pay the expences of his wife's funeral: and if the plaintiff had declared as having himſelf buried the deceaſed, there could have been no queſtion. And, as the caſe now ſtands, the plaintiff having defrayed the expences of the funeral, the huſband is in juſtice equally liable to repay thoſe expences; and in him the law will imply an aſſumpſit for that purpoſe. Judgment for the plaintiff (1).

And Lord *Loughborough* ſaid that there are many caſes of this ſort, where a perſon having paid money which another was under a legal obligation to pay, though without his knowledge or requeſt, may maintain an action to recover back the money ſo paid: ſuch as in the inſtance of goods being diſtrained by the commiſſioners of land-tax; if a neighbour ſhould redeem the goods, and pay the tax for the owner, he might maintain an action for the money, againſt the owner.

Stokes *v.* Lewis, M. 26 Geo. 3. B.R. 1 *Ter. Rep.* 20.

But, as this action muſt be grounded either on an expreſs or implied contract, no action can be maintained for money paid for the uſe of another, if it appear to have been paid *againſt the conſent* of the party. Thus, where it appeared to have been the cuſtom of the pariſhes of *St. Vedaſt* and *St. Michael le quern*, ever ſince their union under the act 22 & 23 *Car.* 2. c. 11. to elect one ſexton for the two pariſhes at a joint-veſtry, and for each pariſh to pay a moiety of the ſalary; and the overſeer of *St. Vedaſt* had paid the ſexton who was laſt choſen, the whole ſum; this being an action for money paid, laid out, and expended by the plaintiffs to the uſe of the defendants. The defence ſet up was, that the laſt election of a ſexton was not a *joint one*; and that the pariſh

(1) In reſpect to the demurrer to evidence, Lord *Loughborough* ſaid that it was extremely abſurd: ſince, by payment of money into court, the defendant had admitted that the plaintiff was intitled to maintain his action to the amount of that ſum *; and alſo, becauſe it was for the jury to determine the quantum of damages. The court cannot anticipate the province of a jury, and aſcertain damages on a writ of inquiry. I did not intend that any of the debts of the deceaſed, diſcharged after her death by the plaintiff, ſhould have gone to the jury: but as the counſel for the defendant thought proper to demurr to the evidence, the judgment on the demurrer muſt be general. They ought at the trial to have contended for a verdict; they ſeem to me to have taken the wrong method for their client.

* And therefore when money is paid into court, there can be no ſuch thing as a nonſuit.

of

of *St. Michael* claimed a right of chooſing a ſeparate ſexton for themſelves, of which they had given notice to the other pariſh. At the trial of the cauſe, at *niſi prius*, the plaintiffs were nonſuited; and afterwards, on a motion for a new trial, THE COURT ſaid, that as this action muſt be grounded either on an *expreſs*, or *implied conſent*; and, as in the preſent caſe, there was neither, the action could not be maintained: for the way of trying the diſpute concerning the election of a ſexton was by refuſing to pay the ſexton elected: that the whole was notoriouſly in litigation; and yet, under theſe circumſtances, *one pariſh has paid the quota of the other*, in ſpite of their teeth; it was therefore impoſſible to ſay that this action for money paid, laid out, and expended, could be maintained: another ſtrong objection is, that it is trying the right of the ſexton (1), without his being a party to it.

Neither can this action be maintained upon an unconſcientious contract:—For where the plaintiff and defendant were brokers, and the plaintiff lent to the defendant a ſum of 45l. for the purpoſe of enabling him to make a purchaſe of a parcel of goods, and the plaintiff took the defendant's note for the 45l. *payable on demand*; and was to have half of the neat profits which ſhould be made on the reſale of the goods purchaſed, over and above the note of hand: the purchaſe was made, and within two hours after, the plaintiff made a demand of payment of the note, in order to force the defendant to ſell the whole of the goods to him; and, as an inducement, the plaintiff offered him 3l. profit, which the defendant refuſed, and afterwards ſold the goods for 5l. profit; the note was repaid by the defendant; and the plaintiff brought his action for *money had and received*, in order to recover the ſum of 2l. 10s. the half of the neat profits on the ſale of the goods. On the trial, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court, whether, as the plaintiff was to have half the profits, and run no riſk, the contract was uſurious or not? and, if it was, then the verdict was to be ſet aſide, and a nonſuit entered in its ſtead. The Court adjudged, that as the note bore intereſt from the demand, and the demand having been made immediately, to have intereſt from that time, and half the profits too, ſeemed to be uſurious: but ſuppoſing it not uſurious, a man could not, in an action for money had and received, which is an equitable action, and founded in conſcience, recover ſuch an immeaſurable and exorbitant demand as this is.

Jeſtons v. Brooke, Ea 18 Geo. 3. B.R. *Cowp.* 793.

So, in the caſe of the wire-drawers, (2) the ground of the action there was, that the plaintiffs, who were gold

Plumbe v. Carter, Tr. Sitt. Guild. 1775. *Cowp.* 116, 795.

(1) Who might have brought his action againſt the pariſh, who refuſed to pay their quota.

(2) *Floyer* v. *Edwards*, *Cowp.* 112.

refiners, had advanced gold wire to others in the ſame trade, upon the terms of paying ſuch a price, if the money was paid *within three months*; and if *not*, then to pay at the rate of *one halfpenny an ounce per month*, over and above the price agreed for: which, in fact, upon calculation, amounted to above 5l. per cent. This, at the trial, was proved to be the conſtant uſage of the trade. An objection was made on the part of the defendant, that it was uſurious. A verdict was found for the plaintiff, and a queſtion reſerved for the opinion of the Court, whether this contract was uſury? And, under all the circumſtances, eſpecially the conſtant uſage, the court were of opinion, it did not amount to uſury within the ſtatute. Some time after, an action for money had and received was brought by the preſent plaintiff, upon a ſimilar contract, to recover from the defendant the ſurplus of the halfpenny an ounce. The defendant paid into court the principal and intereſt, at 5l. *per cent.* from the time of the bargain, and offered to pay coſts down to the action brought. And the ſingle queſtion was, whether the exceſs of intereſt ſhould be paid? It appeared manifeſtly at the trial, that this exceſs was only to be taken in caſe of delay of payment at the end of three months, and for no other reaſon whatſoever; and the vendee was at liberty to have paid the principal at the expiration of that time. Lord *Mansfield* ruled at Guildhall, that the tranſaction ought not to be conſidered as uſurious within the ſtatute. But the law of the land having declared that 5l. *per cent.* was ſufficient for delay of payment, his lordſhip was of opinion that the demand of the ſurplus was an exorbitant demand, and therefore ought not to be recovered in an action for money had and received. The jury accordingly found a verdict for the defendant; which was acquieſced in, without any new trial being moved for.

Willes and another v. Baldwin. M. 21 Geo. 3. B.R. *Doug.* 433.

Alſo, if the conſideration be founded on an illegal and void agreement, the action of aſſumpſit will not lie. Thus, where the plaintiffs were ſuttlers to four regiments, and were to keep eight horſes for each regiment, for the forage of which, government allowed them for each horſe a ration a day, conſiſting of eighteen pounds of hay, and eight pounds of oats; theſe were to be furniſhed by the defendant, who was the contractor, and bound by his contract, not to commute the allowance of forage for money! In fact, the plaintiff kept only fourteen or fifteen horſes, inſtead of thirty-two, and entered into an agreement with the defendant, that they ſhould not take the whole of the allowance, but that the defendant ſhould retain part, and give a certain allowance of 9½d. per ration to the plaintiff, for every ration left. An action of aſſumpſit having been brought on this agreement, a verdict was found for the plaintiffs, but with leave to move to ſet it aſide, and enter a

nonſuit

nonſuit; which motion being made, *the court* held the agreement to be void, and the money not recoverable, it being a foul agreement between the parties, and a clear fraud. Nonſuit entered.

So, where the plaintiff and defendant entered into an agreement in writing, the materiai words of which were, "In caſe, I (the defendant) ſhould ſucceed Mr. *Parſons*, "(the plaintiff) to be maſter-joiner of the ſaid dock-yard "*(at Chatham)*, at the commencement of Mr. *Parſons's* "ſuperannuation, then I do agree, to allow him his *extra* "*pay from the yard-books, excluſive of his ſuperannuation* "*money*, during his natural life," &c. In an action of aſſumpſit brought on this ſpecial agreement, the declaration, after ſtating the agreement, ſet forth, that the plaintiff confiding in the ſaid promiſe of the defendant, did procure himſelf to be ſuperannuated, and that the defendant ſucceeded him: that the defendant received divers ſums *as and for the extra pay* of the plaintiff, by reaſon whereof, he became liable, &c. and being liable, promiſed to pay, &c. there were alſo the common money counts; the defendant pleaded the general iſſue, and on the trial there was a verdict for the plaintiff, ſubject to the opinion of the court, on a caſe which ſtated, in ſubſtance, as follows: the plaintiff was for thirty years maſter-joiner of the dock-yard at Chatham, and the defendant foreman of the joiners; that the defendant having a proſpect of ſucceeding to the office of maſter-joiner, applied to the plaintiff to procure himſelf to be ſuperannuated, which he did, on the written agreement above ſtated being entered into: the ſuperannuation money is an annual allowance from government; the defendant was afterwards appomted to the office; the bare pay of the maſter-joiner, is half-a-crown a day, all above is *extra* pay: there are two ſorts of *extra* pay, the tide *extra* (which is when the men work by the tide, beyond the common yard hours) and the *caſual extra*, which includes *other extraordinary work*, but it is all denominated *extra pay* in the yard-books, without diſtinction: from 1785 to 1787, the defendant paid to the plaintiff the common *tide extra*. But in the ſummer of 1787, *the caſual extra pay* being much increaſed, by the fitting out of a fleet to act againſt the Dutch; the plaintiff claimed this *caſual extra pay*, ſo increaſed, but the defendant refuſed to account for it to him; and in conſequence this action was brought. The caſe was argued upon two queſtions: 1ſt, Whether the agreement was valid? 2dly, Whether, if valid, it did not comprehend *the caſual extra*, as well as *the tide extra* pay? By the court, Every action on promiſes muſt reſt on a fair and valuable conſideration, which it is for the plaintiff to make out; what is the conſideration ſtated here? That the plaintiff repreſented himſelf as unfit for future ſervice, and entitled to a penſion

Parſons v. Thomſon, Hil. 30 Geo. 3. C.B. 1 *Hen. Black.* 322.

penſion for the paſt; this he did at the requeſt of the defendant, on the promiſe from him of a certain allowance: now the repreſentation was either true or falſe; if true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant, all he did was for his own eaſe and advantage: if falſe, the public is deceived, the penſion miſapplied, and the ſervice injured: it is not ſtated, that the plaintiff procured the appointment for the defendant (which would clearly have been brokage of office, and bad) but that he made way for the appointment: but from thence *no valuable conſideration can ariſe*; had the tranſaction paſſed with the knowledge of the admiralty, judging of the caſe, and applying at their diſcretion the allowance they are bound to make, poſſibly it might have ſtood fair with the public: but this caſe reſts on a private unauthenticated agreement between the officers themſelves, which cannot admit of any conſideration ſufficient to maintain an action: if it could be proved, that it was to be meaſured by money, ſo as to form a valuable conſideration, it muſt be in reſpect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant; in this view it certainly would approach very near to brokage; it would differ very little, in effect, from ſelling the intereſt itſelf, though there would be a difference in the conduct of the party, who in the one caſe would be paſſive and the other active; but this paſſive merit, if the expreſſion may be uſed, would not avail him where his active exertion would be a demerit. The caſe of *Ive* v. *Aſh*, *Chan. Prec.* 199. was juſtly determined; it was a purchaſe of a commiſſion allowed to be ſold, the commiſſion was given up, and the purchaſer wanted to get rid of the bargain, and be free from the agreement: he objected that a commiſſion in the marines could not be ſold; but it turned out, upon examination, that the ſale of ſuch commiſſions was permitted, not being looked upon as within the ſtatute: that caſe was therefore well adjudged; for the queſtion whether an office is ſaleable or not, is a matter of public regulation, and not a queſtion for a court: if by public regulation, right or wrong, certain offices are ſaleable, the court cannot ſet aſide the tranſaction for their ſale: the court is not to make the regulation; whether, by the general police of the country, an individual office is ſaleable or not, is not a matter of law; but in the preſent caſe, there is no ground to ſay, that the defendant's office was ſold under any regulation, or that the tranſaction between the parties was carried on under any authority, or with the conſent of their ſuperiors. This agreement reſting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by conſiderations that apply to their feelings, and

is

is not the ſubject of an action: the law encourages no man to be unfaithful to his promiſe, but legal obligations are, from their nature, more circumſcribed than moral duties.

So, in an action of aſſumpſit, for money had and received, brought by the direction of the maſter of the rolls, in conſequence of a bill filed in equity by the plaintiff and his ſon, praying that the defendant might be declared a truſtee of *the office of cuſtomer of Carliſle* for the plaintiff, for the benefit of the ſon. On the trial, it appeared in evidence, that application was made to the lords of the treaſury by the friends of the plaintiff, to procure for the defendant the office of cuſtomer of the port of Carliſle. On 25th February 1773, the defendant ſigned the following declaration: "I do hereby declare, that my own name was "made uſe of IN TRUST for Mr. *John Garforth*, on the "application made to the lords of the treaſury, for the of-"fice or place lately held by Mr. *Grape*, deceaſed, in the "county of Cumberland: and I do hereby promiſe, in caſe "any appointment has been, or is made thereof, that I will, "upon requeſt, *appoint ſuch deputy, or deputies, as he ſhall "nominate*; and alſo empower the ſaid *Mr. Garforth to re-"ceive the ſalary, ſtipend, wages, and fees of the ſaid office "to his own uſe:* Witneſs my hand, *Benſon Fearon.*" On 27th February 1773, the defendant was appointed, by patent, to the office, during pleaſure; and afterwards, on nomination of the plaintiff, conſtituted deputies for *Carliſle*, *Whitehaven*, and *Workington*; but having received the profits, did not account for them to the plaintiff; in conſequence of which the bill was filed: a verdict was found for the plaintiff, with leave to move to enter a nonſuit; a motion having been made for ſuch purpoſe, the caſe was fully argued; and Lord *Loughborough* delivered the judgment of the Court: The tranſaction which is the foundation of the action, is illegal, and the agreement void: this tranſaction concerns a public office, deemed by law to be a place of public truſt, prohibited to be ſold; and even the deputation of which, where ſuch deputation may be made, cannot be an object of ſale: the tranſaction is, that *Fearon* being appointed by the recommendation of *Garforth*, ſhall not interfere in the office, but ſhall appoint ſuch deputies as *Garforth* ſhall nominate, and pay to him the profits: the effect of this is, that to all profitable purpoſes, and as to all the exerciſe of the office, except as to ſigning the receipt for the ſalary, *Garforth* is the real officer, but is not accountable for the due execution of it: he may enjoy it without being ſubject to the reſtraints impoſed by law on ſuch officers, for he does not appear as ſuch officer; he may vote at elections; he may exerciſe inconſiſtent trades; he may act as a magiſtrate in affairs concerning the revenue; he may ſit in parliament; and

Garforth v. Fearon, M. 27 Geo. 3 B.R. 1 *Hen. Black.* 327.

and will be ſafe, if he remains undiſcovered. If extortion be committed in the office by thoſe appointed, the profits of that extortion redound to him, but he eſcapes a proſecution; for not being the acting officer, he does not appear regiſtered upon the records of the exchequer, and is not liable to the diſabilities impoſed by the ſtatute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a truſt can be created in ſuch an office, is for the conſideration of the court in which the ſuit was originally brought. The only queſtion in this court is, whether the agreement ſpringing out of ſuch a tranſaction can ſupport an action? The written agreement was for two purpoſes: one to appoint ſuch deputies as the plaintiff ſhould name; the other to pay over to him all the profits of the office. No argument has been uſed in ſupport of the firſt promiſe, namely, to appoint, at the nomination of another, deputies, for whom the perſon appointing is, in point of law, anſwerable; and thoſe places he is not allowed to ſell or bargain for: in *Smith* v. *Coleſhill*, 2 *And.* 55. it is laid down, that if one part of an agreement be bad, no action can be maintained on any other part which may be good: but it is not neceſſary to reſt on this point, becauſe this agreement is bad in both parts. If it be without any conſideration in a court of law, no action will lie upon it; it is but *nudum pactum*. The conſideration upon which this agreement proceeds is, that the defendant is appointed on the application of the plaintiff, in truſt for him: this is the conſideration: now, what is this but, in plain terms, this propoſition, viz. that the public is abuſed, and the king deceived in the application? therefore there would not be much difficulty to conclude, if there was nothing more in the caſe, that the common law would not ſupport an aſſumpſit upon ſuch an agreement. But it is clearly void by poſitive law reſpecting this office. The appointment of any cuſtomer by any means contrary to the *ſtatute* 12 *Ric.* 2. c. 2. is a miſdemeanor. That ſtatute, though very ancient, is certainly not obſolete; it is the ſtatute under which they are ſworn in the exchequer: it not only prohibits the appointment, but goes on to ſay, that "none that purſueth by him, or by "others, privily or openly, to be in any manner of office "ſhall be put in the ſame office, or in any other;" and the 5 & 6 *Ed.* 6. c. 16. makes void all promiſes, bonds, and aſſurances, as well on the part of the bargainor, as the bargainee. It is ſaid that this was no ſale of the office; that no money has paſſed on the part of the defendant to obtain it: but the ſtatute does not ſtop there: it is neither confined in its expreſſions, nor its intent. In the caſe where a perſon obtaining an office gives money, the words of the act are extremely general; and according to their obvious conſtruction,

conſtruction, without any enlargement, neceſſarily require that all bargains for money concerning thoſe offices which are mentioned in the ſtatute, are and ſhall be prohibited. Now, is it not clear, that the plaintiff has bargained with the defendant? Would the defendant have had the office without that bargain? The promiſe, which is the ground of this action, is, that the plaintiff ſhall have all the profits. By the words of the ſtatute, any profit, however ſmall, would have affected the tranſaction: but here there is a bargain for the whole. Courts of law have very properly conſidered this as a remedial ſtatute, and have conſtrued it liberally, where the validity of ſuch a tranſaction has been brought before them: it is not neceſſary to give an opinion here, whether a truſt can, in any inſtance, be created in ſuch an office. It is here improper to decide, without other conſideration than the preſent circumſtances afford, that there is no poſſible caſe in which a truſt, fit to be executed, may not be created in offices within the ſtatute of *Ed.* 6. This is not a caſe of the execution of a truſt, the cognizance of which is peculiar to a court of equity: if the maſter of the rolls had fixed on the defendant the character of a truſtee, a court of law might not think itſelf at liberty to queſtion the authority of the determination. But the whole queſtion for a court of law to determine is ſimply, WHETHER *there appears a good conſideration on which an aſſumpſit can be ſupported?* And the court is of opinion, for the reaſons ſtated, both on the principles of the common law; and becauſe the tranſaction is in defiance of the ſtatutes which have been made to guard againſt evils of the ſame nature, that the conſideration of the promiſe in this caſe is bad; that, conſequently, it will not ſupport an aſſumpſit; and that, therefore, a verdict muſt be entered for the defendant.

So alſo, if the aſſumpſit has ariſen from any illegal tranſaction, the party cannot recover. This was aſſumpſit for goods ſold and delivered, plea non-aſſumpſit, and verdict for the plaintiff. Upon the rule to ſhew cauſe why a new trial ſhould not be granted, the caſe appeared from the judge's report to be as follows: The plaintiff, who was a reſident at and an inhabitant of Dunkirk, together with his partner, a native of that place, ſold and delivered a quantity of tea (for the price of which the action was brought) to the order of the defendant, knowing it was intended to be ſmuggled by him into England: *they had, however, no concern in the ſmuggling ſcheme itſelf, but merely ſold this tea to him,* as they would have done to any other perſon in the common and ordinary courſe of trade. It was urged, in ſupport of the rule, that the contract being founded upon an intention to make an illicit uſe of it; and that being known to the plaintiff,

Holman and another v. Johnſon, Tr. 15 Geo. 3. B. R. *Cowp.* 341.

tiff, he was not entitled to the assistance of the laws of this country to recover. But, by the Court, the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident. The principle of public policy is this, *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says, he has no right to be assisted; it is upon this ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for when both are equally in fault, *potior est conditio defendentis.* The question therefore is, whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them are all *positivi juris.* The contract of the plaintiff is this: being a resident and inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk. There is no law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them; the contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself: it is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete, by the delivery of the goods at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England, at a certain price; and the plaintiff had undertaken to send it into England, or had had any concern in the removing it into England, he would have been an offender against the laws of this country. But, upon the facts of the case, the vendors

ors of theſe goods are not guilty of any offence, nor have they tranſgreſſed againſt the proviſions of any act of parliament. Rule for new trial diſcharged.

But, where the plaintiffs were four partners, three of whom lived in England, and the other in Guernſey; and the defendant, who reſided in England, ſent an order for ſome brandy to the partner living in Guernſey, with directions for it to be delivered to one Wood, the captain of a ſmuggling veſſel, to be brought into England at the riſk of the defendant; and it was accordingly all put by the partner who reſided at Guernſey into half anchors, and ready ſlung for the purpoſe of ſmuggling, and ſome of it was delivered at Guernſey, and other parts of it at ſea: but the contract was made, and the goods delivered without the privity or perſonal participation of the three partners reſiding in England. An action having been brought by theſe four partners, to recover the value of this brandy, *Buller*, J. at the trial of the cauſe, was of opinion that the plaintiffs could not recover, becauſe it appeared by their own ſhewing, that the goods were intended to be ſmuggled into England, of the laws of which, they as ſubjects of the crown of Great Britain, were bound to take notice; and that one of them, had actually aſſiſted in the very act of ſmuggling. He therefore nonſuited the plaintiffs; and the Court afterwards, upon a motion for a new trial, concurred in the ſame opinion. *Per Cur.* The caſe of *Holman* v. *Johnſon* was on a contract entered into by foreigners bound by no allegiance to this country: but this muſt be conſidered as a contract made in England. When a contract is made for ſmuggled goods, a party cannot come into a court of juſtice to recover on it. A perſon ſuing in a court of law, muſt diſcloſe a fair tranſaction; and it muſt not appear, from his own ſhewing, at leaſt, that he has infringed the laws of his country. Now here three of the plaintiffs lived in England, and they knew, either perſonally, or, which is the ſame thing, by their agent, the other partner living at Guernſey, that the contract which they had entered into was made in direct contravention of the laws of their country: for the goods came under more than ſuſpicious circumſtances, ſince they were ſent in ſlings and half-ankers, ready for ſmuggling: the plaintiffs were agents to the very act of ſmuggling, they were *participes criminis*; and therefore cannot avail themſelves of the laws of this country, in order to enforce a contract made in direct oppoſition to them.

Biggs and others v. Lawrence, M. 30 Geo. 3. B.R. 3 *Ter. Rep.* 341.

So, where an action was brought upon ſeveral bills of exchange which had been given for goods bought by the defendant in Guernſey, the defendant reſted his defence on the ground of its being a ſmuggling tranſaction, in proof of which he read in evidence ſeveral letters, dated Guern-

Clugas v. Penaluna, M. 32 Geo. 3. B.R. 4 *Ter. Rep.* 466.

ſey,

ſey, from the plaintiff, in which he informed the defendant of his having ſhipped ſo many ankers of brandy and gin (1). The prices in the invoices tallied exactly with the bills in queſtion: under theſe circumſtances, the judge directed a nonſuit; and a motion being afterwards made for a new trial, the Court ſaid, If goods be *bona fide* ſold in Guernſey, and delivered there in the fair courſe of trade, the ſeller may recover the price of them here, though they be afterwards ſmuggled into this country. But here the plaintiff himſelf was aſſiſting in the act of ſmuggling by the means of packing the goods; for the ſpirits were delivered in ankers, which are uſed for the purpoſe of ſmuggling; and if he has a part in the tranſaction, it taints the whole of it: and this diſtinguiſhes the caſe of *Holman* v. *Johnſon* from the preſent.

Waymll v. Reed, Ea. 34 Geo. 3. B.R. 5 *Ter. Rep.* 599.

So, in aſſumpſit for goods ſold and delivered, the defence was, that the contract was a ſmuggling tranſaction: it appeared in evidence, that the defendants had applied to the plaintiff, who was a foreigner living at Liſle, for a quantity of lace, which he knew was intended to be ſmuggled into England; and for that purpoſe it was packed by the plaintiff in a peculiar manner, by the direction of the defendant, for the more eaſy conveyance of it without a diſcovery: a verdict was taken for the plaintiff, with liberty to move to ſet it aſide, and enter a nonſuit. A motion to this effect being made, *The Court* ſaid, That where the contract and delivery of goods are complete abroad, and the ſeller does no act to aſſiſt the ſmuggling them into this country; ſuch a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving aſſiſtance to the defendants to ſmuggle the goods by packing them in the manner moſt ſuitable for, and with intent to aid that purpoſe. He cannot therefore reſort to the laws of this country to aſſiſt him in carrying his contract into execution.

Stackpole v. Earle, Hil. 1 Geo. 3. C.B. 2 *Wilſ.* 133.

So, where it appeared that the defendant had promiſed to pay the plaintiff a premium of 2l. *per cent.* on the ſum which a purchaſer (to be procured by the plaintiff) would give for the plaintiff's place of ſurveyor of baggage in the port of London; and the plaintiff did procure him a purchaſer, who gave him 1200l. The plaintiff having, on the defendant's neglect to pay the ſum of 24l. being 2l. *per cent.* on the 1200l. brought his action to recover the ſame. The whole court, on a caſe reſerved from *niſi prius*, were of opinion that this was a *malum prohibitum*, and within the ſtat. 5 &

(1) An anker contains only about ſeven gallons, and foreign ſpirits are prohibited to be imported in veſſels containing leſs than ſixty gallons, by 19 *Geo.* 3. c. 69. § 1.

6 Ed. 6. c. 16. § 2. which prohibits the sale of offices; for though the plaintiff himself was neither buyer nor seller, yet this appears to be a promise to pay him money, to the intent that a person should have an office belonging to the customs, which is within the very words of the statute. And *Clive*, J. said, he thought the selling of offices was *malum in se*, at common law; and that if the statute had never been made, he thought the procuring a person to buy the office of the defendant was not a good consideration in law to raise an assumpsit (which was not denied by any of the judges) because it was illegal: and it is a most certain principle, that every consideration, to ground an assumpsit upon, must be lawful.

But if part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible, and the party may recover on that which is good.—This was an action of assumpsit, and the declaration contained three counts: the first was upon a bill of exchange drawn at Paris by Sir *John Bland*, on August 31, 1755, and bearing that same date, *on himself in England* for the sums of 672l. sterling, payable to the order of the plaintiff, ten days after sight, value received, and accepted by the said Sir *John Bland*. The second count was for 700l. monies lent and advanced. The third count was for monies had and received; and the plaintiff's damage was laid at 800l. At the trial, a verdict was found for the plaintiff, and 672l. given for damages, subject to the opinion of the Court on the following case. The bill of exchange was given at Paris, for 300l. there *lent by the plaintiff to Sir John Bland*, at the time and place of play; and for 372l. more *lost at the same time and place by Sir John Bland to the plaintiff at play*; the play was fair, and there was not the least imputation on the plaintiff. The question was, "Whether, under these circumstances, the plaintiff was entitled to recover *any thing, and what*, against the defendant, who was the administratrix of Sir *John Bland?* By Lord *Mansfield*, CH. J. the general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, for the law of this place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Here the parties had a view to England: for the payment of this bill of exchange is to be in England, it is an English security, and so intended by the parties. In every disposition or contract made abroad, where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern; thus a conveyance, or will of lands, a mortgage, a

Robinson v. Bland, M. 1 Geo. 3. B. R. 2 *Burr.* 1077. 1 *Black.* 234. 256.

contract concerning ſtocks, muſt be all ſued upon in England; and the local nature of the thing requires them to be carried into execution, according to the law here. But the law of both countries in reſpect to this ſecurity is the ſame; the conſideration of the bill of exchange might in an action upon it be gone into in France, as well as here. This writing is, as a ſecurity, void (being void for a gaming debt) both in France and in England: the bill of exchange muſt therefore be laid out of the caſe; for it is very clear the plaintiff cannot recover upon that. Then, as to the other counts for money lent and advanced, and money had and received, conſider it diſtinctly as to each part, 1ſt, *the money won*; 2dly, *the money lent*—as to the *money won*; by the rule of the law of England, no action can be maintained for it; and the contract is to be conſidered as void by the law of France, as well as by the law of England; which makes it unneceſſary to conſider how far the law of France ought to be regarded. Next, as to the *money lent*, it has been twice judicially determined (1), that the legiſlature meant only to avoid the ſecurity, not the contract: the act 16 *Car.* 2. c. 7. § 4. does not meddle with *money lent at play*: but as money exceeding 100l. *loſt, and not paid down* at the time of loſing it, it ſays, that the loſer ſhall not be compellable to make it good; but *the contract, and contracts* for the ſame, and for every part thereof, and all ſecurities ſhall be utterly void: and the 9 Ann. c. 14. only ſays, that *all notes, bills, bonds, judgments, mortgages, or other ſecurities for money won or lent at play ſhall be utterly void.* Here the money was fairly lent without any imputation whatſoever; and the jury have left it quite open to the court to determine whether *any thing, and what* is recoverable? As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is intitled to it both by the law of England, and by the law of France. *Denniſon*, J. The money is made payable in England. As it is a foreign bill of exchange, it muſt of courſe be dated abroad: but it is to be paid here at home: and the plaintiff has appealed to the laws of England, by bringing his action here, and ought to be determined by them. But by the laws of England the ſecurity is void, which might have been pleaded, as well as it might be given in evidence; and the defendant needed not in his plea to have ſaid where it was won at play. There is a diſtinction between *the contract* and *the ſecurity*. If part of *the contract* ariſes upon a good conſideration, and part of it upon a bad one; it is diviſible. But it is otherwiſe as to *the*

(1) *Slater* and *Emerſon*, cor. *Eyre*, Ch. J. ſitt. M. T. 1 *Geo.* 2. *Bargeau* and *Walmſley*, H. 19 *Geo.* 2. *Strange* 1249.

ſecurity

ſecurity: that being entire, is bad for the whole. Therefore the plaintiff ought to be barred of this action upon the bill of exchange, as being a void ſecurity by the laws of this country where he brings his action: but ſtill the contract remains; and he has a right to maintain his action for ſo much of his demand as is legal, which is the money lent. *Wilmot*, J. The contract may certainly be good, though the ſecurity be void: and I think that this contract is good, though the ſecurity is void by the ſtat. 9 Ann. c. 14. This is not ſtated to be money lent to play with, or for the purpoſe of play, but lent at the time and place of play only. Nothing appears upon this caſe to induce any ſuſpicion that it was lent for any bad purpoſe. The ſtatutes meant to prevent exceſſive gaming, and to vacate all ſecurities for money won at play: and the genuine, true, and ſound conſtruction of 9 Ann. is, to underſtand it as intended to prevent *any ſecurities being taken for money won at play*, or *lent to play with*, when the borrower had loſt all his ready caſh, but not to make the contract itſelf void, where the money is fairly and *bona fide* lent, though at the time and place of play.

In an action, upon an aſſumpſit for money paid by the plaintiff for the defendant, at his inſtance and requeſt: the caſe was this; viz. the defendant having loſt a ſum of money, above 10l. upon a bet of a horſe-race, requeſted the plaintiff to pay it for him, which he did, and the court held that the action well lay, and gave judgment for the plaintiff. Alcinbrook *v.* Hale, Ea. 6 Geo. 3. C.B. 2 *Wilſ.* 309.

So, if two perſons jointly engage in a ſtock-jobbing tranſaction, and incur loſſes, and employ a broker to pay the difference, and one of them repay the broker, with the privity and conſent of the other, the whole ſum; he may recover a moiety from that other, in an action for money paid to his uſe: thus where the plaintiff's teſtator, the defendant, and a third, had been engaged together as partners in ſtock ſpeculations, the whole of which were illegal, except a tranſfer of 10,000l. and having incurred ſeveral loſes, came to a ſettlement with *Portis*, their broker, who had paid all the differences; and on that occaſion, the plaintiff's teſtator paid to *Portis* the whole ſum he had advanced, except 511l. for which he drew a bill on the defendant, payable to *Portis*, which the defendant accepted. The bill not being paid by the defendant when it became due, *Portis* brought an action thereon after Keeble's death againſt the preſent plaintiffs, his executors, and recovered the amount of the bill: the preſent action was brought to reimburſe the plaintiffs, the ſum recovered againſt them by *Portis*, and the declaration was for money paid by the plaintiffs to the defendant's uſe; upon which they obtained a verdict for the whole demand. Afterwards on a rule to ſhew cauſe, why the verdict ſhould Petrie *et al.* executors of Keeble *v.* Hannay, M. 30 Geo 3. B.R. 3 *Ter. Rep.* 418.

not be ſet aſide, in *toto*; or at leaſt be reduced to the ſum of 264l. part of the ſum for which the defendant had given his acceptance, and which was his ſhare of the loſs, ariſing from the real transfer of the 10,000l. it was urged, that this was a payment of money ariſing under a contract, on a ſtock-jobbing tranſaction, which was contrary to law, and ſo could not be recovered; and that even the ſum of 264l. was ſo involved in the illegal tranſaction, that it could not be ſeparated from it. By Ld *Kenyon*, Ch. J. As to the 264l. I have no doubt, it was a fair tranſaction; the ſtock was actually purchaſed, and the transfer of it was made: none of the proviſions of the act were thereby infringed, and it is too much to ſay that it ſhall not be binding, becauſe it was accompanied by other tranſactions at the ſame time, which were invalid. But on the principal queſtion his lordſhip was of opinion, that the plaintiff's demand could not be enforced. The judges *Aſhhurſt*, *Buller*, and *Groſe*, were however unanimouſly of opinion, that the plaintiff was entitled to recover under the following principles, *viz.* "In caſe of an illegal tranſaction, "if one perſon pay money for another, without any ex- "preſs authority, he cannot recover it back; but there is a "wide difference between the caſe of partners engaged in "legal and illegal contracts; in the former, if one of the "partners pay the whole of a partnerſhip debt, without "any expreſs promiſe from the other partners, the law "gives him a right to recover it back in an action for "money paid to the uſe of that other partner, and it pro- "ceeds on this ground, that both are liable to pay; but in "the caſe of illegal contracts, as they are not bound to pay, "one of them cannot acquire a right of action againſt the "other, by paying the whole without his conſent; in ſuch "caſes it is neceſſary to have the conſent and direction of "that other." That therefore in this caſe, the defendant having accepted the bill, it was an admiſſion on his part, that the other acted with his privity and conſent, and he was bound in honour and conſcience to repay the plaintiff who paid it for him.

* *Ter. Rep.* 286. If a man has actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back again, in an action for money had and received: as where a man has paid a debt, which would otherwiſe have been barred by the ſtatute of limitations; or a debt contracted during his infancy, and not for neceſſaries, which in juſtice he ought to diſcharge; though the law would not in either of theſe caſes have compelled the payment; yet the money being paid, it will not oblige the payee to refund it.

Thus, in an action to recover 2004l. 3s. 4d. for money had and received by the defendant, for the uſe of the plaintiffs, as executors of *A. Macintoſh*, the defendants pleaded the general

Munt & *al.* executors v. Stokes & *al.* H. 32 Geo. 3. B.R. 4 *Ter. Rep.* 561.

neral issue; and at the trial, a special case was reserved, stating in substance as follows: In January, 1785, the plaintiff's testator, *Alexander Macintosh*, was at Calcutta, in Bengal, in the East Indies, with the ship Hussar, carrying Danish colours, whereof he was at that time master and owner: By the laws of Denmark, all persons who are masters of ships, belonging to Danish ports, and carrying the Danish flag, must be either natural born subjects of the kingdom of Denmark, or become denizans of Denmark, and take the oaths of allegiance to the king of Denmark. On the 6th of January, 1785, *Macintosh* borrowed at Calcutta of the defendants, *being British subjects*, 20,000 current rupees, upon the terms mentioned in the condition of a *respondentia* bond. *Macintosh* soon afterwards sailed in the ship the Hussar, with Danish colours, from Calcutta, to the coast of Coromandel, and there took goods on board, and from thence sailed to Copenhagen: in December, 1785, *Macintosh* died, having first made his will, and appointed the plaintiffs and four others executors, the plaintiffs alone proved the will: on 12th October, 1786, the plaintiffs, upon application to them by the defendants, paid to the defendants 2004l. 3s. 4d. in discharge of the bond so entered into by *Macintosh*: the counsel for the plaintiffs, made three points: 1st, That the defendants could not have recovered this money on the bond, either from the plaintiffs or their testator, the transaction being void by stat. 7 *Geo.* 1. c. 21. §. 2. and 21 *Geo.* 3. c. 65. §. 29. (1) which was admitted: 2dly, That the plaintiffs having paid it, they were entitled to recover it back; 3dly, That if the plaintiffs were entitled, they might recover in this form of action for the plaintiffs might have declared in their own right; and the allegation of their being executors, which was merely description, might be rejected as surplusage; and further, that it was no objection in this stage of the cause, that the action was not brought by all the executors, for that was the subject of a plea in abatement. By the Court, The plaintiffs were bound, both in honour and conscience, to repay to the defendants the money which they had advanced, though the original contract was contrary to a positive law; for this is not a penalty, but money which the defendants had ac-

(1) By the first of these statutes, all contracts and agreements whatsoever made or entered into by any of his Majesty's subjects, for or upon the loan of any money, by way of bottomry, on any ship in the service of foreigners, and bound to the East-Indies, are declared to be void; and by the latter, it is enacted, that it shall not be lawful for any servant of the East-India Company, or any other British subject residing in India, to lend any money to any foreign company, or to any foreign European merchant.

tually advanced; and the original contract was not *malum in ſe*, but *malum prohibitum*; though the ſecurity on which this money was borrowed, was void by the ſtatute, perhaps an action for *money had and received* might have been maintained by the defendants, to recover back this money; for though in the caſe of illegal contracts, one party cannot recover againſt the other, *on the contract itſelf*, yet if he come to reſcind the contract, he may recover back ſo much money, as has been paid. If the party come into a court of juſtice, to enforce an illegal contract, two anſwers may be given to his demand; the one, that he muſt draw juſtice from a clear fountain, and the other that *potior eſt conditio poſſidentis*; ſuch would have been this caſe, if the plaintiffs had not paid the money, and an action had been brought on the contract: But the ground on which we decide this caſe is, that there was no miſrepreſentation, or any improper conduct by the defendants, to extort the money from the plaintiffs; but the plaintiffs knowing the whole tranſaction, and the law alſo, as they were bound to know, voluntarily paid it. There was nothing contrary to conſcience in the defendants receiving the money, which they had advanced to the plaintiff's teſtator: the plaintiffs, therefore, are not entitled, either in law or equity, to recover it back again. The Court did not decide on the queſtion of form. But *Buller*, J. ſaid, that he thought that the point of form was againſt the plaintiffs; and that they ſhould have declared in their own right, and not as executors: but he ſaid, that at all events, if the action be brought by the executors, all of them ſhould have joined, and this was a defect in the plaintiffs' title. Where, indeed, ſeveral are named executors, and one only proves the will and acts, that one is liable to an action; but he cannot ſue alone, until the others have releaſed.

Steers v. Laſhley, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 61.

This was an action on a bill of exchange, drawn by *Wilſon* on the defendant, and indorſed over by the former to the plaintiff, after it had been accepted by the defendant. It appeared at the trial, that the defendant had engaged in ſeveral ſtock-jobbing tranſactions with different perſons, in which *Wilſon* was employed as his broker, and had paid the differences for the defendant: that a diſpute ariſing between *Wilſon* and the defendant, reſpecting the amount of thoſe differences; the matter was referred to the plaintiff and three others, who awarded 306l. 12s. 6d. to be due from the defendant to *Wilſon*; for 100l. part of which *Wilſon* drew the bill, on which this action was brought. The judge who tried the cauſe was of opinion, that as the bill grew out of a ſtock-jobbing tranſaction, which was known to the plaintiff, he could not recover upon it; and therefore there was a nonſuit. It was afterwards moved to ſet this aſide, on the authority of the above caſe of *Petrie* v. *Hannay*.

But, by the Court, If the plaintiff had lent this money to the defendant, to pay the differences, and had afterwards received the bill in queſtion for that ſum, then according to the principle eſtabliſhed in *Petrie* v. *Hannay*, he might have recovered; but here the bill was given for theſe very differences; and, therefore, *Wilſon* himſelf could not have enforced payment for it, then the ſecurity was indorſed over to the plaintiff, he knowing of the illegality of the contract, between *Wilſon* and the defendant, for he was the arbitrator to ſettle their accounts; and under ſuch circumſtance, he cannot be permitted to recover on the bill in a court of law.

So a ſecurity given by an infant is only voidable: for it may be revived by a promiſe after he comes of age. In ſuch caſe, he is bound in equity and conſcience to diſcharge the debt, though the law would not compel him to do ſo; but he may wave the privilege of infancy, which the law gives him for the purpoſe of ſecuring him againſt the impoſitions of deſigning perſons: and if he chooſe to wave his privilege, the ſubſequent promiſe will operate upon the preceding conſideration. Cockſhott v. Bennet, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 766.

And if to a plea of infancy, the plaintiff reply, that *after the defendant had attained his age of twenty-one years, he ratified and confirmed the ſeveral promiſes and undertakings*, and the defendant rejoin that he did not; on iſſue joined thereon, it is ſufficient at the trial for the plaintiff to prove a promiſe by the defendant, and reſt his caſe there; for it is not incumbent on the plaintiff to ſhew that the defendant was of age at the time when the promiſe was made, for infancy is a fact which, if true, reſts within the knowledge of the defendant, and if he wiſhes to take advantage of it, the proof of the fact lies on himſelf. Borthwick v. Carruthers, Ea. 27 Geo. 3 B.R. 1 *Ter. Rep.* 648.

In aſſumpſit for money had and received; the caſe was as follows: the plaintiff was overſeer of the pariſh of Grimley, in the county of Worceſter, and the defendant, of St. Martins, in the city of Worceſter; the pariſh of Grimley granted a certificate to a pauper, acknowledging him to be ſettled in their pariſh, which certificate was directed to St. Peters, in Worceſter, or any other pariſh in the ſaid city; afterwards the pauper was removed by an order of two juſtices from St. Martins to *Grimley*; and the defendant having demanded 8l. 9s. 10d. of the plaintiff, for money expended by St. Martins, in maintaining the pauper and his family for the four laſt years; the plaintiff paid the ſame: this action was therefore brought to recover this ſum back again, as being paid by the plaintiff in his own wrong, the pauper having been certificated not to St. Martins, but to St. Peters. By the Court, money due in point of honour or conſcience, though a man is not compellable Farmer v. Arundel, Tr. 12 Geo. 3. C.B. 2 *Black.* 824.

to pay it, yet if paid, it ſhall not be recovered back. Now, put the form of the certificate out of the caſe, it is nevertheleſs evidence at all events, that the pariſh of Grimley, have acknowledged a pauper to be their pariſhioner, and it is allowed that he has been maintained four years by the pariſh of St. Martins; admitting, therefore, that this money could not have been demanded by the defendant (which is not neceſſary to decide), yet it is an honeſt debt, and the plaintiff having once paid it, ſhall not by this action, which is conſidered as an equitable action, recover it back again. Judgment for defendant.

2 *Burr.* 1012. So if a perſon pays to the extent of principal and intereſt on an uſurious contract, or money fairly loſt at play; in neither of theſe caſes can the party recover it back; for it was paid through a motive of honour and honeſty, and the defendant may therefore retain it with a ſafe conſcience: and the law will not compel him to refund it.

Lindon *v.* Hooper, Hil. 16 Geo. 3. B.R. *Cowp.* 414. An action for money had and received, does not lie to recover back money paid for the releaſe of cattle damage feaſant, though the diſtreſs were wrongful. Upon a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, it appeared as follows: this was an action for money had and received, brought by the plaintiff againſt the defendant, who had diſtrained the plaintiff's cattle; the plaintiff inſiſted he had a right of common, and demanded his cattle to be reſtored, which the defendant refuſed to do, unleſs the plaintiff would pay him 20s. for the damage done; upon this the plaintiff paid the money in diſpute for the releaſe of his cattle; and the action was brought for that money: at the trial the plaintiff was nonſuited, on the ground that it ſhould have been either replevin or treſpaſs. The queſtion now was, whether the plaintiff was entitled to recover back the money ſo paid, by this ſpecies of action? By the Court, though after the cauſe is brought before the jury, an objection to turn the plaintiff round, if the merits can be fully and fairly tried in the action brought, is unfavourable, yet if founded in law, it muſt prevail: the preſent caſe is ſingular, and depends upon a peculiar ſyſtem of ſtrict poſitive law: diſtraining cattle, doing damage, is a ſummary execution in the firſt inſtance; the diſtrainer muſt take care to be formally right, he muſt ſeize them in the act, upon the ſpot; for if they eſcape, or are driven out of the land, though after view, he cannot diſtrain them: [here a number of rules, in relation to the impounding and manner of treating the diſtreſs were mentioned:] the law has provided two preciſe remedies, for the proprietor of cattle which happen to be impounded: 1ſt, He may replevy; and if he does, upon the avowry, he muſt ſpecially ſet out a right of common, or ſome other title, as a juſtification of the cattle being where

where they were taken: or if he does not chooſe to replevy, but is deſirous to have his cattle immediately re-delivered, he muſt make amends, and then bring an action of treſpaſs for taking his cattle, and particularly charge the money ſo paid by way of amends, as an aggravation of the damage occaſioned by the treſpaſs: if to ſuch an action the diſtrainer pleads, that he took them doing damage, the plaintiff muſt ſpecially reply the right or title which he alleges the cattle had to be there. If inſtead of an action of treſpaſs, an action to recover back the money ſo paid by way of amends, might be brought, at the election of the plaintiff, the defendant would be laid under a great difficulty; he might be ſurprized at the trial; he could not be prepared to make his defence; he could not tell what ſort of right of common, or other juſtification the plaintiff might ſet up; the plaintiff might ſhift his preſcription as often as he pleaſed; or he might reſt upon objections to the regularity of the diſtreſs; the plaintiff can never be ſuffered to elect to throw ſuch a difficulty upon his adverſe party; beſides, as applied to the ſubject matter of this queſtion, the action for money had and received, could never anſwer the equitable end for which it was invented, and deſerves to be encouraged. For the point to be tried and determined in this action is, whether the plaintiff's cattle treſpaſſed upon the defendant's land? that may depend upon the plaintiff's right, or the defendant's right, or the fact of treſpaſſing; or it may depend upon mere form: if the diſtreſs was irregular, the amends muſt be recovered back again; ſo that allowing the owner of the cattle to ſubſtitute this remedy in lieu of an action of treſpaſs, would as between the parties, be unequal and unjuſt; and upon principles of policy, would produce inconvenience. It would break in upon that branch of common and ſtatute law, which relates to diſtreſſes; it would create inconvenience by leaving rights of common open to repeated litigation, and depriving poſterity of the benefit of preciſe judgments upon record. Rule diſcharged.

But where goods are taken in execution, and ſold under a warrant of diſtreſs upon a conviction, and the conviction is afterwards quaſhed; the party may wave the treſpaſs, and bring his action for money had and received, for the clear money produced by the ſale of the goods; for the conviction being quaſhed there can be no juſtification: ſo where goods are taken in execution which are not the property of the perſons againſt whom execution is taken out, the owner may wave the treſpaſs, and bring his action for the amount of the money which the goods ſold for: but the plaintiff, by bringing ſuch action for money had and received, can only recover the money for which the goods were ſold. If treſpaſs be brought in ſuch a caſe, the defendant

Feltham *v.* Terry, Ea. 13 Geo. 3. B.R. *Bull.* N.P. 131. *Cowp.* 419. 1 *Ter. Rep.* 387.

muſt plead ſpecially, and the plaintiff may recover damages far beyond the money actually received from the ſale of the goods.

Nightingale and others *v.* Deviſme, Ea. 10 Geo. 3. B.R. 2 *Burr.* 1089. 3 *Black.* 684.

The action for money had and received, does not lie to recover back ſtock improperly transferred, becauſe ſtock cannot be conſidered as money:—This was an action for money lent and advanced, money had and received, and money paid, laid out, and expended; on the trial of the cauſe, a verdict was taken for the plaintiffs, with 1170l. damages, ſubject to the opinion of the court on the following caſe.—One *Mettivier*, committed an act of bankruptcy, on April 12th, 1769, whereupon a commiſſion iſſued, and the plaintiffs were choſen aſſignees; on April 17th the bankrupt transferred 500l. Eaſt India ſtock to the defendant, which ſtock the defendant had, ſome months previous to the bankruptcy, transferred to *Mettivier*, the bankrupt, merely to entitle him to vote for directors, in ſuch manner as the defendant could depend on. The defendant to ſecure a re-transfer, had taken a note from the bankrupt for 1370l. and when the ſaid tranſfer was made, on April 17th, the defendant told the bankrupt, he might call for the note at his houſe, but it was not called for: the queſtion was, whether the plaintiffs were entitled to recover in this action? By the Court, This is a new ſpecies of property, ariſen within the compaſs of a few years. It is not money: we do not ſay, that an action cannot be framed ſo as to come at juſtice in this caſe, but we are all of opinion, that this action for money had and received to the uſe of the plaintiffs, will not lie in the preſent caſe, where no money was received.

Noyes *v.* Price, *Eſſex. Dig.* 99.

So if bank notes be refuſed to be delivered up, aſſumpſit for money had and received will not lie, it muſt be trover.

Longchamp *v.* Kenny, Ea. 19 Geo. 3. B.R. *Doug.* 137.

Although where the demand is for a ſpecific thing, an action of this kind cannot be maintained; yet if there be ground to preſume that it has been converted into money, and the defendant has had notice of the nature of the demand, it will lie. In this caſe, the plaintiff had received a number of maſquerade-tickets from Mrs. *Cornelys*, to diſpoſe of, for which he was to account after the maſquerade, by paying the value or returning the tickets; the defendant had got poſſeſſion of one of the tickets, which had been delivered to the plaintiff, and when the agent of Mrs. *Cornelys*, came to demand an account, the plaintiff told him, that the defendant had had one of the tickets, and muſt pay for it; upon this the agent went and made a demand on the defendant, but he refuſed; the plaintiff was then threatened with an arreſt, on which he paid five guineas, the value of the ticket; this action was therefore brought to recover the value of this ticket; and the declaration contained a count for money had and received, one for money paid, laid out, and expended, and one for money lent:

beſides

beſides the above facts, it appeared on the trial, that the defendant had notice that the plaintiff meant to ſue him *for the value of the ticket*, and that he came prepared to reſiſt that demand: the jury found a verdict for the plaintiff, ſubject to the opinion of the court, whether the action could be maintained. By Lord *Mansfield*, Ch. J. it is certain, that where the demand is for a ſpecific thing, an action cannot be maintained in this form; and if the preſent action had been brought without notice of the nature of the demand, I ſhould have thought it could not have been ſupported. But here the defendant came prepared: if he ſold the ticket, and received the value of it, it was for the plaintiff's uſe, becauſe the ticket was his. Now, as the defendant has not produced the ticket, it is a fair preſumption that he has ſold it. *Aſhhurſt* J. and *Buller* J. were clear, that the count for money had and received, was maintainable; and they inclined alſo to think, that the evidence would have ſupported the count for money paid; for *Aſhhurſt* J. obſerved, that the caſe was like that of a ſurety, who, by paying the debt for the principal, ſaves him from being ſued, and who can maintain an action againſt him for money paid: and here he ſaid the plaintiff had paid the five guineas, under a compulſion brought upon him by the defendant, and had thereby ſaved him from an action.

But where the declaration ſtated, that the plaintiff having diſtrained ſome pictures of *Poole* his tenant, and being about to ſell them, the defendant, in conſideration that the plaintiff would return the goods to *Poole*, undertook to pay the plaintiff, on a certain day 90l. yet that he did not: at the trial it appeared, that the agreement was, that the plaintiff ſhould deliver the pictures *to the defendant*, and not to *Poole*, and Lord *Kenyon*, Ch. J. who tried the cauſe, thought it was a fatal variance; but a verdict was taken for the plaintiff, with liberty for the defendant to move to enter up a nonſuit: on a motion being made for this purpoſe, the counſel for the plaintiff abandoned the ſpecial count, but inſiſted that, as the declaration alſo contained a count for money had and received, he might recover on that count, for the defendant could not be ſurpriſed, as it appeared on the face of the record, that the cauſe of action was the value of the pictures; and they cited the above caſe of *Longchamp* v. *Kenny*. But, by the Court, in that caſe, the ticket was delivered for the purpoſe of being carried to market; and the preſumption was, that it was ſold, as the defendant would give no account of it. But here a contrary preſumption ariſes; for the pictures were delivered to the defendant in order to avoid their being ſold.

Leery v. Goodſon. Ea. 32 Geo. 3. B.R. 4 *Ter. Rep.* 687.

In an action for goods ſold and delivered, it appeared that the defendant had ordered the goods to be ſent to him by land carriage,

Vale v. Bayle, Ea. 15 Geo. 3. B.R. *Cowp.* 294

carriage, by a poſtſcript to his letter, ſaying, " Pray be ex-
" peditious in ſending them; and, inſtead of letting them go
" by the way of *Briſtol*, where many things you have
" ſent me have been detained, *ſend them by land-carriage.*"
The witneſs proved the delivery of the goods to the book-
keeper of the *Birmingham* carrier, to be ſent from thence, by
way of *Coventry*, to the defendant, who lived at *Caermar-
then*; and that *there was no other mode of conveyance by land-
carriage.* The goods were loſt on the road; and the judge
who tried the cauſe was of opinion, that this was not a
delivery to the defendant, and non-ſuited the plaintiff. This
nonſuit was afterwards moved to be ſet aſide; and by the
Court, If the vendor take upon himſelf actually to deliver
the goods to the vendee, he ſtands to all riſques; but if the
vendee order a particular mode of conveyance, the vendor
is excuſed. This caſe is as much as if the defendant had
mentioned the *Birmingham* carrier particularly by name; for
there being but one carrier, the plaintiff had no choice by
whom to ſend them.

Chorley, M.D. *v.* Boſcot, Tr. 31 Geo 3. B.R. 4 *Ter. Reſ.* 317.

The plaintiff, who was a phyſician, brought this action for fees for attending, for a conſiderable time, on the defendant's teſtator: the plaintiff obtained a verdict at the aſſizes; and a motion having been made to ſet aſide ſuch verdict, The Court were of opinion, That the fees of a phyſician are honorary, and not demandable of right, and therefore ſet the verdict aſide.

Rich *v.* Coe and others, Tr. 17 Geo. 3. E.R. *Cowp.* 636.

Whoever ſupplies a ſhip with neceſſaries, has a treble ſecurity: 1ſt, The perſon of the maſter; 2dly, The ſpecific ſhip; 3dly, The perſonal ſecurity of the owners, whether they know of the ſupply or not.—On the trial of an action of aſſumpſit for goods ſold and delivered, and alſo for work and labour, the jury found a verdict for the plaintiff, ſubject to the opinion of the court, on the following caſe:—A ropemaker, to whom the plaintiff was executor, had ſupplied a ſhip with cables to the value of 5l. 8s. 3d. by the order of the captain, and made the owners of the ſhip (the defendants) debtors in the uſual manner, without naming the owners, or knowing particularly who they were: the ſhip was let by the defendants to the captain, at 36l. per annum, for a term of years, under covenants on their part, that he ſhould have the ſole management of the ſhip, and employ her for his own ſole benefit and advantage; and on his part, that he would at all times, at his own coſts and charges, repair the veſſel, and her tackle, rigging, &c. The caſe then ſtated, that the plaintiff's teſtator had no notice of this contract, at the time they furniſhed the captain with the goods; the queſtion was, whether the defendants, the owners of the ſhip, were liable to this debt? By the court, It is impoſſible to ſay, that the plaintiff is not entitled to recover.—

recover.—Whoever ſupplies a ſhip with neceſſaries, has a treble ſecurity: 1, The perſon of the maſter; 2, The ſpecific ſhip; 3, The perſonal ſecurity of the owners, whether they know of the ſupply, or not. 1ſt, The maſter is perſonally liable, as making the contract; 2dly, The owners are liable, in conſequence of the matter's act, becauſe they chooſe him: they run the riſk, and they ſay whom they will truſt with the appointment and office of maſter. If the owners, in this caſe, had delivered the value of the goods in queſtion, in ſpecie to the maſter, with directions for him to pay it over to the creditors, and the maſter had embezzled the money, it would have been no concern of the creditors: for they truſt ſpecifically to the ſhip, and generally to the owners. In this caſe, the defendants are the owners; and there happens to be a private agreement between them and the maſter, by which he is to have the ſole conduct and management of the ſhip, and to keep her in repair; but this cannot affect the creditors, who are total ſtrangers to the tranſaction. To be ſure, if it appeared, that a tradeſman had notice of ſuch a contract, and in conſequence of it gave credit to the captain individually, as the reſponſible perſon; particular circumſtances of that ſort, might afford a ground to ſay, he meant to abſolve the owners, and to look ſingly to the perſonal ſecurity of the maſter. But here there was no notice whatever of the contract: we are, therefore, all of opinion, that, under theſe circumſtances, there is no colour to ſay, that the creditors ſhould be ſtripped of the general ſecurity they are by law entitled to againſt the owners.

In an action brought by a ſhipwright for work and labour done, and materials provided, in repairing the defendant's ſhip; the queſtion was, whether the plaintiff was entitled to recover, under the following circumſtances: the plaintiff was poſſeſſed of a dock, and the defendant's ſhip being damaged, was put into it, in order to be repaired by the plaintiff, and the defendant agreed to pay him 5l. for the uſe of the dock: on the day before the ſhip was to go out of dock, and when only three hours' work was wanting to complete the repair, a fire happened at an adjacent brewhouſe, which communicating to the dock, the ſhip was burned. By the court, This is a deſperate caſe for the defendant (though compaſſionate); it is like the caſe of a horſe, that a farrier was curing, being burnt in the owner's *own* ſtable; there the court held, that the farrier ſhould be paid for what he had actually done; ſo here the defendant paid 5l. for the uſe of the dock. Menetone, *v.* Athawes, M. 5 Geo. 3. B.R. 3 Burr. 1592.

In aſſumpſit for work and labour with the common money counts which had been tried twice, and on each trial with a verdict in favour of the plaintiff; it appeared on Trelawney *v.* Thomas, M. 30 Geo. 3. C.B. 1 *Hen. Black.* 303.

on a motion for a new trial, that the verdict laſt obtained was for the amount of the money advanced by the plaintiff, for the purpoſes of an election for members of parliament for Briſtol, together with a certain ſum for his attendance; and that the defendant, *who was a member of the election committee, had taken upon himſelf a very active part, in engaging the plaintiff to advance money, and attend in collecting the voters reſident in* London, *and conveying them to* Briſtol. The defendant endeavoured to prove, that he acted merely as the agent of *Peach*, one of the candidates, and by his authority; and for this purpoſe produced two witneſſes, who being examined on the *voir dire*, were not permitted to be examined, on the ground of being intereſted. It was now, on the motion for a new trial, urged, that the defendant was merely the agent of *Peach*, and therefore not perſonally liable; and that the evidence of the witneſſes who had been rejected, ought to have been admitted. But the court (except *Wilſon*, J.) were of opinion, that the witneſſes were properly rejected; and as to the liability of the defendant, they ſaid, that it would be an exceedingly hard caſe, if the plaintiff was not entitled to recover againſt the defendant, conſidering from the ſtate of the evidence, the active ſhare and part which he took in this buſineſs. That he ſeemed to have been a perſon ſupporting the credit of *Peach*, and putting himſelf forward as a ſtake, to be reſponſible to every body: that it was clear, the defendant was a member of the committee, and ſuppoſing the money to come from that committee, and having ſaid nothing to give the plaintiff a better right againſt any other perſon, he ſhould not be permitted to turn the plaintiff round: he appeared to be, in fact, the only perſon the plaintiff could ſue.

Atkins & *Ux.* v. Hill, Ea. 15. Geo. 3. E.R. *Lowth.* 284.

Aſſumpſit upon an expreſs promiſe.] A legatee may ſue at law for his legacy, if the executor has received aſſets, and made an expreſs promiſe to pay the legacy.—In aſſumpſit, the plaintiffs declared againſt the defendant, for that one J. C. by his laſt will, gave to the plaintiff's wife the ſum of 60l. and of his ſaid will, made the defendant ſole executor: that divers goods and chattels afterwards, came to the hands of the defendant, as executor of J. C. more than ſufficient to pay all the debts and legacies; of which the defendant then and there had notice: by reaſon of which, the defendant became liable to pay; and being ſo liable, in conſideration thereof, undertook and faithfully *promiſed* to pay the 60l. To this declaration, the defendant demurred generally; and in ſupport of the demurrer, it was objected, 1ſt, That no action lies for a legacy iſſuing out of perſonalty; 2dly, That before a legatee can entitle himſelf to a remedy againſt the executor, it muſt be ſhewn that he has received aſſets ſufficient

ſufficient to anſwer all demands of a higher nature, and particularly the general expences, which muſt be firſt proved. By the court, The argument in ſupport of this demurrer, has proceeded upon ſuppoſing a *general queſtion*, which is not at all involved in this caſe, and agitating that general queſtion, as if this were a declaration upon the ground of the will only, and nothing elſe. If it were a general queſtion, we ſhould heſitate: the objection taken upon the ſuppoſition of its being ſo, is, that a legacy ariſing out of a will of perſonal eſtate being a teſtamentary matter, the cognizance of it belongs peculiarly and excluſively to the eccleſiaſtical juriſdiction: if that propoſition were univerſally true, the objection would hold equally againſt the juriſdiction of the courts of equity; but this is a caſe not within any ſuch general queſtion. This is a caſe in which the declaration particularly ſtates, that aſſets have been received by the defendant, the executor, more than ſufficient to pay all the teſtator's debts and legacies: if ſo, it moſt undoubtedly muſt be taken upon the pleadings, that there was ſufficient to diſcharge the funeral expences, becauſe they are payable firſt; conſequently, if there was leſs than the amount of them, there could not be ſufficient to diſcharge the debts and legacies: the declaration then goes on to ſtate, that in conſideration of there being full ſufficient aſſets as aforeſaid, the defendant undertook and promiſed to pay the plaintiff his legacy. In the preſent caſe, therefore, there is not only an aſſent to the legacy, but an *actual promiſe* and undertaking to pay it, and that promiſe founded on a good and valuable conſideration, which, in all caſes, is a ſufficient ground to ſupport an action: it is ſo in caſes of obligations, which would otherwiſe only bind a man's conſcience, and which, without ſuch promiſe, he could not be compelled to pay; as where an infant contracts debts during his minority; if after he comes of age, he conſents to pay them, an action lies: ſo a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. In this caſe, the promiſe is grounded upon a reaſonable and conſcientious conſideration; namely, that the defendant had aſſets to diſcharge the legacy; if ſo, he was compellable in a court of equity, or in the eccleſiaſtical court, to pay it. It is *an expreſs promiſe* made upon a good and ſufficient conſideration.

So, where an action was brought againſt the defendant *in her own right*, the declaration ſtated, that G. S. by his will, bequeathed a legacy of 50l. to the plaintiff; that he appointed the defendant his executrix; that ſhe proved the will; that goods and chattels came to her hands more than ſufficient to pay all the teſtator's debts and legacies, by reaſon

Hawkes & Ux. v. Saunders. Hil. 22 Geo. 3. Coop. 289.

ſon whereof, ſhe became liable to pay the legacy; and being ſo liable, in conſideration thereof ſhe *promiſed* to pay it. To this declaration, two objections were made in arreſt of judgment; 1ſt, That the defendant is not ſufficiently deſcribed as executrix, and therefore there cannot be judgment *de bonis teſtatoris*; 2dly, No judgment can be entered *de bonis propriis*, becauſe there was no conſideration for the promiſe; and, therefore, it is *nudum pactum*. By the Court, As to the firſt, the plaintiff cannot upon this declaration take judgment *de bonis teſtatoris*. The action is brought againſt the defendant in her own right, and not as executrix: it charges her with a perſonal promiſe to pay the legacy, and not upon a qualified promiſe to pay as executrix, or out of aſſets: and the plaintiff having by his declaration, made a perſonal demand againſt her; he muſt ſtand or fall by that, and cannot now reſort to any demand that he may have upon her in the particular character of executrix. The forms of pleading are very different, where a perſon is charged as executrix, and where ſhe is charged perſonally: in the firſt caſe, ſhe is always named *as executrix* in the beginning of the declaration; ſhe is afterwards ſtated to be liable *as executrix*, and the promiſe alleged to have been made by her *as executrix*. But in the other caſe, ſhe is charged *generally* as any other perſon, and a general charge is a perſonal charge.—This caſe, therefore, depends wholly upon the ſecond queſtion: whether there be a ſufficient conſideration alleged for the promiſe; or, whether the defendant's promiſe be merely *nudum pactum*, and void?—Where a man is under a legal or equitable obligation to pay, the law implies a promiſe, though none was ever actually made; a *fortiori*, a legal, or equitable duty, is a ſufficient conſideration for an *actual promiſe*. Where a man is under a moral obligation, which no court of law, or equity can enforce, and *promiſes*; the honeſty and rectitude of the thing is a conſideration: as if a man promiſes to pay a juſt debt, the recovery of which is barred by the ſtatute of limitations; or, if a man after he comes of age, promiſes to pay a meritorious debt, contracted during his minority, but not for neceſſaries; or if a bankrupt, in affluent circumſtances, after his certificate, promiſes to pay the whole of his debts; or if a man promiſe to perform a ſecret truſt, or a truſt void for want of writing, by the ſtatute of frauds; in ſuch and many other inſtances, though the promiſe gives a compulſory remedy, where there was none before, either in law or equity; yet, as the promiſe is only to do what an honeſt man ought to do, the ties of conſcience upon an upright mind, are a ſufficient conſideration. But an executor who has received aſſets, is under every kind of obligation to pay a legacy. He receives the money

money by virtue of an office, which he ſwears to execute duly: he receives the money as a truſt, or depoſit, to the uſe of the legatee. He ought to aſſent, if he has aſſets: he has no diſcretion or election: he retains what belongs to the legatee; and therefore owes him to the amount. An account of aſſets, or a judgment to pay out of aſſets, is only neceſſary where the ſufficiency of aſſets is uncertain. Where the ſufficiency of aſſets received is certain, the executor's duty to pay a legatee, follows by neceſſary conſequence, the legacy, in ſuch a caſe, is a demand clearly due from the executor upon various grounds of natural and civil juſtice, and may be recovered from him by proceſs of law: in ſuch a caſe, a promiſe to pay ſtands upon the ſtrongeſt conſideration. In this caſe there was a full fund; and the defendant was bound in law, juſtice, and conſcience, to pay the plaintiff his legacy, as ſhe in conſideration of that fund *promiſed* to pay. This, certainly, was a ſufficient conſideration.

But unleſs there is *an expreſs promiſe* to pay, a legacy cannot be recovered in a court of law from an executor. This was aſſumpſit for the arrears of an annuity bequeathed to the plaintiff's wife, by the defendant's teſtator; wherein the declaration ſtated, that the teſtator bequeathed to the wife of the plaintiff 40s. a-year for her life; that ſhe appointed the defendant his executor, who proved his will, and poſſeſſed himſelf of aſſets *fully ſufficient to pay and ſatisfy all the debts, legacies, and funeral expences of the teſtator, and charges of proving the will*, whereby the defendant became liable to pay the plaintiff 40s. a-year, and being ſo liable, promiſed to pay, (averring, that three years and three-quarters were due.) On the general iſſue pleaded, there was a verdict for the plaintiff, ſubject to the opinion of the court, on the following caſe—The teſtator made his will, 31 Jan. 1774, and thereby gave the plaintiff's wife the annuity in queſtion: the defendant, who was his ſurviving executor, proved the will on 28th May, 1775, and paid the annuity for ſeveral years up to Lady Day, 1790. *The defendant never made any expreſs promiſe to pay*; but was poſſeſſed of aſſets ſufficient to have paid the plaintiff's demand, if parol evidence of an acknowledgment of having aſſets without any other evidence thereof, were ſufficient. By the court, the ground of this action, as it appears on the declaration, is, that in conſideration of aſſets, the defendant promiſed to pay this annuity. It is not pretended, that the defendant made any *expreſs promiſe* to pay; and the queſtion is, whether under theſe circumſtances the law does, or does not imply ſuch a promiſe. No caſe has been cited to ſhew that it does. The arguments which have of late years been advanced, in ſupport of this action, are founded on the ſuppoſed juſtice

Deeks, *v.* Strutt, Tr. 34 Geo. 3. B.R. 5 *Ter. Rep.* 690.

of the caſe, and the convenience of the parties; but when it is conſidered, in what manner a court of equity interpoſes in ſuits for legacies, in taking care that proviſion is made for the different parties entitled; and what inconvenience, and even ruin to private families, would have enſued, from determining that an action can be brought in a court of law for a legacy: we think that thoſe who have wiſhed to ſupport the action, would heſitate before they came to the concluſion, that the action can be maintained. If an action will lie for a legacy, no terms can be impoſed on the party who is entitled to recover; and, therefore, where the legacy is given to a wife, the huſband would recover at law, and no proviſion could be made for the wife, or her family: whereas, a court of equity will take care to make ſome proviſion for the wife in ſuch a caſe. But the whole of this admirable ſyſtem which has been founded in a court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy. Theſe are deciſive reaſons againſt the juriſdiction of the courts of law over this ſubject, and have influenced thoſe who once entertained an idea, that this action could be ſupported. There is one caſe in the books (1) where the declaration ſtates, that in conſideration of a forbearance by the plaintiff to ſue, the executor promiſed to pay the legacy; and the court held that the action might be maintained; but the circumſtance of that action being brought on a promiſe, in conſideration of forbearance, ſhews that it was underſtood that the bare poſſeſſion of aſſets was not alone ſufficient. This is a novel attempt; and we are of opinion, that the action cannot be ſupported—*poſtea* to defendant.

Martyn, v. Hind, Ea. 16 Geo. 3. B.R. *Cowp.* 437.

In an action brought by the plaintiff againſt the defendant, who was the rector of St. Ann's, Weſtminſter, to recover a ſum of money due from him to the plaintiff, for officiating as his curate, the declaration conſiſted of ſeveral counts; and the third count, on which the verdict was taken, ſtated, "That the defendant was rector of the church, and as "ſuch, by a certain inſtrument in writing undertook, and "to the plaintiff *faithfully promiſed to retain and continue* "*the plaintiff to officiate in the ſaid church, until he ſhould be* "*otherwiſe provided with ſome eccleſiaſtical preferment*; unleſs "by fault by him committed, he, the ſaid plaintiff, ſhould "be lawfully removed from the ſame, and to pay him "fifty guineas a-year during that time: it then concluded "with an averment, that although the plaintiff was not "provided with any other eccleſiaſtical preferment nor

(1) *Davis* v. *Wright*, 1 *Vent.* 120. and *Smith* v. *Johns*, Cr. Jac. 257.

"lawfully

" lawfully removed, the defendant had refuſed to pay." There was a verdict for the plaintiff, and at the trial the plaintiff to prove the defendant's undertaking, gave in evidence the certificate directed by him to the Biſhop of *London*, on the plaintiff's being ordained prieſt; whereby he certified, " That he had nominated and appointed the plaintiff to " perform the office of curate, and thereby promiſed to " allow him fifty guineas per ann. for his maintenance in " the ſame, and to continue him to officiate in the church, " *until he ſhould be otherwiſe provided of ſome eccleſiaſtical pre-* " *ferment*, or for fault by him committed, lawfully re- " moved." On the part of the defendant, two written notices were proved to have been given in writing to the plaintiff, requiring him to quit the curacy: they alſo produced an appointment of the plaintiff to the readerſhip of the pariſh, the duty of which office, was to read prayers on ſuch days as the parſon of the pariſh was not uſed to perform divine ſervice. The reader was appointed by the veſtry, and ſupported by their order, and at their will, out of monies allowed the churchwardens in their accounts (1). Upon ſhewing cauſe againſt a motion for a new trial, it was inſiſted *on the behalf of the plaintiff*, that a readerſhip was no eccleſiaſtical preferment: and *on the behalf of the defendant*, three objections were made to the plaintiff's recovering in this action: 1ſt, That the promiſe is a promiſe to, and a contract, or engagement with the biſhop, to indemnify him from maintaining the plaintiff; but is no promiſe, no contract, no engagement with the plaintiff, and therefore gives to him no right to ſue: The 2d objection was, that the plaintiff was not licenſed by the biſhop: The 3d objection was, that the plaintiff was appointed reader of extra prayers in this pariſh church, at 30l. a-year, to be paid by the churchwardens, and charged in their accounts,

(1) At the trial, the defence attempted to be ſet up was, that the plaintiff was lawfully removed for faults by him committed, and imputations were thrown upon his life and *manners*, and evidence offered to prove the irregularity of his conduct: but Lord *Mansfield*, who tried the cauſe, would not ſuffer them to go into any criminal charge againſt the plaintiff; becauſe, in the firſt place, the defendant ought in that caſe to have complained to the biſhop, and obtained his ſentence, or judgment, or directions in a formal, or, at leaſt, in a ſummary way; and, 2diy, if the defendant could, without applying to the biſhop, have removed the plaintiff for a cauſe ſubject to the opinion of this, or any other court, as to the ſufficiency of ſuch cauſe of removal, he ought to have given the plaintiff notice of it: but, in the notices given to the plaintiff to quit, the defendant had ſpecified no fault, or objection, and grounded them on his own will and pleaſure: therefore, he could not be prepared to make any anſwer to what was now by ſurprize, offered to be laid to his charge.

which the defendant contended was an eccleſiaſtical preferment. By the court, the certificate is not a contract with the biſhop to indemnify him; but a certificate and aſſurance to the biſhop of a matter of fact: that ſuch an one has appointed the perſon named in the certificate, to be curate of his pariſh; that he undertakes to pay him a certain ſalary, and that he will continue him in the curacy, till he is otherwiſe provided: it is no indemnity to the biſhop, or any thing like it; it is no promiſe to, or contract with him, but merely an information of a matter of fact; the contract is with the curate: therefore, there is no ſhadow of objection to the plaintiff's maintaining this action—As to the ſecond objection, that the plaintiff is not licenſed by the biſhop: within the true intent and meaning of the cannon law, he is licenſed by the biſhop; for he has ordained him on this title. If ſo, the biſhop has ſolemnly approved of his being the curate of this church: it is the very foundation and title of the ordination, and therefore he is licenſed to all intents and purpoſes. Whether this be a compliance with the letter of ſome penal ſtatutes, which require a ſpecific form of licenſe, may be a critical queſtion. But the objection does not lie in the mouth of the defendant, as an excuſe to him for not performing his contract. He, as well as the plaintiff, have underſtood for years, that his ordination upon this title was a ſufficient licenſe; or, if they did not ſo underſtand it, the defendant has waved the objection. In his notice to quit, he does not object the want of a licenſe: in caſe he had, the plaintiff might have immediately got a licenſe, had he thought that neceſſary. If, after reaſonable notice, he does not procure every qualification to enable him to do the duty, the defendant would be excuſed from paying him the ſalary, for the plaintiff's ſervice, *as curate*, is not only the conſideration, but the condition of the ſalary—As to the third objection, that the plaintiff is, in fact, and agreeably to the terms of the contract, otherwiſe provided with an eccleſiaſtical preferment, we find it impoſſible to ſay, that this readerſhip is an eccleſiaſtical preferment, for the plaintiff is not a reader in any ſenſe of the law. This is nothing more than a pariſh employing a clergyman in prieſt's orders to read prayers, and they call him a reader. The term, reader, is made uſe of by the cannon law: it is one of the five orders of the Romiſh church, inferior to the deacon; they are always conſidered laymen, in the idea of the cannon law, and are expreſsly put in oppoſition to clergymen. Is an employment then an eccleſiaſtical preferment, where a private man may be employed. *Watſon*, upon the canon law, ſtates, that there are but two ways of being provided for by the church, without being an *incumbent* of it; viz. being a

curate,

curate, or a lecturer; they are both taken notice of by law: they muſt be licenſed; they muſt ſubſcribe to the articles, and make the declaration. But a prieſt, employed by any body to read prayers, wants no authority; the very ordination gives him authority: he wants no licenſe, he ſigns no articles; the biſhop cannot inhibit him, and the office is temporal. What ſtability is there then, in the preſent appointment? No one can read prayers in a church, without the conſent of the rector. What obligation is there, if the pariſh ſhould think fit not to have a reader, to bind or compel them to have one any longer? The appointment and ſalary are only during pleaſure; and the office, ſuch as requires no licenſe, or authority: therefore, it is impoſſible to conſider this as an eccleſiaſtical preferment; the conſequence is, that the rule for a new trial muſt be diſcharged.

Cooke, v. Oxley, Eſq. 30 Geo. 3. B R. 3 *Ter. Rep.* 653.

In order to ſuſtain a promiſe, there muſt be either a damage to the plaintiff, or an advantage to the defendant. In this caſe, the third count in the declaration upon which the verdict was taken, ſtated, "That in a certain diſcourſe "between the plaintiff and defendant, concerning the buying "266 hogſheads of tobacco, the defendant propoſed to ſell "and deliver to the plaintiff the ſaid 266 hogſheads of to-"bacco, at a certain price; whereupon the plaintiff deſired "the defendant to give him time to agree to, or diſſent from "the ſaid propoſal, till the hour of four in the afternoon; "and thereupon the defendant propoſed to ſell and deliver "the ſame upon the terms aforeſaid, *if the plaintiff would* "*agree to purchaſe them upon the terms aforeſaid*, and would "give notice thereof to the defendant, *before the hour of four* "*in the afternoon of that day*." The plaintiff then averred, that he did agree to purchaſe, and gave notice thereof before four o'clock, but that the defendant did not deliver, &c. It was moved to arreſt the judgment, on the ground that there was no conſideration for the defendant's promiſe.—By the court, in order to ſuſtain a promiſe, there muſt be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was firſt made: the agreement was not binding on the plaintiff before four o'clock, and it is not ſtated, that the parties came to any ſubſequent agreement. There is, therefore, no conſideration for the promiſe.

Anonymous, Tr. 14 Geo. 3. B.R. Coup. 128.

The plaintiff having ſued out a writ of execution againſt the defendant, upon a judgment obtained againſt him, the defendant, in conſideration that the plaintiff would ſtay the execution at that time, undertook to pay the debt and coſts: ſeveral applications had been ſince made to the defendant for payment without effect, and therefore he was now held to bail upon his new aſſumpſit for 17l.; it was moved, that

he might be diſcharged on common bail, on the ground that the original debt was under 10l. By the court, this is a new ſpecies of action, and an attempt to turn a judgment debt, into a debt upon ſimple contract. If the undertaking had been by a third perſon, in conſequence of the forbearance, it would have been a good ground of aſſumpſit againſt ſuch third perſon: but here the promiſe is by the defendant himſelf to pay a debt, to which he was before liable upon record: for by the judgment, he is liable to the coſts, as well as the debt. Therefore, this promiſe is no ground upon which to raiſe an aſſumpſit.

Moulſdale, *v.* Birchall, Ea. 12 Geo. 3. In the Ex. in Er. 2 *Black.* 820.

An aſſumpſit will lie, for not paying the conſideration of an aſſignment of an uncertain debt. This was error from the King's Bench.—The defendant in error brought an action againſt *Moulſdale*, ſtating in his declaration, that one P. A. was indebted to him in 54l. 1s. 10½d. for goods and merchandize; but the exact amount thereof of the time of the contract, on which this action was brought, was unknown both to the plaintiff and the defendant; and that *Birchall* had ſold, and *Moulſdale* had bought the ſaid debt, be it more or leſs for its whole amount, except 10l. which *Moulſdale* was to have for taking upon him the ſaid debt; and that *Birchall* was to receive certain cabinet-makers goods therein ſpecified, to the amount of 38l. 14s. in part of payment, and the reſidue except as aforeſaid, in other cabinet-makers' goods to the value thereof; and for non-delivery of theſe goods, the action was brought. To this the defendant demurred; and on the plaintiff's joining in demurrer, judgment was given for the plaintiff; and the defendant now brought his writ of error: after argument and full conſideration. The Court were clear that the conſideration was a good one, although the debt was uncertain when aſſigned.

Pillans and Roſe, *v.* Van Mierop and Hopkins, Ea. 5 Geo. 3. B.R. 3 *Burr.* 1663.

Any damage to another, or ſuſpenſion, or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking. On a motion for a new trial in this caſe, on the ground that the verdict was againſt evidence; it appeared, that the ſubſtance of the evidence was as follows: one *White*, a merchant in Ireland, deſired to draw upon the plaintiffs, who were merchants at Rotterdam, in Holland, for 800l. payable to one *Clifford*, and propoſed to give them credit upon a good houſe in London for their reimburſement, or any other method of reimburſement. The plaintiffs, in anſwer, deſired a confirmed credit upon a houſe of rank in London, as the condition of their accepting the bill. *White* names the houſe of the defendants, as this houſe of rank, and offers credit upon them, whereupon the plaintiffs honoured the defendant in favour of *Clifford*,

Clifford, and paid the money, and then (1) wrote to the defendants to know "Whether they would accept ſuch bills, as they, the "plaintiffs, ſhould, in about a month's time, draw upon the "ſaid *Van Mierop's* and *Hopkins's* houſe here in London, "for 800l. upon the credit of *White*;" and they having received their aſſent, accordingly drew upon the defendants: in the interim, *White* failed before their draft came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them, which they nevertheleſs did; and therefore the defendants refuſed to pay their bills. On the trial, a verdict was found for the defendants: on the motion for a new trial, the defendants objected that the letter whereby they undertook to honour the plaintiffs' bills, was *nudum pactum*, and that therefore this action could not be ſupported, upon the breach of this agreement. By the Court, if there was any kind of fraud in this tranſaction, the colluſion and *mala fides* would have vacated the contract; but from the letters that paſſed, it is clear that there was none: it rather ſeems, as if the defendants had effects of *White's* in their hands, but whether they had, or had not, is immaterial: then, if there be no fraud, it is a mere queſtion of law. The law of merchants, and the law of the land is the ſame: a witneſs cannot be admitted to prove the law of merchants; we muſt conſider it as a point of law: a *nudum pactum* does not exiſt, in the uſage and law of merchants; the ancient notion about the want of conſideration, was for the ſake of evidence only: for when it is reduced into writing, as in covenants, ſpecialties, bonds, and the like, there was no objection to the want of conſideration: and the ſtatute of frauds proceeded upon the ſame principle. In commercial caſes amongſt merchants, the want of conſideration is not an objection: but, in the preſent caſe, there is a conſideration; any damage to another, or ſuſpenſion, or forbearance of his right, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking. Now, here, the promiſe and undertaking of the defendants did occaſion a poſſibility of loſs to the plaintiffs: it is plain that the plaintiffs would not rely on *White's* aſſurance only, but wrote to the defendants, to know if they would accept their drafts. The credit of the plaintiffs might have been hurt by the refuſal of the defendants to accept *White's* bills, they were, or might have been prevented from writing to him, or getting further ſecurity from him; it comes within the caſes of promiſes, where the debtee forbears ſuing the original debtor. Then, whether by the law of merchants, this contract is not

(1) A letter of credit may be given, as well for money already advanced, as for money to be advanced in future. *Per* Lord *Mansfield*, ſame caſe, *Burr.* 1667.

binding on the defendants, though it was without conſideration, the law is to judge; the true reaſon why the acceptance of a bill of exchange ſhall bind, is not on account of the acceptor's having, or being ſuppoſed to have effects in hand, but for the convenience of trade and commerce. *Fides eſt ſervanda:* an acceptance *for the honour of the drawer*, ſhall bind the acceptor: ſo ſhall *a verbal acceptance*; and whether this be an actual acceptance, or an agreement to accept, it ought equally to bind the defendants; they ought to be equally obliged to perform the effect of their undertaking. An agreement to accept a bill *to be drawn* in future, would by connection and relation bind, on account of the antecedent relation; and there is no difference between its being before, or after the bill was drawn. Here was an agreement ſufficient to bind the defendants to pay the bill: agreeing to honour it, is agreeing to pay it; therefore they are bound to pay it.—New trial granted.

Iſrael, *v.* Douglas, *& al.* Ea. 29 Geo. 3. C.B. 1 *Hen. Black.* 239.

In this action, the plaintiff declared, 1ſt, for money had and received; 2dly, money paid; 3dly, money lent; 4thly, on an account ſtated. There was a verdict for the plaintiff; and on a motion for a new trial, the material facts of the caſe were theſe: "The defendants, who were partners, were "indebted to one *Delvalle*, a broker, in 64l. 9s. for bro-"kerage; and *Delvalle* was indebted to the plaintiff in 40l. "on a promiſſory note. *Delvalle* applied to the plaintiff to "lend him a further ſum, which the plaintiff refuſed to "advance without ſecurity; whereupon *Delvalle* gave him "an order on the defendants, for the ſum in which they "were indebted to him, *Delvalle*, for brokerage. This "order was ſent by the plaintiff to the defendants, in Nov. "1787, with a requeſt that they would acknowledge their "having given him credit for it. *The defendant*, Douglas, "*anſwered, that they would pay money which they owed to* "Delvalle, *to no other perſon but the plaintiff*, but objected "to the amount of the ſum contained in the order, which "they deſired to have rectified. Another order was then "ſent to them, which *Douglas* again objected to, *promiſing,* "*at the ſame time, to pay the plaintiff, what they really owed* "*to* Delvalle, *and requeſting an order to pay, or give credit to* "*the plaintiff for ſo much in their hands, as was, in fact, due* "*to* Delvalle. *An order in this form was accordingly ſent* "*them, which they accepted; in conſequence of which, the* "*plaintiff advanced* 70l. *to Delvalle*, who, afterwards be-"coming bankrupt, the defendants refuſed to pay the money "to the plaintiff, according to the order." By the Court, where a party has not the ſubſtantial juſtice of the caſe on his ſide, the court will not favour any action that he may bring; but when juſtice is clearly with him, they will, if poſſible, allow him to maintain the action he has brought; becauſe the only effect of a refuſal would be to make him

adopt

adopt another form of action. Now, in this caſe, this debt which was due from the defendants to *Delvalle*, is, with the conſent of the parties, aſſigned to the plaintiff. The defendant, *Douglas*, has due notice of it, and aſſents; by which aſſent, he becomes with his partner, liable to the plaintiff. He makes no objection to an order from *Delvalle*, to pay his money to the plaintiff, but only to the amount of the ſum to be paid. He inſiſts, that the whole demanded by *Delvalle* is not due, and therefore requires a looſer order, which is obtained on the faith that he would pay the balance. On his failure to pay, his promiſe attached, ſo as to make the defendants liable to an action: then the queſtion is, whether when *Iſrael* brings an action in his own name againſt the defendants, this ſhall not be conſidered as money had and received by them to his uſe. Now, when *Douglas* had admitted the money to be due, he was that moment ſtopped, as it were from ſaying, that it was not due: it is like a man having money due to me in his hands, which I order him to pay to another. Now, if I pay money to you for another perſon, it is money had and received by you to his uſe; but where is the real and ſubſtantial difference, whether I, in fact, pay money to you for a third perſon, or whether I give you an order to pay ſo much money as you owe to me, to which you expreſsly aſſent: on reaſon and found law, it is money had and received to the uſe of ſuch third perſon. If my debtor tenders me money, which I give back to him, and tell him to pay to another, he then, in point of fact, receives money to the uſe of the other. The action may be maintained alſo on the account ſtated: *Delvalle* gives an order to pay to the plaintiff a liquidated balance; the only diſpute is concerning the amount of that balance. *Douglas* ſays, "I will pay you according to the "ſum which ſhall appear due." He is here again ſtopped from denying the effect of his promiſe.—*Wilſon*, J. doubted whether the action could be maintained on the count for money *had and received*, becauſe no money had, in point of fact, been received by the defendants; and he did not recollect any caſe where the court had gone ſo far as to allow that count to be maintained, where no money had, in fact, been received; but he agreed in opinion with the other judges, as to the count on the *inſimul computaſſent*.

An auctioneer employed to ſell the goods of a third perſon by auction, may maintain *an action for goods ſold and delivered* againſt a buyer, though the ſale was on the premiſes of the owner, and the goods were known to be his property. The plaintiff was an auctioneer, and employed by one *Crown* to ſell his goods by auction: the ſale was at the houſe of *Crown*, and the goods were known to be his property; the defendant bought goods to the amount of 7l. 9s. 6d. and

Williams, v. Millington, M. 29 Geo. 3. 1 *Hen. Black.* 8.

after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2l. 4s. 6d. in caſh, and put a receipt into his hand for five guineas, as a debt due from *Crown* to the defendant. While the plaintiff was heſitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. Afterwards, the plaintiff being called upon by *Crown*, paid to him (who refuſed to accept the receipt) the whole ſum for which the goods were ſold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered. The declaration was for goods ſold and delivered, with the uſual money counts:—plea general iſſue; verdict for the plaintiff. It was moved, on the part of the defendant, to ſet this verdict aſide, and enter a nonſuit, on the ground that as the goods in queſtion were known to be the property of *Crown*, and ſold as ſuch, the plaintiff, who was only the channel through which the contract was made between buyer and ſeller, was not entitled to bring an action for goods ſold and delivered. The caſe was fully argued, and *Per Cur.* The defendant having practiſed a trick upon the plaintiff, by driving off the goods in a cart, and at the ſame time holding out the money in ſight, together with the paper containing a receipt for the debt, due from *Crown* the owner, ſhall not be ſuffered to avail himſelf of ſuch conduct: but the general queſtion is extremely clear, that an auctioneer has a poſſeſſion coupled with an intereſt, in goods which he is employed to ſell; not a bare cuſtody like a ſervant, or ſhopman. There is no difference, whether the ſale be on the premiſes of the owner, or in a public auction-room; for on the premiſes of the owner, an actual poſſeſſion is given to the auctioneer and his ſervants, by the owner, not merely an authority to ſell. The poſſeſſion is in the auctioneer, and it is he who makes the contract; if they ſhould be ſtolen, he might maintain treſpaſs, or an indictment for larceny. An auctioneer has alſo a ſpecial property in him, with a lieu for the charges of the ſale, the commiſſion and the auction-duty, which he is bound to pay. In the common courſe of auctions, there is no delivery without actual payment; if it be otherwiſe, the auctioneer gives credit to the vendee entirely, at his own riſk: though he is like a factor, therefore, in ſome inſtances, in others, the caſe is ſtronger with him than with a factor, ſince the law impoſes a duty on him, and the credit in caſe of a delivery, without the recompence of a commiſſion ſuit *del crodere*. Beſides, the defendant having in this caſe, contracted with the plaintiff for the goods, ſhall not be permitted to ſay, that the plaintiff had no right to contract: having the benefit, property, and poſſeſſion of them, it ſhall not lie in his mouth to diſpute the validity of the contract. He, who

claims

claims under the plaintiff, ſhall not ſay, "I will not pay, "becauſe you had no property in the thing ſold:" the verdict is, therefore, right, inaſmuch as the party who has gained poſſeſſion of the goods, ſhall be eſtopped from ſaying, to avoid a juſt payment, that there was no property in him, from whom that poſſeſſion was derived. Another circumſtance alſo, in favour of the plaintiff, is, that every part of the declaration is proved: property is not ſtated to be in him, becauſe it is implied by law, but only that the goods were ſold and delivered by him to the defendant; this is proved, and affords a ſtrong reaſon why the defendant ſhould not be permitted to diſpute the effect of the ſale and delivery.

Oxley, v. Young, & *al.* Hil. 36 Geo. 3. C.B. 2 *Hen. Black.* 613.

In aſſumpſit, the declaration ſtated, that before the promiſe and undertaking of the defendants, one *Byſtrom*, of Gottenburgh, had ordered from the plaintiff certain goods of the value of 260l. to be ſent to him by the plaintiff, and, therefore, in conſideration that the plaintiff, at the requeſt of the defendants, would execute the order, the defendants undertook to pay him 130l. on being drawn upon at the expiration of nine months, from the date of the invoice of the plaintiff, in a bill at three months: it was then averred, that the plaintiff executed the order, and ſent the goods to *Byſtrom*, and drew upon the defendants; but the defendants neither accepted the bill, nor paid the money. The general iſſue being pleaded, a verdict was found for the plaintiff, on the following facts:—On Feb. 6, 1793, the plaintiff wrote to the defendants, informing them that he had received an order from *Byſtrom*, for certain goods, with directions to draw on the defendants for half the amount of them, and requeſting to know whether he could rely on their acceptance of his bill. On Feb. 12, the defendants having received a guarantee in a letter from *Echmans* and Co. for any buſineſs they might tranſact for *Byſtrom*, as far as 600l.; they wrote to the plaintiff, ſignifying that they had received ſuch an indemnity, and would undertake for the 130l. to be drawn upon in the manner ſtated in the declaration: in anſwer to this letter, the plaintiff wrote to the defendants on Feb. 18, ſaying, that in conſequence of their letter, he propoſed *putting the order in hand for* Byſtrom. The plaintiff, in June following, ſhipped the goods according to the direction of *Byſtrom*, the invoice being dated June 22, 1793. On 6th Sept. following, the defendants received from *Echmans* and Co. a letter, the purport of which was, that they *recalled* their guarantee for *Byſtrom*, as he had not made uſe of it, nor would in future, and deſiring the defendants not to ſend him any more goods on the faith of it: on the ſame day, the defendants wrote to the plaintiff, to know whether he had executed any order for *Byſtrom*, in conſequence of their

their letter preſuming he had not, as he had not adviſed them of it: not receiving any anſwer from the plaintiff to this, for ſome days, on the 10th of Sept. the defendants gave up to *Echmans* and Co. their guarantee: afterwards, on the 1ſt of Oct. the defendants received a letter from the plaintiff, dated Groningen, Sept. 21ſt, in which he ſaid, that being from home on buſineſs, and not having his papers to refer to, he could only ſay in anſwer to their letter of the 6th of Sept. that he had ſent a parcel of goods to *Byſtrom*. In anſwer to this, the defendants wrote to the plaintiff, obſerving that the goods which he had ſent to *Byſtrom*, could not be on their guarantee, otherwiſe he ought to have adviſed them at the time they were ſent; and that he had been ſo long in anſwering their letter, that, in the mean time, they had written to *Echmans* and Co. giving an account of all the goods that had been ſhipped for *Byſtrom* on their credit. At the end of nine months, from the date of the invoice, the plaintiff drew a bill of exchange on the defendants for 130l. at three months, which being neither accepted nor paid by them, this action was brought. A motion was made for a new trial on two grounds: 1ſt, that the plaintiff ought to have given notice to the defendants, of his having ſhipped the goods for *Byſtrom*: and, 2dly, that the defendants were entitled to an immediate anſwer to their letter of the 6th of Sept. and that the plaintiff ought to have left ſome confidential perſon at his houſe in his abſence, with authority to open and anſwer letters, inſtead of ſending them to him upon the continent. By the Court, the verdict was properly found. The right to ſue on the guarantee attached, when the order was put in a train for execution, ſubject to its being actually executed. Now, this right could not be diveſted, even by a wilful neglect of the plaintiff, though perhaps he might be liable to an action on the caſe, at the ſuit of the defendants, if any ſuch neglect could be ſhewn, contrary to all good faith, and by which a loſs had been incurred: but ſtill this could not diſcharge the defendants from their engagement. A merchant, when he goes abroad, is obliged to leave a confidential clerk behind him, where he undertakes to do any act, ſuch as to accept bills, or pay money; but he is clearly not bound ſo to do, for any other purpoſe.

Latham, v. Barber, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 67.

Pleadings in Aſſumpſit.]—In an action upon promiſes for the non-performance of a contract, relating to ſome ſhares in a navigation. The firſt count in the declaration ſtated, "That the plaintiff, at the time of making the promiſes, "to wit, *on 25th May*, 1793, *was lawfully entitled* to five "ſeveral ſhares in the Grantham canal navigation; that in "conſideration that the plaintiff, at the requeſt of the de-"fendant, had then and there bargained, and ſold to the "defendant,

" defendant, the plaintiff's right and title to the ſhares, the " defendant undertook, and promiſed to pay the plaintiff on " the 1ſt of June then next, as well the ſum of fifteen " guineas, as a premium for each ſhare, as, alſo, all ſuch " ſums of money as had been before paid by the plaintiff, " by way of depoſit, with an averment that the plaintiff had " paid 10l. as a depoſit, in reſpect of each ſhare." There were other ſimilar counts: on the trial of the cauſe, two objections were taken by the defendant, but over-ruled by the judge, who gave leave for the defendant to enter a non-ſuit, if the court ſhould be of opinion that either of them ought to have prevailed: afterwards, on the motion to enter a nonſuit, the counſel for the defendant abandoned thoſe objections, and made another, viz. that the navigation ſhares were not the ſubject matter of a contract, at the time when the contract itſelf was made. For that it appeared by the act, 33 *Geo.* 3. cap. 94. under which this navigation was carried on, that no ſhare could be veſted in any proprietor, before the 1ſt of July, and, conſequently, that the plaintiff neither did, nor could prove the allegation in the declaration, that at the time of the contract *the plaintiff was lawfully entitled* to the ſhares: that it was enacted by one clauſe in the ſtatute, that the firſt general aſſembly of the company ſhould be held on 1ſt July, 1793, and by another, that on the firſt meeting of the proprietors, the company ſhould execute deeds under their common ſeal, for each diſtinct ſhare, *which deeds ſhould reſpectively veſt in each proprietor one ſhare*; after which, the proprietors might transfer them by indorſement. By the Court, the plaintiff has averred, that he had a veſted property in a certain number of ſhares, on a day prior to that, when, by the act of parliament, he could have ſuch an intereſt: the objection now relied on is fatal; but as the plaintiff did not at the trial agree to be nonſuited, if the objection now relied upon were fatal, we can only grant a new trial, upon the hearing of which the plaintiff muſt fail, if he will carry the record down again.

In aſſumpſit on an agreement, by which the defendant was to take of the plaintiff certain premiſes, and the fixtures of the plaintiff at a fair appraiſement, by two appraiſers, or their umpire, or elſe to forfeit a depoſit of five guineas, and if either ſhould fail in his part of the agreement, that he ſhould pay 10l. to the other, excluſive of the depoſit: the defendant to take poſſeſſion on a day ſpecified. In a declaration on this agreement, the plaintiff averred, that on the day he was ready to deliver to the defendant the premiſes and fixtures *at ſuch appraiſement, as in the ſaid agreement mentioned*, but that the defendant refuſed to take the ſame, whereby he became liable to pay the 10l.; on a ſpecial demurrer

Luxton v. Robinſon, Hil. 21 Geo. 3. B.R. 2 *Doug* 620.

murrer to this declaration; the court held it to be ill, because the plaintiff was to deliver poſſeſſion, and therefore ought to have ſhewn, that he had a right ſo to do; and alſo, becauſe, if each were to appoint an appraiſer, the plaintiff ſhould have ſhewn, that he had appointed one.

Marriot *v.* Liſter, Ea. 2 Geo. 3. C. B. 2 *Wilſ.* 141.

The plaintiff declared *in indebitatus* aſſumpſit, for money lent by him to one J. D. at the ſpecial inſtance and requeſt of the defendant; and the judgment was arreſted for *Per Cur.* The word *lent* is a technical term, and no man can be indebted to another for money lent, unleſs the money be actually lent to that perſon himſelf. But this count alledges, that the defendant is indebted to the plaintiff for money lent to a ſtranger, J. D. Now J. D. is certainly indebted to the plaintiff, becauſe the money was lent to J. D. and the law raiſes the promiſe, which is not neceſſary to be proved; therefore, if J. D. is indebted to the plaintiff for this ſum lent to him, the defendant cannot alſo be indebted to him for it, becauſe there cannot be a double debt upon a ſingle loan. This is a ſpecial undertaking, or promiſe to pay a ſum of money lent by the plaintiff to a ſtranger, which the law does not raiſe, and, therefore, ſuch ſpecial promiſe is traverſable, and muſt be proved; but, upon an *indebitatus aſſumpſit* for money lent to a defendant, the law raiſes the promiſe, which is not traverſable, and need not be proved; in ſhort, it is abſurd to affirm A. is indebted to B. for money lent to C. for the ſame money cannot be lent to two perſons ſeverally—*There was alſo a caſe of* Poorhead, v. Smith, *next term after this, wherein the ſame doctrine was held.* 2 Black. 874.

Stephenſon, *v.* Hardy, H. 13 Geo. 3. C. B. 3 *Wilſ.* 388. 2 *Black.* 872.

But an *indebitatus aſſumpſit* for money lent to the wife, at the requeſt of the huſband, is a good count.—In this caſe, the plaintiff declared that the defendant was indebted to the plaintiff in 30l. for money lent to *Ann*, the wife of the defendant, in his abſence, and at his ſpecial inſtance and requeſt. It was proved at the trial, that the defendant being about to go to Ireland, deſired the plaintiff to lend his, the defendant's wife money, if ſhe ſhould have occaſion for it in his abſence, which he accordingly did. There was a verdict for the plaintiff, and it was afterwards moved in arreſt of judgment: and the above caſe of *Marriot* v. *Liſter*, was cited and relied on, to ſhew that the count was bad. BUT by the Court, this is a poor ſhift to delay the payment of a juſt debt: if goods are delivered to the wife, at the inſtance and requeſt of the huſband, he is bound by a contract expreſſed; if a huſband turns his wife out of doors unjuſtly, and ſhe buys neceſſaries of life, he is bound to pay for the ſame, by an implied promiſe; he is alſo bound by all her contracts for neceſſary goods during co-habitation,

tion, and although the goods be actually delivered to her, yet they are goods ſold and delivered to him. You cannot make a contract with an infant; but you may plead, that you lent an infant money to buy neceſſaries, according to his ſtate and quality, and that the money was laid out in neceſſaries: it has been admitted, that if the word *advanced* had been inſerted in the count, inſtead of the word *lent*, it would have been good; but the word lent, is the ſame as the word advanced. *A loan to the wife, at the requeſt of the huſband*, is the ſame in law, as if the loan had been to the huſband himſelf. A wife may make an incohate contract, which the huſband may afterwards confirm, or diſaffirm; and here he had, if the expreſſion may be allowed, previouſly confirmed the contract for the loan.

This was an action on promiſes by bill. The declaration, which was entitled, *generally of Michaelmas Term*, ſtated the promiſes, and the breach thereof to have been made on the 7th of Nov. To this there was a ſpecial demurrer, and the cauſes aſſigned were, that the declaration was entitled of Michaelmas Term generally, and had relation to the firſt day of the Term; whereas the promiſes were laid on a day ſubſequent to the firſt day of the Term, viz. on Nov. 7th; and, alſo, that the declaration by the memorandum, appeared to have been exhibited before any cauſe of action occurred. By the Court, we ought to make any intendment againſt a mere captious objection: the delivery of the declaration is the act of the party; and it appears by the courſe of the court, which we are bound to take notice of, according to the caſe in 2 *Lev.* 176. that in ancient times the parties could not declare till the ſitting of the court: ſo that here the promiſes and the breach may well have taken place before the delivery of the declaration.—Demurrer over-ruled, but the defendant had leave to amend on payment of coſts. Pugh, v. Robinſon, Hil. 26 Geo. 3. B.R. 1 *Ter. Rep.* 116.

In an action upon a contract a trivial variation in ſetting out a contract, a record, or any written inſtrument is fatal, becauſe it does not appear that the contract given in evidence, is that on which the plaintiff declares. 4 *Ter. Rep.* 560.

Thus in aſſumpſit to recover the ſum of 40s. 6d. due to the plaintiff as vicar of the pariſh of Trinity, in the city of Coventry, purſuant to an order made by the Lord Chancellor, and the Chief Juſtices of the Courts of King's Bench, for payment of tythes, in purſuance of a power given to them for that purpoſe, by the ſtatute paſſed in the 4th and 5th years of *Philip* and *Mary*. The plaintiff in his declaration, ſtated the ſtatute to be the 4th of *Philip* and *Mary*: whereas, the record when produced in evidence, appeared to be the 4th and 5th of *Philip* and *Mary*. This, Raan v. Green, M, 17 Geo. 3. B.R. *Cowp.* 474.

it was contended by the counſel on the part of the defendant, was a fatal variance, and the plaintiff was nonſuited, but with leave to move for a new trial without coſts. A motion was accordingly made for a new trial; and refuſed for *Per Cur.* The declaration deſcribes the ſtatute to be the 4th of *Philip* and *Mary*; upon the parliament roll being produced, it appears to be an act paſſed in the 4th and 5th of *Philip* and *Mary*. The ſtatute, therefore, deſcribed in the declaration, is different from the ſtatute produced, and in fact, there is no act in the ſtatute book of the 4th of *Philip* and *Mary*. The court will always incline to lean againſt niceties in matters of variance: but where it is in the deſcription of a ſtatute, or record, it is fatal. Here the action which is an action of aſſumpſit, is brought in conſequence of a right, liquidated by means of the ſtatute: the ſtatute is, therefore, the only ground of action; without it there could not have been any order: but when the order was made, the law raiſed an aſſumpſit. The defendant pleads non-aſſumpſit, and nothing is clearer than that the plaintiff upon the general iſſue pleaded, muſt prove his whole caſe. The firſt thing to be proved here, is the ſtatute: but, inſtead of producing the ſtatute ſet forth in the declaration, the plaintiff produces a different act—There *muſt* be a nonſuit.

Pope v. Foſter, Ea. 32 Geo. 3. B.R. 4 *Ter. Rep.* 590.

But a party in ſtating the proceedings at *niſi prius*, may alledge that the trial was had on the firſt day of the ſittings, although, in fact, it was had on a ſubſequent day of the ſame ſittings: the whole ſittings being in law but one day, provided the *record*, when produced, will ſupport ſuch an averment: but if the day mentioned in the declaration, vary from the day in the record produced, this variance will be fatal, though it be laid under a *videlicit*, the day being material. Thus, where an action was brought for a malicious proſecution in the Court of King's Bench, and the declaration ſtated, that the traverſe came on to be tried on a certain day, *to wit*, on the 25th of Feb. 1791, and ſo proceeded to ſtate the acquittal, &c. The copy of the record, which was produced in evidence, proved the acquittal to have been not merely on a different day of the ſame ſittings, but on a day of a different ſitting. It was, therefore, objected that this variance was fatal; to which it was anſwered, that the day in the declaration mentioned being laid under a *videlicit*, was immaterial; and that the true day might be ſhewn by other evidence: but Lord *Kenyon*, who tried the cauſe, being of opinion that the variance was fatal, the plaintiff was nonſuited; and the court agreed in the ſame opinion afterwards, on a motion made to ſet the nonſuit aſide.

Mather, v. Brinker, Ea. 4 Geo. 3. C.B. 2 *Wilſ.* 243.

It was moved on the behalf of the defendant, to ſet aſide a verdict for the plaintiff, without defence at the trial, be-

cauſe

cause the paper book of the issue delivered and paid for, varied from the record of *nisi prius* in this, viz. in the issue delivered, in the beginning of the declaration, the plaintiff's name was *James*, but in the record of *nisi prius*, *John*, which was the right name; and in the issue delivered in the breach assigned, it was *not* regarding his promises, but in the record of *nisi prius*, it was *regarding* his promises, omitting the word *not*.—By the Court, This is a mere *vitium clerici*, and could not possibly prejudice the defendant.

Where the declaration was, that the defendant had agreed to sell to the plaintiff 400 bushels of oats, at 1s. 6d. per bushel, and breach in the non-delivery: at the trial, on the general issue, it was proved that the contract was for so many bushels according to the Hartland grain measure, which contains 8 gallons and a half to the bushel; on which it was objected that the contract proved varied from that declared on; for that a bushel, without any other explanation, means a bushel by the Winchester measure, which contains only 8 gallons, and that no other than this could be used by the sellers of corn, under a penalty of 40s, by the 22 Car. 2, c. 8.(1) The judge, however, suffered the cause to proceed, and there was a verdict taken for the plaintiff, reserving liberty to the defendant's counsel to move to enter a nonsuit, which motion being afterwards made: the Court said, that the question was not whether these parties might not have contracted for the sale of corn by a customary measure, differing from the statute measure; but whether there was not a variance between the contract proved, and that alleged in the declaration, of which, they said, no doubt could be entertained; for that a bushel, taken by itself, and without reference to any custom, or particular agreement, means a statute bushel. —Rule for new trial absolute.

Hockin v. Cooke Tr. 31 Geo. 3. B.R. 4 *Ter. Rep.* 314.

So, where the plaintiff declared upon a special agreement, by which he was to buy of the defendant, all the fat or tallow which the defendant should have to dispose of for 12 months, at the price of 4s. per stone: the agreement proved was, that the plaintiff was to give 4s. per stone, and if he gave any other person more, he was to give the same to the defendant. The judge who tried the cause, was of opinion, that this was a material variance, and nonsuited the plaintiff; afterwards, a rule having been obtained to shew cause why this nonsuit should not be set aside, the Court said, that the nonsuit was proper; for the agreement was the gist of the action, and it was incumbent on the plaintiff to state his case truly; but that the contract, as stated, was different in sense

Churchill v. Wilkins, M. 27 Geo. 3. B.R. 1 *Ter. Rep.* 447.

(1) See title *Corn*.

from that which was proved, for a contract that the defendant ſhall deliver all his tallow *at a particular price*, is not the ſame as a contract that he ſhall deliver it at that price, *or at a greater*, on the happening of a particular event. The plaintiff ſhould have ſtated the whole, and then have averred that he had not given more than 4*s*. a ſtone to any other perſon, and that he was ready to have paid that ſum.

Layton v. Pearce, M. 19 Geo. 3. B.R. *Doug.* 14. 15.

So, where by the lottery act, 17 Geo. 3, c. 46, a penalty of 500*l*. was given againſt any perſon who ſhould receive any money whatſoever in conſideration *of repayment of any ſum or ſums of money*, in caſe any ticket ſhould prove fortunate, or in caſe of any chance or event relating to the drawing of any ticket; and an action was brought under this ſtatute againſt the defendant, who was a lottery-office keeper, *for having received* 1*l*. 6*s*. *from one R. G. in conſideration of repaying the value of an undrawn ticket, if the number* 37033 *ſhould be drawn on the enſuing day*. The agreement proved at the trial was in the alternative, viz. that R. G. had paid to the defendant 1*l*. 6*s*. on condition that if the ticket ſhould come up, either blank or prize, on the enſuing day, he, the defendant, *would deliver to R. G. an undrawn ticket, or pay him* 20*l*. neither of which had he done; there was a verdict for the plaintiff; but it was afterwards moved to enter a nonſuit, 1ſt, becauſe the agreement proved did not correſpond with that ſtated in the declaration; 2dly, becauſe the agreement, as proved, would not maintain the action, for that being optional, it was not within the proviſions of the ſtatute. By the Court, If the option had been in the inſurer, and if he had made his election to take the 20*l*. the contract would have been ſufficiently ſtated, becauſe he would thereby have converted the agreement into an abſolute contract for the payment of money, and then the other part of the alternative in the original bargain would become ſurpluſage. But in point of law, the perſon who is to perform one of two things in the alternative, has the right to elect, and in this caſe, having the option, he might have elected to perform that which was not prohibited by the ſtatute, viz. to deliver an undrawn ticket; the preſent action therefore cannot be ſupported.—Judgment of nonſuit.

Payne v. Bacomb, Ea. 21 Geo. 3, B.R. *Doug.* 651.

But if the plaintiff declares on a ſpecial agreement in *indebitatus aſſumpſit*, and has alſo other general counts in his declaration, if he fails in proving the ſpecial agreement, he may go into evidence on the general counts: thus, where in aſſumpſit, the plaintiff declared on a ſpecial agreement, to pay his proportion of the expences of a ſuit, and the plaintiff failed in proving it, he was allowed to reſort to the general counts, for money laid out and expended, and money had and received.

Till

Till within theſe few years, it was a generally received motion, that on a count upon an *inſimul compataſſent*, the plaintiff was obliged to prove the exact ſum laid: but this idea is now exploded, and the plaintiff may now recover part of the ſum laid on this count, as well as on any other. Thompſon *v.* Spencer, Ea. 8 Geo. 3. B.R. *Bull.* N. P. 129.

In aſſumpſit, the pleas were, 1ſt, the general iſſue, and 2dly, in bar, that the plaintiffs ought not to maintain their action to recover more than 5l. 5s. becauſe the defendant was on 1ſt June, indebted to the plaintiffs in 18l. 14s. and to divers other perſons (naming them) in certain other ſums, and being unable to pay the whole of the ſaid debts, *the plaintiffs* and the ſaid other perſons agreed, for compounding the defendant's debts, to take and accept from him 5s. 6d. in the pound, to be paid within a reaſonable time, in full ſatisfaction and diſcharge of ſuch their debts; and there was an averment, that the defendant, in purſuance of the ſaid agreement, did tender to the plaintiffs the ſum of 5l. 5s. being ſo much as amounted to 5s. 6d. in the pound: to this plea there was a general demurrer and joinder. By the Court, The queſtion is, whether this promiſe by the plaintiffs to take a leſs ſum than the whole demand, was obligatory on the party *ab origine*, or whether it was a *nudum pactum* for want of a conſideration? it was clearly a *nudum pactum* in its creation: here there is a debt of 20l. due from the defendant, and a promiſe by the plaintiff to take 5l. only, which is in effect a promiſe to give the defendant 15l.; for a promiſe to forgive the defendant 15l. is like a promiſe to give that ſum; but ſuch a promiſe is a *nudum pactum* for want of a conſideration, and therefore is not binding unleſs it be executed: the plaintiff is always entitled to the whole demand; and therefore, as this agreement has not been followed up by an actual acceptance, which is negatived by the record, it was not obligatory; and the plaintiffs, whether from caprice or any other motive, were at liberty to refuſe taking leſs than their whole demand. If, indeed, the debtor had aſſigned over all his effects to a truſtee, in order to make an equal diſtribution amongſt all his creditors, that would have been a good conſideration in law for the promiſe, but no ſuch fact appears in this caſe. Heathcote and others *v.* Crookſhanks, Tr. 29 Geo. 3. B.R. *Ter. Rep.* 24.

The defendant being indebted to the plaintiff, and to ſeveral other creditors, on 15th November, entered into an agreement with moſt of them by deed, to pay them 5s. in the pound on their reſpective debts, on or before the enſuing Chriſtmas, which they agreed to accept, in full ſatisfaction and diſcharge of what was due to them from the defendant: the defendant not making the payment of 5s. in the pound, at Chriſtmas, the plaintiff, in March following, ſued out execution againſt the defendant, under a judgment obtained againſt him in the preceding Hilary Term; under this writ of execution, the ſum of 19l. 2s. was levied, and a rule having been granted, calling on the plaintiff to ſhew Cooling *v.* Noyes, Ea. 35 Geo. 3. B.R. 6 *Ter. Rep.* 263.

cauſe why the ſheriff ſhould not pay that ſum back again to the plaintiff: an affidavit was, on ſhewing cauſe, produced, alleging, that an impoſition had been practiſed upon the plaintiff; that in order to induce him to ſign the deed of compoſition, the defendant repreſented to him, that if he would compound, all the other creditors would, whereas it was ſince diſcovered that that was untrue, inaſmuch as two of the creditors refuſed; and it was alſo ſtated, that the plaintiff would not have ſubſcribed the deed, had it not been for that repreſentation. By the Court, The plaintiff having been impoſed upon, when he entered into the agreement, it is not binding upon him: it was his intention to make the defendant a free man by the compoſition; this was his inducement to agree to accept a part inſtead of the whole of his debt, but his purpoſe is not anſwered, if other demands ſtill remain unſatisfied; on the ground, therefore, of miſrepreſentation, the plaintiff is not bound by his agreement.

Lynn & al. v. Bruce, Tr. 34 Geo. 3. C.B. 2 *Hen. Black.* 317.

In an action of aſſumpſit, the 1ſt count of the declaration was, on a forbearance to ſue on a bond, given by the defendant to the plaintiff, for 200l.; the 2d count was in ſubſtance, that in conſideration that the plaintiff, at the defendant's requeſt, had conſented and agreed *to accept and receive* from the defendant a compoſition of 14s. in the pound, and ſo in proportion for a leſſer ſum than a pound, upon 105l. 5s. 2d. due from the defendant to the plaintiff, on a bond, dated the 30th March, 1792, for 200l. in full ſatisfaction and diſcharge of the bond, and all money due thereon; the defendant promiſed to pay the ſaid compoſition; it was then averred, that the compoſition amounted to 73l. 13s. 0d.; and that the defendant had paid the plaintiff 70l. 6s. part thereof; the breach was, that he did not pay 3l. 7s. 6d. the reſidue, a verdict having been found for the plaintiff on the whole declaration; it was afterwards moved in arreſt of judgment, on the ground of the inſufficiency of the ſecond count. By the Court, This will be found to be a very clear caſe, when the nature of the objection is underſtood: the conſideration of the promiſe is, as ſtated in this caſe, on an agreement to accept a compoſition in ſatisfaction of a debt; if this is an agreement which is binding, and can be enforced, it is a good conſideration; if it is not binding, and cannot be enforced, it is not a good conſideration. It was ſettled in the caſe of *Allen* v. *Harris*, 1 *Lord Raym.* 122. upon conſideration of all the caſes, that upon an accord, which this is, no remedy lies; it was there ſaid that the books are ſo numerous, that an accord ought to be executed, that it was impoſſible to overturn all the authorities: the expreſſion is, *overthrow all the books.* It was added, that if it had been a new point, it might have been worthy of conſideration. But we think it was rightly ſettled upon found principles. *Intereſt reipubliciæ ut ſit finis litium:* accord *executed* is ſatisfaction,

accord

accord *executory*, is only ſubſtituting one cauſe of action in the room of another, which might go on to any extent; the caſes in which the queſtion has been raiſed, whether an accord executory could be enforced, and in which it has been ſo often determined, that it could not, have been caſes in which it has been pleaded in bar of the original action, but the reaſon given in three of the caſes, in 1 Roll. Abr. Tit. Acc. pl. 11, 12, 13, is becauſe the plaintiff hath not any remedy for the whole, or when part has been performed, for that which is not performed: which goes directly to the giſt of this action, as it is ſtated in the count objected to. This is an action brought to recover damages for this part of the accord which has not been performed. But an accord muſt be ſo completely executed in all its parts, before it can produce legal obligation or legal effect, that in *Peyton*'s caſe, 5 Co. 79 *b*. it was holden, that where part of the accord had been executed, tender of the reſidue would not be ſufficient to make it a bar to the action, but that there muſt be an acceptance in ſatisfaction. There are two caſes in Cro. Eliz. 304, 305, to the ſame effect: it was argued, according to the caſes in Roll. Abr. that an accord, executory in any part, is no bar, becauſe no remedy lies for it for the plaintiff: perhaps it would be a better way of putting the argument, to ſay that no remedy lies for it for the plaintiff, becauſe it is no bar; but put either way, it concludes in ſupport of the objection to the ſecond count on this declaration, and conſequently the judgment muſt be arreſted.

In an action of aſſumpſit, the declaration ſtated, that it was agreed on 1ſt May, 1792, that the plaintiff ſhould give the defendant a colt in exchange for the defendant's mare, and ſhould pay the defendant two guineas to boot on 17th December following, and that the plaintiff ſhould keep the colt until 29th September: that mutual promiſes were made: that the defendant, to make the agreement more firm and binding, paid to the plaintiff one halfpenny in earneſt "of the bargain;" that the plaintiff kept the colt till 29th September, and that the plaintiff was ready and willing, and offered to pay the defendant the two guineas, but that the defendant would not receive the money; and that he had not returned the mare to the plaintiff, *although often requeſted ſo to do*. To this the defendant demurred, and the cauſe aſſigned was, that it did not appear by the declaration that the plaintiff was ready and willing, or offered to deliver the colt to the defendant in exchange for the mare. By the Court, The payment of the halfpenny veſted the property of the colt in the defendant, and therefore it was unneceſſary for him to ſhew that he had tendered the colt to the defendant. But there ſeems to be another objection: the plaintiff has not alleged that he made any ſpecial requeſt to the defendant to

Bach *v.* Owen, M. 34 Geo. 3. B.R. 4 *Ter. Rep.* 409.

deliver the mare; the want of a requeſt is a ſubſtantial defect, and where it is neceſſary to allege a ſpecial requeſt, the general words at the concluſion *although often requeſted ſo to do* will not anſwer the purpoſe.

Dale *v.* Sollet, M. 8 Geo. 3. B.R. 4 *Burr.* 2133.

In an action for money had and received to the plaintiff's uſe, the plaintiff can recover no more than he is in conſcience and equity entitled to, which can be no more than what remains after deducting all juſt allowances, which the defendant has a right to retain out of the ſum demanded. This was an action for money had and received, and the defendant had pleaded the general iſſue only. By the evidence on the trial, it appeared that the defendant, who was a ſhip-broker, had recovered from another perſon 2000l. for damages done to the plaintiff's ſhip, which ſum he had paid over to the plaintiff, excepting 40l. which he deducted and retained for his own labour and ſervice; and the jury were of opinion, that he ought to retain 40l. as a reaſonable allowance. On a caſe reſerved from *niſi prius*, the queſtion was, whether the defendant could give evidence in this manner of this labour and ſervice, or whether he ought not to have pleaded it by way of ſet off, or at leaſt have given notice of it as a ſet off? By the Court, There can be no doubt of the defendant's being at liberty to give this evidence: it is not in the nature of a croſs demand, or mutual debt: it is a charge, which makes the ſum of money received for the plaintiff's uſe ſo much leſs, and the plaintiff can recover no more than what remains after deducting all juſt allowances, which the defendant has a right to retain out of the very ſum demanded. Judgment of nonſuit.

Seddon & *al.* *v.* Tutop, Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 607.

In aſſumpſit for goods ſold and delivered, the plea was a former recovery of 71l. 10s. for the damages the plaintiffs had ſuſtained, as well by means of not performing the ſame identical promiſes, as for their coſts. Replication that the promiſes and undertakings in this action were not the ſame; on which iſſue was taken. At the trial, it appeared by the evidence, that the plaintiff, in a former action, declared on a promiſſory note for 51l. and for goods ſold to the amount of 25l. 7s. but upon executing a writ of enquiry after judgment by default, he gave no evidence on the count for goods ſold, but took damages for the amount of the promiſſory note only; afterwards on an application to the defendant for the 25l. 7s. he refuſed to pay, on which the preſent action was brought. There was a verdict for the plaintiff, and it was afterwards moved to ſet the ſame aſide, on the ground that the defendant ought not to be harraſſed with the expence of two actions, when one would have anſwered the plaintiff's purpoſe. By the Court, The iſſue was, whether the damages demanded in this action have been already ſatisfied by the recovery in the former action? and moſt clearly they have not. In this caſe there were two diſtinct demands, not in the

the leaſt blended together; and though the plaintiffs might in the firſt action have proved this demand; owing to inadvertence, they did not; and the recovery on the note in that action is no bar to their demand in this, which is for goods: we muſt take care not to tempt perſons to try experiments in one action, and when they fail, to ſuffer them to bring other actions for the ſame demand: the plaintiff who brings a ſecond action ought not to leave it to nice inveſtigation, to ſee whether the two cauſes of action be the ſame; he ought to ſhew beyond all controverſy, that the ſecond is a different cauſe of action from the firſt in which he failed: in this caſe it is clearly ſhewn that this demand was not enquired into in the former action.

It was moved, that all proceedings might be ſtayed in this action; on an affidavit by the defendant, that on applying to the plaintiff's Attorney to know what the debt was, he ſaid that it was a guinea and an half: it was contended, that as the debt was under 40s. the Court could not take cognizance of it, and that they would not ſuffer the defendant to be harraſſed by going on to trial; this being a novel application, as it did not appear upon record, the Court had at firſt ſome doubt; but it being mentioned by Lord Kenyon, that he remembered many applications of this ſort in the Exchequer, the Court granted a rule to ſhew cauſe: afterwards the rule was made abſolute; for, *Per Cur.* This is a very general queſtion, which concerns the practice of the Court, it is, whether it ſhall be permitted to parties to ſue in the ſuperior courts for ſuch ſmall ſums as thoſe under 40s? this is expreſsly prohibited by the ſtat. 6 Ed. 1, c. 8; and therefore upon conſideration, we are of opinion, that the rule ſhould be made abſolute, but not with coſts, as it is the firſt application of the kind. Kennard *v.* Jones, M. 32 Geo. 3. B.R. 4 *Ter. Rep.* 495.

So where an affidavit was made by the defendant, that the debt did not amount to 40s. the proceedings were ordered to be ſtayed; for the Court ſaid, that the Court of Exchequer always interfered in ſuch caſes, though the demand did not appear on the record to be under 40s. and that as it was expreſsly ſtated by one party, and not denied by the other, that ſuch was the preſent caſe, they ought to ſtay the proceedings. Wellington *v.* Arters, M. 33 Geo. 3. B.R. 5 *Ter. Rep.* 64.

The Court of Common Pleas have alſo ſtayed the proceedings in ſeveral actions, the cauſes being beneath the dignity of the Court, being ſeverally under 40s. as appeared by the plaintiff's bills, and their own acknowledgment, proved by affidavit, and not denied. Stean *v.* Holmes Ea. 11 Geo. 3. C.B. and Alcock *v.* Brown, C.B. Ea. 9 Geo. 3. 2 *Black.* 754.

But as no action can be brought in the county court, unleſs the cauſe of action ariſe, and the defendant reſide, within the county; if that be not the caſe, the action may be brought in the ſuperior courts, although for a ſum leſs than 40s.—In this caſe, on ſhewing cauſe againſt a rule for ſetting aſide all proceedings in this action, on the ground that the demand Welſh *v.* Troyte Ea. 32 Geo. 3. C.B. 2 *Hen. Blank.* 29.

was for a ſum under 40s. and that therefore the action ought to have been brought in the county court: it was ſtated, that the defendant lived in Devonſhire, and the ſale and delivery of the goods was in Somerſetſhire: that the action therefore could not be brought in the court of either of thoſe counties; not in the former, becauſe the cauſe of action aroſe in the latter, nor in the latter, becauſe the defendant lived in the former; for it was a rule of law, that no ſuit could be brought in a county court, unleſs both the defendant reſided, and the ſubject-matter aroſe within its juriſdiction. The counſel for the defendant gave up the objection, admitting that the rule could not be ſupported.

Tubb v. Woodward, Hil. 35 Geo. 3. B.R. 6 *Ter. Rep.* 175.

So alſo on ſhewing cauſe againſt a rule for ſtaying the proceedings in this action, on the ground, that by the plaintiff's own account, the cauſe of action did not amount to 40s. it was anſwered, that the cauſe of action aroſe in Oxfordſhire, and that the defendant lived in Wiltſhire: and therefore as the defendant did not live within the juriſdicton of the county court of Oxfordſhire, the plaintiff would have no remedy if he could not maintain this action, and for this was cited the above caſe of *Welſh v. Troyte*. By the Court, There is no ground for this application: if the action cannot be brought in the inferior juriſdiction, the plaintiff is not therefore to loſe his debt, but he muſt ſue in the ſuperior courts.

Blaney v. Hendrick, Ea. 11 Geo. 3. C.B. 2 *Black.* 761. 3 *Wilſ.* 205.

Damages in Aſſumpſit.] Intereſt is due on all liquidated ſums from the inſtant the principal becomes due and payable: therefore on all bills of exchange, notes of hand payable at a day certain, accounts ſtated, or money lent, the jury, in aſſeſſing the damages, may give intereſt.—Thus in aſſumpſit for money lent, and upon an account ſtated, where there was judgment by default, the plaintiff proved, on executing the writ of enquiry, an account ſtated, and a balance due, ſigned by the defendant; upon which the jury gave that ſum, and 81l. 0s. 8d. for intereſt, from the time of ſettling the account, till the time of bringing the action: it was afterwards moved to ſet the inquiſition aſide, upon an objection that the jury had done wrong in giving intereſt in this caſe: but the court held that the intereſt was properly allowed; that it was due on all liquidated ſums, from the inſtant the principal became due and payable, and therefore when a bill of exchange or note is due, it carries inſtant from that time; ſo likewiſe, when *money lent* becomes due, it carries intereſt from the day it becomes payable.

Trelawney v. Thomas, M. 30 Geo. 3. C.B. 1 *Hen. Blac.* 305.

And money paid, laid out, and expended for the uſe of another, ſtands preciſely on the ſame ground as money lent in point of reaſon, juſtice, and equity; therefore the jury, in aſſeſſing the damages, may in this caſe alſo give intereſt. This was aſſumpſit for work and labour, with the common money counts, and the plaintiff recovered a verdict for the amount

amount of *money advanced by him* for the purpoſes of an election for members of parliament for Briſtol, *viz.* 44*l. with intereſt*, together with a certain ſum for his attendance; on a motion for a new trial, one of the grounds urged, was, that the jury ought not to have calculated intereſt: but the court held it right, and noticed the above caſe of *Blaney* v. *Hendrick*, as law.

But for goods ſold or delivered, or work and labour, the ſum is not liquidated till the jury find the value, and therefore in aſſeſſing the damages in theſe caſes, they cannot allow intereſt. 1 *Hen. Black.* 305. 3 *Wilſ.* 605. 2 *Black.* 761.

In an action of aſſumpſit, the plaintiff declared, upon a bill of exchange of the value of 672l. with the uſual money counts; the bill appeared to have been given for 372l. loſt at play, and alſo for 300l. lent at the time and place of play: it was holden (1), that as part of the conſideration for the bill was money loſt, it was void as a ſecurity as to ſo much; and conſequently that it could not be good as a ſecurity as to the reſidue: but it was likewiſe holden, that as an action lay for the money lent at the time of playing, the bill, although void as a ſecurity, was evidence of a contract to pay the principal ſum, really and *bona fide* lent by the plaintiff to the defendant: and it became a queſtion, *whether it ſhould carry intereſt*, and *to what time ſuch intereſt ought to be computed and allowed?* By the Court, The giving the bill of exchange ſhews that upon the loan, the intention and agreement of the parties was, that the money ſhould carry intereſt, if not repaid within the limited time: the contract remains good, though he gave a void ſecurity to perform it, ſo that it is a liquidated ſum, which carries intereſt from the time at which it was agreed to be paid. But the queſtion is, *whether it is to ſtop at the commencement of the action, or to be carried on to the time of liquidating the debt, by the verdict, or by the judgment?* The general practice of aſſociates, in taking damages in theſe caſes, is to ſtop at the commencement of the action, and to allow the intereſt no further down. But this practice, however general, is not founded in law, but in miſtake and miſapprehenſion: and this will appear very plain, whether it be conſidered on the foot of natural juſtice or law: 1ſt, in point of juſtice, nothing can be more agreeable to juſtice, than that the intereſt ſhould be carried down quite to the actual payment of the money, but as that cannot be, it ſhould be carried on as far as to the time when the demand is completely liquidated: then to conſider it upon the common and ſtatute law:—there is no ſtatute, nor any principle of the

Robinſon v. Bland, M. 1 Geo. 3. B.R. 2 *Burr.* 1077.

(1) See p. 273, ſupra.

common

common law againſt it. It is agreeable to the principles of the common law, that wherever a duty has incurred pending the writ, for which no ſatisfaction can be had by a new ſuit, ſuch duty ſhall be included in the judgment to be given upon the action already depending. Where a new action may be brought, and a ſatisfaction obtained thereupon, for any duties or demands which have ariſen ſince the commencement of the depending ſuit, that duty or demand ſhall not be included in the judgment upon the former action: as in covenant for non-payment of rents, or of an annuity payable at different times, you may bring a new action, *toties quoties*, as often as the reſpective ſums become due and payable. So in treſpaſs, and in tort, new actions may be brought as often as new injuries and wrongs are repeated: and therefore damages ſhall be aſſeſſed only up to the time of the wrong complained of. But where a man brings an action of aſſumpſit, for principal and intereſt, upon a contract obliging the defendant to pay ſuch principal money, with intereſt from ſuch a time, he complains of the nonpayment of both; the intereſt is an acceſſary to the principal, and he cannot bring a new action for any intereſt grown due between the commencement of his action and the judgment in it. Here the plaintiff cannot bring a new action for the intereſt, for he has already had a ſatisfaction upon the defendant's promiſe. The Court of Chancery has, in caſes of this kind, often a concurrent juriſdiction with the courts of common law, on account of aſſets (not an extraordinary, but an ordinary juriſdiction, by reaſon of the fund;) and it ſeems abſurd, that two courts of juſtice, who have concurrent juriſdiction, ſhould go by different rules: they ought to act uniformly as far as may be. Now in chancery, intereſt is computed even up to the day when it is conjectured or agreed that the maſter's report will be confirmed (though a future day) which they fix according to probable conjecture. *Why then may not juries compute intereſt to the time of the verdict, or even till the end of* 4 *days within the next term*; before which time the plaintiff cannot ſign his judgment? Carrying down the intereſt does a plaintiff complete juſtice: it is agreeable to the principles of the common law, and interferes with no ſtatute: it takes from defendants the temptation to make uſe of all the unjuſt dilatories of chicane; for if intereſt is to ſtop at the commencement of the ſuit, where the ſum is large, the defendant may gain by protracting the cauſe in the moſt expenſive and vexatious manner; and the more the plaintiff is injured, the leſs he will be relieved: here the jury have left the matter quite open to us, and we can bring the intereſt down to the time of the liquidation and aſcertainment of the ſum really due from the defendant to the plaintiff, which is

the time of giving the judgment: therefore let judgment be entered accordingly.

At the trial of this cauſe, before lord *Mansfield*, the only queſtion was, whether the plaintiffs were entitled to intereſt on the value of goods ſold by them to the teſtator? They were wholeſale linen-drapers, and the teſtator an American merchant; and it appeared to have been the uſage of the American trade, for merchants here to allow to their American correſpondents 12 months' credit, and then to charge them 5l. per cent. for intereſt, and for the tradeſmen here to allow the merchants 14 months' credit, and then to charge 5l. per cent. This was hardly diſputed by the defendants, and his Lordſhip held, that *though by the common law, book debts do not of courſe carry intereſt, it may be payable in conſequence of the uſage of particular branches of trade, or of a ſpecial agreement*; or in caſes of long delay under vexatious and oppreſſive circumſtances, if a jury, in their diſcretion, ſhall think fit to allow it in damages.

Eddowes & *al.* v. Hopkins & *al.* executors of Harris, Ea. 29 Geo. 3. B.R. 1 *Doug.* 375.

3. *Aſſumpſit for uſe and occupation.*

A plaintiff cannot firſt recover in ejectment, and then for uſe and occupation for the time ſubſequent to the day of the demiſe in ſuch ejectment, but his remedy is by action for the meſne profits only. In aſſumpſit for uſe and occupation, there was a verdict for the plaintiff, ſubject to the opinion of the court on the following caſe: the defendant was, on July 18th, 1777, tenant from year to year to Mr. *Bowes*, and on that day, Mr. *Bowes*, together with his wife, Lady *Strathmore*, granted an annuity to the plaintiff during the life of Lady *Strathmore*, charged on the eſtate of which the defendant was tenant; the defendant continued tenant, and *Bowes* received the rents till November, 1784, when 81l. rent was in the defendant's hands: *in* 1785, *the plaintiff brought an ejectment, laying the demiſe on April* 6, *and recovered poſſeſſion*, and then gave notice to the tenant, the defendant, to attorn to him, and pay over to him the rent then in his hands. The defendant refuſed to attorn or pay him the rent, upon which a writ of poſſeſſion was executed; and this action was brought for uſe and occupation to recover the rent accruing from the time when the laſt payment was made to *Bowes*, to the execution of the writ of poſſeſſion: upon this caſe two queſtions were argued, 1ſt, whether the plaintiff was entitled to any of the rents and profits of the lands occupied by the defendant? and, 2dly, ſuppoſing him to be entitled to them, whether he could recover them in this form of action? By the Court, The defendant, who is the tenant, originally came into the eſtate as tenant from year to year to Mr. *Bowes*; he was ſo at the time of the conveyance from Mr. *Bowes* to the plaintiff, and he continued to hold

Birch *v.* Wright, M. 27 Geo. 3. B.R. 1 *Ter. Rep.* 378.

hold the eſtate as ſuch, without any new agreement or notice of the conveyance till the ejectment was brought. Whilſt he was tenant to Mr. *Bowes*, he clearly was entitled to ſix months' notice before the end of a year to quit, and he could not have been turned out without it: he was entitled to the ſame notice from the plaintiff before he could be evicted, for as the plaintiff claims under a conveyance from Mr. *Bowes*, he cannot be in a better ſituation than Mr. *Bowes* himſelf was: he ſtands exactly in the place of Mr. *Bowes*, with this difference, that his title is ſubſequent to the title of the defendant. In this caſe, the defendant is to be conſidered as holding during all the time, under a demiſe made before the conveyance to the plaintiff: for if a tenant, from year to year, hold for four or five years, either he or his landlord, at the expiration of that time, may declare on the demiſe as having been made for ſuch a number of years: it would be unjuſt to a tenant, to ſay that he ſhould be turned out by the aſſignee of a reverſion, or by any perſon claiming under his leſſor, when he could not be turned out by the leſſor himſelf. On the other hand, it is no injuſtice, it is no hardſhip, on the aſſignee to ſay, he muſt comply with the ſame rules and conditions, as the perſon of whom he bought has ſubjected himſelf to: whether the plaintiff be conſidered as a mortgagee only, or as a purchaſer or aſſignee of the reverſion, it will make no difference. His title firſt accrued in July 1777; it was too late then to give notice to the defendant to quit at the end of the current year, for that expired on November 22d, the defendant, therefore, at the time that the plaintiff's title accrued, had as permanent an intereſt in the eſtate till 22d November, 1778, as if it had been leaſed to him by deed till that time: he had alſo a further intereſt in it; unleſs determined by ſix months' notice previous to that time, which notice never having been given, he continued rightful tenant to ſome one, down to the time that the ejectment was brought. This brings on the conſideration who is entitled to the rent? and that depends on the nature and effect of the conveyance from Mr. *Bowes* to the plaintiff, and the operation of the ſtatute of the 4th *Ann.* c. 16. Now whether it be conſidered as a mortgage, or as an abſolute grant of the reverſion, it will make no difference. There is, in ſome reſpects, an analogy between this caſe and the caſe of a mortgage, for it is a ſecurity for money; the annuities, or rents, are to be paid out of the rents and profits, and then the remainder of thoſe rents and profits is to be paid to Mr. *Bowes*; ſo in the caſe of a mortgage, till the principal is called for, the intereſt is to be paid out of the rents and profits, and the remainder is to be retained by the mortgagors; in both caſes the borrower would be liable to pay it, if the rents and profits were not ſufficient, but that is by

by virtue of his covenant: in other reſpects, this caſe is not at all like a mortgage, for a mortgage is always in its nature redeemable, but theſe annuities are not made ſo: this muſt be held to be a grant of the reverſion, and not a mortgage. But ſuppoſing Mr. Bowes and the plaintiff are to be conſidered as mortgagor and mortgagee: in that light it would be ſaid that there is an implied agreement between the mortgagor and the mortgagee, that the mortgagor ſhall hold as tenant at will to the mortgagee, paying the intereſt from time to time, and the principal when called for. If the mortgagor be tenant at will, he is entitled to the rents and profits till that will is determined, and whenever the will is determined, it cannot have relation back to a former time, becauſe that would be by a ſubſequent act to make an eſtate tortious, which was rightful at the time that it exiſted: the ſtatute 4 *Ann.* c. 16, enacts, that all grants or conveyances thereafter to be made by fine, or otherwiſe, of any manors, rents, reverſions, or remainders, ſhall be good and effectual, to all intents and purpoſes, without any attornment of their tenants, as if their attornment had been made. This clauſe comprehends all grants and conveyances, and therefore whether it be a grant by way of mortgage, or of the fee ſimple, or only of the reverſion for a term of years, as in the preſent caſe, it makes no difference, and the effect of the clauſe is, that it creates an immediate privity between the grantee and the tenant. It cannot be reſtrained merely to the making of the grant good, as between the grantor and grantee: 1ſt, becauſe it expreſsly mentions grants by fine; and they were good to all purpoſes before without attornment, except as to creating ſuch a privity as would enable the grantee to diſtrain; 2dly, becauſe the ſtatute ſays the conveyance ſhall have the ſame effect as if an attornment had been made. Now if an attornment in fact were made before the ſtatute, there can be no doubt but the grantee was perfect landlord to the tenant, and entitled to all the rents accruing due from the time of the attornment, though, according to *Co. Lit.* 310 *b*, it would not have entitled him to the rents which became due between the time of the grant and the time of the attornment: the legiſlature having gone the length of making the grantee a perfect landlord without the knowledge of the tenant, it occurred to them, that miſchiefs might enſue by leaving the tenant open to a diſtreſs or action for the rent, at the ſuit of a perſon of whom he knew nothing, and after he had paid his rent to his original landlord, and therefore they prudently added the proviſo, that no perſon ſhould be prejudiced by payment of rent to any grantor or connuſor, or by breach of any condition for non-payment of the rent, before notice ſhould be given to him of the grant by the connuſee or grantee: this they prudently added, becauſe, perhaps, it was not abſolutely neceſſary

neceſſary: for the wiſdom, the benevolence, and the liberality of the common law had made the ſame proviſion before, as appears by the caſe of *Watts* v. *Ognell*, Cro. *Jac.* 392: that caſe was debt for rent by the aſſignees of a reverſion, under a fine levied to their uſe, and there the Court held, that the action was well brought, and that notice need not be alleged in the declaration; but they agreed that the leſſee is not bound to pay *without notice*; and if he hath paid it to his ancient leſſor, it is a good excuſe for him, and he may plead it: and if he hath not paid it, the action gives him notice to pay it to the grantee, and then he is chargeable for all which was not paid: this caſe, though decided almoſt 100 years before the paſſing of the ſtatute of Ann, where actual attornment was not neceſſary, eſtabliſhed the ſame rule which the act profeſſes to make, and it is a caſe well worthy of obſervation; for, 1ſt, it ſhews how much the common law regarded and required notice where a perſon had not the means of knowing; for at that time there was no ſtatute which required notice to be given; 2dly, it ſhews that where attornment is diſpenſed with, or ſupplied by a ſtatute, the grantee has as complete and perfect a title, as if attornment had actually been made; 3dly, this caſe fortifies an argument drawn from the form of pleading, viz. that ſince the ſtatute an attornment never is alleged, either in the declaration in covenant, or in an avowry, which can only be, becauſe it is ſupplied by the ſtatute, and therefore unneceſſary; and 4thly, it proves that nothing can excuſe the leſſee from paying the rent to the aſſignee but *actual payment* to the original leſſor, without notice of the grant, and if that be his caſe, he may plead it; *from hence the concluſion is, that the plaintiff was the landlord of the defendant. He had a clear legal title, which he could ſupport upon pleading, either in an action of covenant, or in avowry; and the tenant was anſwerable to his action, unleſs he could allege ſome legal bar in his defence, and which he could only do by ſhewing payment to the grantor before notice:* the firſt propoſition which we laid down was, "that the defendant, under his firſt demiſe, continued rightful tenant to ſome one till the time when the ejectment was brought," and it is clear that *that ſome one during all the time that the rent in arear accrued, was the plaintiff*; conſequently, *the plaintiff is entitled to maintain an action for uſe and occupation againſt the defendant for all that is due and unpaid, as rent during the time that the plaintiff was landlord, and the defendant had the premiſes as his tenant:* but then another queſtion remains to be conſidered, namely, down to what time the plaintiff is entitled to recover that rent in the preſent action: for the plaintiff it was contended, that he had a right to recover it down to the time of executing the writ of poſſeſſion. Now the plaintiff cannot firſt recover

in

in ejectment, and then for uſe and occupation for the time ſubſequent to the day of the demiſe in ſuch ejectment; for the action for uſe and occupation, and the ejectment, when applied to the ſame time, are totally inconſiſtent: in one, the plaintiff ſays the defendant is his tenant, and therefore he muſt pay him rent; in the other, he ſays he is no longer his tenant, and therefore he muſt deliver up the poſſeſſion; he cannot be permitted to do both. It has been admitted, that an action would lie for the meſne profits, which is of courſe after ejectment, and may be maintained without proving any title; we are therefore of opinion, that the plaintiff is in this action entitled to recover a proportional part of the rent up to the 6th of April, the defendant having continued tenant to the plaintiff up to that time, which is the day of the demiſe laid in the ejectment: but that he is not entitled in this action to recover any rent ſubſequent to that day.

In an action for uſe and occupation, the tenant cannot be permitted to impeach his landlord's title. In an action for uſe and occupation: it appeared on the trial, that a former incumbent had let ſome of the glebe lands to the defendant, who had continued tenant to the preſent incumbent (the plaintiff) and had paid him half a year's rent for the ſame. The defendant offered to give evidence of the plaintiff's having been ſimonically preſented, of which he was ignorant when he paid the former rent: but the judge who tried the cauſe, refuſed to receive it, under the common rule that a tenant ſhall not be permitted to impeach his landlord's title in an action for uſe and occupation, and there was a verdict for the plaintiff: it was afterwards moved to ſet the verdict aſide: but, by the Court; The rule of not giving in evidence *nil habuit in tenementis* in an action for uſe and occupation is not a mere technical rule, but is founded in public convenience, juſtice, and policy; and the only queſtion here, is, whether that rule ſhall ſtill prevail? Now here the defendant, who occupied the land, did ſo by the permiſſion of the plaintiff, and then refuſed to pay his rent, under an idea that he might conteſt the plaintiff's right: but the plaintiff could not be ſuppoſed to come to trial prepared to meet ſuch a defence, and to make out his title; ſuch an action as the preſent does not involve the queſtion of title.

Cooke *v.* Loxley, M. 33 Geo. 3. B.R. 5 *Ter. Rep.* 4.

And where there is a note in writing, expreſſing the amount of the rent, no evidence of a parol agreement for the payment of any greater rent than is therein expreſſed ſhall be admitted; for the courts muſt be very cautious in admitting any evidence to ſupply or explain written agreements, elſe the ſtatute of frauds would be eluded, and the ſame uncertainty introduced by ſuppletory or explanatory evidence, which that ſtatute has ſuppreſſed in reſpect to the principal object. It never ought to be ſuffered ſo as to contradict

Preſton *v.* Merceau, Hil. 19 Geo. 3. C. B. 2 *Black.* 1249.

tradict or explain away an explicit agreement, for that is in effect to vary it. Therefore, where there was a written agreement to let a leaſe of an houſe for 26l. per ann: on this an action was brought for the uſe and occupation. The defendant paid 26l. into court. At the trial, the plaintiff offered to give parol evidence, that beſide the 26l. per ann. the defendant was to pay the ground-landlord 2l. 12s. 6d.; but no evidence was offered of the actual payment of ſuch ground-rent at any time, without which *De Grey, Ch. J.* thought ſuch parol evidence inadmiſſible, and nonſuited the plaintiff: afterwards, on a motion to ſet this nonſuit aſide, the Court held, that the judge did right in rejecting the evidence, and ſaid, that the plaintiff could ſhew nothing to alter the rent or the term, the two things expreſſed in the agreement; but that with reſpect to collateral matters it might be otherwiſe. He might ſhew who was to put the houſe in repair, or the like, concerning which nothing is ſaid, but that he could not, by parol evidence, ſhorten the term to 14, or extend it to 25 years, or make the rent other than 26l. per ann.

Wilkins v. Wingate, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 62.

This was an action of debt; iſſue was taken on the plea to the firſt count: it was alleged in the 2d count, that the plaintiff, on 20th December, 1791, demiſed to the defendant a meſſuage, &c. for three years, to commence on the 25th of that month, at the yearly rent of 30l. payable on 25th March, 24th June, 29th September, and 25th December; that the defendant entered on 22d of December, 1791, and that 15l. for half a year's rent became due *on that day*. The third count was for uſe and occupation generally, for 10l. for half a year: to the 2d count the defendant pleaded the plaintiff *nill habuit in tenentis*, and he demurred to the laſt count. The plaintiff replied to the 2d plea, that the defendant ought not to be permitted to ſay that he had nothing in the premiſes, becauſe the plaintiff demiſed the ſaid meſſuage to the defendant by deed, dated 20th December, 1791, which was ſealed by the defendant as well as the plaintiff: to this replication the defendant demurred, and aſſigned for cauſe, that the demiſe in the replication was not averred to be the ſame as that mentioned in the ſecond count, and that it did not appear for what term the plaintiff demiſed the ſame, or that it was for the ſame term, or under the ſame rent as ſet forth in the 2d count in the declaration: it was argued, that an action of debt would not lie for uſe and occupation generally, for that the particulars of the demiſe, the entry of the leſſee, and the time when the rent became due, ſhould have been ſtated. But the Court ſaid, that the contrary had been determined in the court of common pleas, on a demurrer in the caſe of *Strand* v. *Rogers*, Hil. 32 Geo. 3; and that, according to a caſe in *Salk.* 227, the ſecond plea could not be ſupported, both parties having executed the deed, though whether the eſtoppel were formally

formally replied was, perhaps, another queſtion: the ſecond count was, however, held to be ſubſtantially bad—for ſtating the rent to have become due on a day before it could poſſibly have accrued. Judgment therefore was given for the defendant upon the 2d count, and for the plaintiff on the 3d.

4. *The Action of Debt.*

1. *On bonds.*] Wherever a perſon gives a ſecurity by way of indemnity for another, and pays the money, the law raiſes an aſſumpſit; but where he will not rely on the promiſe which the law will raiſe, but takes a bond as a ſecurity, there he has choſen his own remedy, and he cannot reſort to an action of aſſumpſit. In aſſumpſit for money paid, laid out, and expended; money lent and advanced; money had and received; and upon an account ſtated; and pleas; 1ſt, non-aſſumpſit; 2dly, that the defendant became a bankrupt on 11th February, 1785; and that the cauſe of action accrued to the plaintiffs before: there was a verdict for the plaintiffs, damages 1200l. ſubject to the opinion of the court on the following caſe: The plaintiffs, on 8th November, 1783, joined the defendant as ſurety in ſeveral bonds, for the payment of ſeveral ſums of money, amounting to 1500l. by inſtalments, the firſt of which was to become due on March 8th, 1786; and the defendant, by bond of the ſame date, 8th November, 1783, became bound to the plaintiffs in 3000l. conditioned for payment of 1500l. with intereſt, on 8th February, 1784; and alſo gave them a warrant of attorney to enter up judgment thereon; which bond and warrant of attorney were given by the defendant to the plaintiffs, to ſecure to them the payment of 1500l. and intereſt, for which they had ſo become engaged as aforeſaid: on 13th Auguſt, 1784, the plaintiffs ſigned judgment againſt the defendant; and on 20th November, ſued out a *fi. fa.* returnable on 24th January, 1785, under which the goods of the defendant were taken in execution, but a commiſſion of bankruptcy having iſſued againſt the defendant on 2d December, 1784, and he being thereon declared a bankrupt, the aſſignees under that commiſſion claimed the effects ſeized, and on indemnifying the ſheriff, procured a return of *nulla bona* to the *fi. fa.* and got the goods delivered to them: the obligees in the inſtalment bonds, proved under the commiſſion, and received a dividend of 5s. 6d. in the pound: the defendant obtained his certificate, and the reſt of the principal and intereſt ſecured by the above bonds, amounting to 1200l. 4s. 7d. and for which this action was brought, had been paid by the plaintiffs ſince the date of the defendant's certificate to the obligees, who thereupon, by deed, aſſigned over to them the ſubſequent dividends.

Touſſaint and others v. Martinnant, M. 28 Geo. 3. 2 *Term Rep.* 100.

By the Court, in ancient times, no action could be maintained at law where a ſurety had paid the debt of his principal: and the firſt caſe of the kind in which the plaintiff ſucceeded, was before *Gould*, J. at Dorcheſter, which was decided on equitable grounds. Now, why does the law raiſe even a promiſe? becauſe there is no ſecurity given by the party. But, if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe. Promiſes in law, only exiſt where there is no expreſs ſtipulation between the parties: in the preſent caſe, the plaintiffs have taken a bond, and therefore they muſt have recourſe to it; it is their only ſecurity: poſſibly, if the plaintiffs had recovered upon the bond when it was forfeited, and they were not afterwards damnified by being obliged to pay the inſtalments, by a bill in equity, they might have been compelled to refund all that money which they had received: but at law, the penalty of the bond became a legal debt, and as ſoon as that was forfeited, they became creditors of the bankrupt, and might have proved their debt under the commiſſion. But ſtill the bond was their remedy: and they ſhall not be permitted to change their ſecurity upon a ſubſequent event, and reſort to that indemnity which the law would have raiſed:—it has been objected, that this bond could not be proved under the commiſſion, becauſe it is ſaid that there was no conſideration for it: but clearly as a queſtion of law, there was a ſufficient conſideration; for the ſurety binds himſelf to pay the debt of another, who afterwards becomes a bankrupt; the conſideration is therefore good in law; and it is not unreaſonable; for the ſurety may ſay he will only lend his credit for three months, and if the money be not paid at that time, he will call on the principal for his indemnity. The ſurety is the effective and reſponſible man; he is the perſon to whom the creditor principally looks, and he is taken becauſe the credit of his principal is doubted:—there is as little foundation for another objection that has been taken, viz. that the bond is fraudulent, becauſe it is made payable before the day on which the 1ſt inſtallment became due: it is not fraudulent againſt the eſtate of the bankrupt, for the bankrupt cannot make any difference in this caſe: in no event could this circumſtance have that effect on the bankrupt's eſtate, which has been ſuggeſted, for a court of equity would undoubtedly give relief if it were attempted to prove the two bonds under the commiſſion: it would interpoſe, and would not ſuffer more than 20s. in the pound to be paid for the ſame debt: one particular courſe by which a court of equity might give relief, would be to compel the creditor to make his election to which of the two ſecurities he would reſort; or when the whole ſum had been proved under one of the bonds, they might

might compel the party in poſſeſſion of the other to give it up.---Judgment of nonſuit.

But in this caſe, which was aſſumpſit for money had and received, and plea of non aſſumpſit, it appeared on the trial, that the defendant, who was captain of an Indiaman, had borrowed of one *Cox* 1000l. upon two reſpondentia bonds of 500l. each, and in the preſence of *Cox*, ſigned thereon an indorſement, whereby he declared, that it was not ſubject to any article or articles of agreement, or to any ſettlement whatever; and if *Cox* ſhould chooſe to aſſign it to any perſon, he thereby acknowledged, that "he held himſelf bound to pay unto ſuch aſſignee, or aſſignees thereof, as ſhould be duly appointed by *Cox*, the whole both of the principal and intereſt of the within bond, agreeable to the tenor thereof, without any deduction or abatement whatſoever." This indorſement was calculated to make the bond aſſignable abſolutely, and to prevent the defendant from ſetting off what might be due in account from *Cox* to him. On 22d January, 1777, the plaintiff advanced money to *Cox*, upon an aſſignment of theſe bonds: mean time, the ſhip ſailed for India, and returned back in May 1778, to England, when the plaintiff informed the defendant of the aſſignment of the bonds, and demanded payment of the money: the defendant deſired time, and begged that the plaintiff would not ſue him: but ſtill delaying payment, this action was brought. It was objected at the trial, that this action was not maintainable, it being a debt on a ſpecialty; but *De Grey*, Ch. J. thought otherwiſe, and there was a verdict for the plaintiff for principal and reſpondentia intereſt: a new trial was afterwards moved for: but by the Court, Reſpondentia bonds have been found eſſentially neceſſary for carrying on the Indian trade, but it would clog thoſe ſecurities, and be productive of great inconvenience, if they were obliged to remain in the hands of the firſt obligee. This contract is therefore deviſed to operate upon ſubſequent aſſignments, and amounts to a declaration, that upon ſuch aſſignment, the money which I have ſo borrowed ſhall no longer be the money of A. but of B. his ſubſtitute; the plaintiff, is certainly entitled to the money in conſcience, and therefore entitled alſo at law; for the defendant has promiſed to pay *any perſon* that ſhall be entitled to the money. And *Blackſtone*, J. ſaid, the promiſe made by the defendant, upon his return from India, was clearly an aſſumpſit to the plaintiff: it would be a ſufficient promiſe to avoid the ſtatute of limitations: and that the aſſignment and other tranſactions were fully ſufficient as a conſideration to make that aſſumpſit binding: and upon that ground it was clear that a general *indebitatus* aſſumpſit would lie.

Fenner v. Meares Hil. 19 Geo. 3. C.B. 2 *Black.* 1269.

Turner v. Vaughan, Ea. 7 Geo. 3. C.B. 2 *Wil* 339.

In debt upon a bond, conditioned for the payment of 30l. *per ann* from the defendant to the plaintiff, the conſideration appeared to be for *cohabitation had by the ſaid above bounden*, T.V. (the defendant) *with the ſaid* C.T. (the plaintiff): to the declaration in this action, there was a general demurrer and joinder in demurrer: and on the argument it was objected, that it appeared by the condition of the bond, that it was executed and given upon an illegal flagitious conſideration of having cohabited with the plaintiff. But by the Court, Without hearing the other ſide, there muſt be judgment for the plaintiff: the court may take this for a lawful and conſcientious conſideration; we muſt preſume that the defendant hath done what in honour and conſcience he ought to have done, and that he thought himſelf a wrong doer, and gave the plaintiff this bond to make her amends. And per *Clive*, J. If a man has lived with a girl, and afterwards gives her a bond, it is good. Suppoſe this bond had been given by the defendant to the plaintiff, for being his miſtreſs, it would have been good in point of law, although in a court of equity it would be poſtponed to creditors. *Jekyll*, Maſter of the Rolls, in a caſe where creditors interfered againſt a bond of this ſort, wiſhed he could have given the lady the money upon the bond: and where it is *præmium pudoris*, a court of equity will not relieve againſt ſuch a bond. This condition is incapable of an explanation to make the bond an illegal act.

Ex parte Cottrell in the matter of *Eaves*, a bankrupt, *Hil.* 18 Geo. 3 B.R. *Cowp.* 742.

So, where in a caſe from the court of chancery, for the opinion of the court of king's bench: it appeared, that *Eaves*, the bankrupt, who had cohabited with one *Catherine Eſſex*, for 8 years, and had a child by her, then living, propoſed (on his being about to marry a perſon of fortune) that if *Cottrell* would marry her, and ſettle a freehold houſe and land (which he was ſeiſed of) upon her for life, and take care of the child, he *(Eaves)* would give the ſaid *Cottrell* 42l. for eight year's wages, due to the ſaid *Catharine Eſſex*, and a bond for the payment of 400l. by inſtalments: that accordingly, *Cottrell*, having made ſuch ſettlement, and married *Catherine Eſſex*, *Eaves*, *for the conſiderations aforeſaid, and in purſuance of the agreement between him and* Cottrell, entered into a bond in the penal ſum of 800l. conditioned for the payment of 400l. to *Cottrell* by inſtalments; but before any payment on the bond became due, *Eaves* was declared a bankrupt: it was objected that this bond was not founded on a *bona fide* conſideration. But by the Court, It is a good conſideration between the parties, it is a ſtipulation between them in conſideration of marriage: the one has performed his part and married the woman; the other is therefore bound to perform his; there is no ground to impute any fraud

fraud in the caſe. *Cottrell* entitled to come in as a creditor under the commiſſion againſt *Eaves*.

But in debt upon a bond, upon oyer being prayed, it appeared to be a bond from *W. P.* the inteſtate, to the plaintiff in a penalty: it recited that the inteſtate and plaintiff had agreed to live together, therefore he had agreed to find her meat, drink, waſhing and lodging, and to leave her an annuity of 60l. a year, if he quitted her, or ſhe outlived him: and if they had any child, he was to take care and provide for it: but if ſhe ſhould leave him, or go to another man, then he ſhould not be obliged to provide for her any longer, or to leave her any annuity. The defendant pleaded that this bond was given for an unlawful conſideration, that "of living together in a ſtate of fornication," and was therefore void in law. The plaintiff replied, that ſhe was a virgin, and ſeduced by the defendant, and that it was *premium pudicitæ*. By the Court, There is no virtuous part in this contract; all is calculated for the purpoſes of proſtitution: it is the price of proſtitution, *premium proſtitutionis*; for if ſhe becomes virtuous, ſhe is to loſe the annuity: it appears clearly upon the condition, that the bond is illegal and void. Walker *v.* Perkins, Adminiſtrator, M. 5 Geo. 3. B.R. 3 *Burr.* 1568. 1 *Black.* 517.

In debt upon a bond given by the defendant to the plaintiffs, who were churchwardens and overſeers of the pariſh of Cranſford, with condition, that if the defendant ſhould hire one *S. C.* as a ſervant, for ſuch time as ſhould gain him a ſettlement in the pariſh of Saxted, and ſhould permit and ſuffer him to gain a ſettlement in the pariſh of Saxted; or if the ſaid *S. C.* ſhould gain a ſettlement, by the aſſiſtance of the defendant, any where out of the pariſh of Cranſford, then the obligation to be void, otherwiſe in force: on the trial, there was a verdict for the plaintiffs; and it appeared that the defendant, who had married the ſiſter of *S. C.* at her requeſt, and to ſave him from being taken to a gaol, on a baſtardy warrant, gave the bond in queſtion: it was moved in arreſt of judgment, on the ground that this bond was an apparent fraud upon the pariſh of Saxted, and all other pariſhes, and therefore againſt law, and void. But it was reſolved by the Court, that the bond was a good bond: that nothing illegal appeared therein, nor was the ſame obtained by the plaintiffs through any unlawful or corrupt means. Whiting and others *v.* Punchard, Ea. 10 Geo. 3 C.B. 3 *Wilſ.* 50.

In an action of debt upon a bond, the defendants prayed oyer of the condition; and then pleaded the act 7 Geo. 2, c. 8 (an act to prevent the infamous practice of ſtock-jobbing) and that the plaintiff and *Richardſon* were jointly concerned in certain contracts; that the plaintiff, contrary to the ſtatute, voluntarily gave to divers perſons, large ſums of money, amounting to the ſum of 3000l. for compounding and making up differences for the not delivering ſtock, and Faikney *v.* Reynous and others, Ea. 7 Geo. 3. B.R. 4 *Burr.* 2069.

for not performing contracts; and that this bond was given by the defendants to the plaintiff, for ſecuring the repayment of 1500l. (being the moiety of the ſaid 3000l.) to the plaintiff, by the ſaid *Richardſon:* to this plea the plaintiff demurred, and the defendant joined in demurrer. It was reſolved by the Court (after argument) that this bond was not within the act of parliament, nor did it appear to have been given upon any illegal conſideration; and that the plea was no defence againſt the payment of it; and therefore that it remained a good bond on the face of it, till the obligor could ſhew that it was bad: they obſerved, that paying money to compound theſe differences was not a *malum in ſe*; but only ſtood prohibited by this act; which neither invalidates, nor means to invalidate all ſecurities relating to it (as the act of exceſſive gaming does) it only prohibits *paying or receiving* money for compounding differences: this is not a bond for the payment of the compoſition money to the perſons *Faikney* and *Richardſon* had contracted with; but a bond for *Richardſon* paying to *Faikney* a debt of honour, and reimburſing to *Faikney* the money that *Faikney* had paid upon *Richardſon*'s account, to compound the difference of contracts, wherein they had been jointly concerned: this was a fair, honeſt tranſaction between theſe two, and therefore it is a good bond, and the plaintiff ought to recover upon it. And lord *Mansfield* obſerved, that if money be lent, in order to pay a play debt (ſuppoſing the lender not to have been preſent at the time and place of play (1) or in order to pay off an uſurious contract, or even to lend out upon uſury; and a bond be given for ſecuring the repayment of the money ſo lent, ſuch a bond will not be void: the obligor will be bound to pay it. Its being voluntary is not of itſelf an objection to his being liable to the payment of it; it is a good bond, unleſs ſomething appears to render it otherwiſe.

Bagſhaw *v.* Boſſley, M. 31 Geo. 3. B.R. 4 *Ter. Rep.* 78.

In debt on a bond brought by the ſurviving obligee, the defendant craved over of the bond and obligation; and it thereby appeared (after reciting that the obligees had appointed the defendant to ſerve the curacy of a free chapel, and that the defendant had agreed to be conſtantly and duly reſident at the curacy houſe there, in and upon the curacy, and in default of ſuch reſidence, had alſo agreed to reſign and deliver up the ſaid curacy and chapel into the hands of the ordinary, within one month next after the requeſt of the obligees, or either of them, or within one month next after notice in writing, ſo that the ſaid curacy and chapel might become vacant, and the ſaid obligees, the patrons thereof, might preſent thereto anew) that the condition was, that if

(1) See *Robinſon* v. *Bland*, in p. 273, ſupra.

the

the obligor did and ſhould in default of ſuch conſtant and due reſidence in and upon the ſaid curacy, within one month next after the requeſt of the obligees, or either of them, or within one month after notice in writing, abſolutely reſign the curacy, and deliver up the ſaid curacy to the ordinary, ſo that the ſaid curacy and chapel might become vacant, and the obligees, the patrons thereof, preſent anew; and if the obligor did not ſuffer any waſte or dilapidations, the obligation ſhould be void. The defendant *pleaded*, 1ſt, that he had reſided at the curacy houſe, and had not committed or ſuffered waſte; 2dly, that after his appointment to the curacy, he had a general licence from the obligees to reſide elſewhere. *Replication*, 1ſt, that the defendant voluntarily abſented himſelf, from 7th April, 1790, to the 8th of April following; and that the plaintiff gave him notice to reſign within a month; 2dly, that after the time when the ſuppoſed licence was granted, viz. on 7th April, 1790, the plaintiff countermanded and revoked the ſaid licence, to both theſe replications there was *a general demurrer* and joinder. By the Court, (after argument) This caſe has been argued, that the patron's right of preſentation is a mere public truſt. But it is a truſt coupled with an intereſt, for it is a ſubject of conveyance for a valuable conſideration, which is not the caſe with a naked truſt. As ſoon as the defendant was preſented to the living, he was bound to take upon himſelf all the duties of an incumbent, to reſide on the living, to take upon him the cure of ſouls, and to keep the houſe in proper repair. Now this bond was only entered into for the purpoſe of ſecuring a performance of all thoſe duties, which by law, and without the bond, he was bound to diſcharge; therefore a bond for the performance of theſe duties is not illegal. With reſpect to the licence: in general, the ſame perſon who gives, may revoke a licence; it is not like the caſe in *Cro. Eliz.* 815, where the leſſor had given his tenant licence to aſſign, and it was held, that the licenſe to aſſign having been once given, there was an end of the proviſo; for here the condition is not that the defendant ſhall not be abſent without conſent, but that he ſhall not be abſent; and if he be, and do not return after a a month's notice, that he ſhall reſign: then the conſent to be abſent for a time does not vary the caſe; for the defendant was bound to return after a month's notice.

But it has been held, in the houſe of lords, that *a general reſignation bond*, from the incumbent to the patron, is void. The Lord Chancellor, in this caſe, delivered his opinion, that all bonds of this nature are void, and that a preſentation, or collation, ought to be without any condition whatever; and though moſt of the judges were of a different opinion, yet they grounded their opinion more upon precedent than upon principle;

Biſhop of London *v.* Fytche, Dom. pror. 1783; cited 4 *Ter. Rep.* 80, 81.

ciple; and one of them ſaid, that had it been *res integra*, he ſhould have been of a different opinion.

Partridge *v.* Whiſton, Tr. 31 Geo. 3. B.R. 4 *Ter. Rep.* 359.

However, in this caſe, which was debt on a bond from the defendant on his preſentation to a living, conditioned to reſign it, when the patron's ſon was ordained, and could be preſented, the defendant relied on the agreement being ſimoniacal, and pleaded, 1ſt, that it was corruptly, *ſimoniacally*, unlawfully, and againſt the form of the ſtatutes, agreed between the plaintiff and the defendant; that the former ſhould preſent the latter, in conſideration that if he ſhould be admitted, he would reſign, &c.; and that in purſuance of ſuch agreement he executed the bond: 2dly, that the living was a benefice, with cure of ſouls, and ought to be held by clerks for life, freely and without any control of the patron; and that ſuch clerks are not bound by the law of the land to reſign on requeſt, &c. To theſe pleas there was a general demurrer, and joinder in demurrer; and the Court ſaid, that as this was not preciſely ſimilar to the caſe of the *Biſhop of London* v. *Fytche*, they were bound by the eſtabliſhed ſeries of precedents, to give judgment for the plaintiff.

Davis *v.* Maſon, Hil. 33 Geo. 3 B.R. 5 *Ter. Rep* 118.

In debt on bond for 200l. the condition of which (after reciting that the plaintiff had taken the defendant as an aſſiſtant in the buſineſs of a ſurgeon, apothecary, and man-midwife; and that the defendant had agreed with the plaintiff not to exerciſe the buſineſs on his own account, within the diſtance of ten miles from Thetford, where the plaintiff reſided for fourteen years) was, that the defendant would not exerciſe the buſineſs, &c. within that diſtance, &c. the defendant pleaded, that before the execution of the bond, it was agreed between the plaintiff and the defendant, that the latter ſhould become an aſſiſtant to the former in the above buſineſs, *for ſo long as it ſhould pleaſe the plaintiff*; that the plaintiff, without the conſent of, or any miſconduct or default in the defendant, and againſt his will, diſmiſſed him; that the defendant had lawfully ſerved an apprenticeſhip, wherefore he exerciſed the buſineſs within ten miles, &c. concluding that the agreement and bond were void in law. To this plea there was a ſpecial demurrer on the form of pleading: but the Court directed the counſel to confine themſelves to arguments on the validity of the bond. And by the Court (after argument) This queſtion has been at reſt ever ſince the caſe of *Mitchell* v. *Reynolds*, 1 *Pere Wm.* 181: a bond in reſtraint of trade cannot be arbitrarily taken, and without conſideration; ſome conſideration muſt appear. But here the plaintiff being eſtabliſhed in buſineſs as a ſurgeon at Thetford, the defendant wiſhed to act as his aſſiſtant, with a view of deriving a degree of credit from that ſituation; on which the former ſtipulated, that the defendant ſhould not come to live there under his auſpices, and ſteal away his patients: this

this ſeems to be a fair conſideration for the bond: as to the objections that the limits are unreaſonable, that does not neceſſarily follow, nor is there any line to be drawn; neither are the public likely to be injured by an agreement of this kind, ſince every other perſon is at liberty to practiſe as a ſurgeon in this town.

In debt on a bond for 1000l. the defendant craved oyer of the condition, which (after reciting that the committee of the African company had, at the requeſt of the defendant, nominated and appointed him to the office of regiſtrar of the ſaid company, at Cape Coaſt Caſtle, during the pleaſure of the committee, under a certain ſalary; that the defendant had agreed to take upon him the ſaid office, and that in virtue ther of he would be entruſted with the poſſeſſion, management, and ſale, of the property and effects of all perſons dying inteſtate at the ſettlement, and with the remittance of the net proceeds thereof to the committee, in order to be by them paid over or delivered to the lawful adminiſtrator) was conditioned to be void, if the defendant did, as long as he continued in the office, whenever, and as often as any perſon in the ſervice of the committee died inteſtate, forthwith take under his care, and into his poſſeſſion, all and ſingular the goods, chattels, &c. of ſuch perſon or perſons, &c. &c. The defendant then demurred generally, and the plaintiffs joined in demurrer. On the argument, two objections were taken in ſupport of the demurrer: 1ſt, that the condition of the bond was illegal, inaſmuch as it required the defendant, the regiſtrar, to do acts which were illegal, and for doing which he would ſubject himſelf to actions: 2dly, that the performance of the condition would tend to lay a reſtraint on the African trade, contrary to the object and policy of the acts of parliament relating thereto. But the Court were all of opinion, that this was a legal bond; that the duty impoſed on the officer, was impoſed on him for the benefit of every one concerned in the African trade; that it was not intended that he ſhould detain the effects of any perſon dying in that country inteſtate, againſt the rightful adminiſtrators, but merely that they ſhould be depoſited in a place of ſafe cuſtody, until they were claimed by thoſe who were legally entitled to them; and that no rule of law, or decided caſe, would be violated by a deciſion againſt the defendant.

African Company *v.* Torrane Hil. 36 Geo. 3. B.R. 6 *Ter. Rep.* 538.

In debt upon bond for 700l. the defendant, after over of the obligation, whereby it appeared that one *John Walker* and *Thomas Walker*, with the defendant, were jointly and ſeverally bound to the plaintiff in 700l. conditioned for the payment of 350l. pleaded, 1ſt, *non eſt factum*; 2dly, that before, and at the time of making the bond, and the note aftermentioned, the two obligors, *John Walker* and *Thomas Walker*, and three others, ſtood indicted by one *John Rudge*, on

Collins *v.* Blantern, Ea. 7 Geo. 3. C. B. 2 *Wilſ.* 341.

on five indictments, for wilful and corrupt perjury, and had ſeverally pleaded not guilty before the making the bond and note: and the ſeveral traverſes on the indictments were at the time of making the unlawful agreement after mentioned, and the note and ſaid bond, viz. on the ſame day the bond was made, were about to come on to be tried at Stafford, whereupon it was then corruptly agreed between *Rudge*, the proſecutor, the plaintiff, and the five perſons indicted, that the plaintiff ſhould give the proſecutor, *Rudge*, his note for 350l. *in conſideration for not appearing to give evidence* at the trial of the ſaid traverſes, and that the obligors ſhould execute the bond to the plaintiff of the ſame date of the note, as an indemnity to the plaintiff for giving ſuch note. That the plaintiff gave to *Rudge*, the proſecutor, the note for 350l. for not appearing as proſecutor, and giving evidence; and that the obligors, on giving the note, executed this bond as an indemnity to the plaintiff for giving ſuch note: there was then an averment, that the bond was given for the ſaid conſideration, and no other, and that the obligors were not indebted to the plaintiff, *and ſo the bond was void in law, et hoc paratus*, &c. 3dly, plea that the bond was given by the obligors to indemnify the plaintiff againſt a note given by him to the proſecutor, and that the plaintiff had not been damnified by the note. The plaintiff replied, and took iſſue on the firſt plea, and demurred generally to the two others: the defendant joined in demurrer. There were four queſtions in this caſe: 1ſt, whether it did not appear from the facts alleged in the ſecond plea, that the conſideration for giving the bond was illegal? 2dly, whether a bond, given for an illegal conſideration, was not clearly void at common law, *ab initio?* 3dly, ſuppoſing the bond void, whether the facts diſcloſed in the plea to ſhew it void, could by law be averred and pleaded ſpecially? 4thly, if they could be pleaded, then whether this ſecond plea was duly, aptly, and properly pleaded? By the Court, as to the firſt queſtion, The whole of the tranſaction is to be conſidered as one entire agreement, the bond and note are both dated on the ſame day, for payment of the ſame ſum of money on the ſame day: the manner of the tranſaction was to gild over and conceal the truth; and whenever courts of law ſee ſuch attempts to conceal ſuch wicked deeds, they will bruſh away the cobweb varniſh, and ſhew the tranſactions in their true light. This is an agreement to ſtifle a proſecution for wilful and corrupt perjury, a crime moſt detrimental to the commonwealth; for it is the duty of every man to proſecute, appear againſt, and bring offenders of this ſort to juſtice: many felonies are not ſo enormous offences as perjury, and therefore to ſtifle a proſecution for perjury, ſeems to be a greater offence than to compound ſome felonies. The promiſſory note was certainly void: what right then hath

hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the conſideration for giving them being wicked and unlawful. As to the *ſecond* point, we are all of opinion, that the bond is void, *ab initio*, by the common law, by the civil law, moral law, and all laws whatever. This is a contract to tempt a man to tranſgreſs the law, to do that which is injurious to the community; it is void by the common law, and the reaſon why the common law ſays ſuch contracts are void, is for the public good: *you ſhall not ſtipulate for iniquity.* All writers upon our law agree in this: no polluted hand ſhall touch the pure fountains of juſtice; whoever is a party to an unlawful contract, if he hath once paid the money ſtipulated to be paid in purſuance thereof, he ſhall not have the help of a court to fetch it back again: you ſhall not have a right of action when you come into a court of juſtice in this unclean manner, to recover it back *procul o! procul eſte profani.* As to the *third* point, whether this matter can be pleaded? It is objected againſt the defendant, that he has no remedy at law, but muſt go ſeek it in a court of equity: the anſwer is, we are upon a mere point of common law, which muſt have been a queſtion of law, long before the courts of equity exerciſed that juriſdiction which we now ſee them exerciſe; a juriſdiction which never would have ſwelled to that enormous bulk we now ſee, if the judges of the courts of common law had been anciently as liberal, as they have been in latter times. To ſend the defendant in this caſe into a court of equity, is to ſay, there never was any remedy at law againſt ſuch a wicked contract as this is. It would have been much to be regretted if this caſe had been without remedy at common law: *eſt boni judicis ampliare juriſdictionem*, and it may be ſaid *eſt boni judicis ampliare juſtitiam:* therefore, whenever ſuch caſes as this comes before a court of law, it is for the public good that the common law ſhould reach them, and give relief. Formerly there was too confined a way of thinking in the judges of the common law courts; and courts of equity have riſen by the judges not applying the principles of the common law, but being too narrowly governed by old caſes and maxims, which have too much prevented the public from having the benefit of the common law. It is now objected, as a maxim, that the law will not endure a fact *in pais dehors*, a ſpecialty to be averred againſt it, and that a deed cannot be defeated by any thing leſs than a deed, and a record by a record, and that if there be no conſideration for a bond, it is a gift. The anſwer to this is, that the preſent condition is for the payment of a ſum of money, but that payment to be made was grounded upon a vitious conſideration, which is not inconſiſtent with the condition of the bond, but ſtrikes

at the contract itſelf in ſuch a manner, as ſhews that in truth the bond never had any legal entity, and if it never had any being at all, then the rule or maxim, that a deed muſt be defeated by a deed of equal ſtrength, doth not apply to this caſe. The law will legitimate the ſhewing it void, *ab initio*, and this can only be done by pleading: nothing is due under ſuch a contract, then the law gives no action, the *debitum* never exiſted; as much as if it had been ſaid, it ſhall be void, becauſe there is no debt. But if this wicked contract be not pleadable, it will be good at law, be ſanctified thereby, and have the ſame legal operation as a good and an honeſt contract, which ſeems to be moſt unreaſonable and unrighteous; and therefore, unleſs we are chained down by law to reject this plea, we will admit it, and let juſtice take place: it would be ſtrange abſurdity for the law to ſay, that this contract is wicked and void, and in the ſame breath for the law to ſay, you ſhall not be permitted to plead the facts which clearly ſhew it to be wicked and void. All the caſes upon acts of parliament, with reſpect to making bonds, &c. void, do warrant the receiving this plea and averment: there is no direction, in ſuch acts of parliament, given for the form and manner of pleading in thoſe caſes; the end directs and ſanctifies the means. There can be no difference between an act being void by ſtatute, or by the common law: for wherever a bond is void at law, or by ſtatute, you may ſhew how it is void by plea, and that in truth it never had any legal exiſtence. The ſtatute law is the will of the legiſlature in writing; the common law is nothing elſe but ſtatutes worn out by time: all our law began by conſent of the legiſlature; and whether it is now law by uſage or writing, it is the ſame thing; a ſtatute ſays ſuch a thing ſhall be avoided by plea, why therefore may not a deed, executed upon a conſideration againſt the common law be avoided by plea: in *dureſs*, *gaming*, *ſimony*, *infancy*, *coverture*, and the like, ſuch a plea as this, which diſcloſes there never was any obligation, is admiſſible. This proves that the contract, in the preſent caſe, may be reached by a plea, and avoided at common law: and the plea ſhews a fact, which, if true, proves that the bond never had any legal exiſtence at all. As to the *fourth* point, the plea is rightly pleaded, and concludes very properly in ſaying, *and ſo the ſaid bond is void*, for he could not ſay *non eſt factum*, when he ſealed the deed. But ſuppoſing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer as this is: and we are all of opinion, that *judgment muſt be for the defendant*; *that the averment pleaded is not contradictory, but explanatory of the condition*; *that the bond was void, ab initio, and never had exiſtence.*

In

Barker & *al.* Executors of Pyatt, v. Parker, Tr. 26 Geo. 3. B. R. 1 *Ter. Rep.* 287.

In debt on bond, in the penalty of 400*l.* by the executors of the obligee againſt the obligor; the condition of the bond was (after reciting) *that the teſtator had taken one* J. H. *into his ſervice as a clerk, and likewiſe as his book-keeper and accountant, and in ſuch other buſineſs as he ſhould think fit to employ him about:* that if the ſaid *J. H.* ſhould, from time to time, give unto the teſtator, his executors, and adminiſtrators, a juſt and true account in writing, and diſcharge himſelf of, and likewiſe pay and deliver unto the teſtator, his executors, or adminiſtrators, all ſuch ſums of money, bills, notes, goods, effects, and things whatſoever, and of what nature ſoever, which he, the ſaid *J. H.* ſhould, from time to time, receive or diſcharge, or which ſhould come into his hands, charge, or cuſtody, of or belonging to the ſaid teſtator, *his executors, or adminiſtrators*, or to any other perſon or perſons, wherewith he or they ſhould or might be charged or chargeable, or otherwiſe in any other way or manner whatſoever, &c. &c. the bond ſhould be void. The defendant pleaded performance. The plaintiffs replied, that the teſtator made his will, and thereby directed that they ſhould carry on his buſineſs: that they proved his will; that *J. H.* was at the time of the teſtator's death, in his ſervice, and they continued to employ him therein: *that after the death of the teſtator, and whilſt the ſaid* J. H. *continued in their, the plaintiffs' ſervice,* 502*l.* 8*s.* 8*d. belonging to the plaintiffs, as executors; being the balance of an account ſtated between them and* J. H. *for monies belonging to them as executors, before that time received by the ſaid* J. H. *as their ſervant) came into, and was then in the charge of the ſaid* J. H. *as their ſervant*; which ſaid ſum, the ſaid *J. H.* had neglected to pay, &c. The defendant rejoined, that after the death of the teſtator, the ſaid *J. H.* and the plaintiffs, accounted together for all money received by the ſaid *J. H.* in the teſtator's life time, and paid over to the plaintiffs the balance then due; and that after the teſtator's death, *a new agreement was made between the ſaid plaintiffs and the ſaid* J. H. *that the ſaid* J. H. *ſhould ſerve the ſaid plaintiffs as their ſervant, in the nature of a clerk,* in the buſineſs intended to be carried on under the teſtator's will; and that he ſhould *likewiſe buy and ſell the different commodities,* and *pay the ſervants in the ſaid trades their reſpective wages,* and which before that time the ſaid *J. H.* had not been accuſtomed to do, and for which they were to pay the ſaid *J. H.* a greater ſalary than the teſtator in his life-time gave: that in purſuance of ſuch new agreement, *J. H.* was employed by the plaintiffs, and *the ſaid ſum of* 502*l.* 8*s.* 8*d. in the replication mentioned, was money which accrued to the ſaid plaintiffs after the death of the teſtator, in purſuance of the ſaid employment of the ſaid* J. H. *under the ſaid new agreement.* To this rejoinder there was a general demurrer, and joinder

in demurrer. By the Court, The ſervice in the contemplation of the parties was *the ſervice to the teſtator*: there was no idea then of carrying it farther: a trade is not tranſmiſſible, it is put an end to by the death of the trader. Executors, *eo nomine* do not uſually carry on a trade; if they do ſo, they run great riſk; and without the protection of the court of chancery, they would act very unwiſely in carrying it on. The bond in queſtion is relative to the ſervice with the teſtator: it was given as an indemnity that the clerk ſhould be faithful to him, and ſhould pay all the money received on his account to him, or to his executors; becauſe money might be in his hands at the time of the teſtator's death, for which he could only account to the executors: though the clerk was to account to the executors, it was only for money belonging to the teſtator; ſo that it was the intention of the parties, that the bond ſhould not be extended beyond the life of the teſtator. If executors carry on a trade, they muſt do it as individuals, for their own advantage: however, there are many inſtances of trade being carried on under the direction of the court of chancery: but this is quite a new thing, and ſhews the materiality of the rejoinder. There is not only a new agreement, but a greater burden is thrown thereby on the clerk, on which account he is to receive greater wages: all accounts, relative to the tranſactions in the life-time of the teſtator were ſettled: this is a new agreement made by the executors perſonally, and cannot affect the aſſets of the teſtator.—Judgment for the defendant.

Wright *v.* Ruſſel, *Hil.* 14. Geo. 3. C.B. 3 *Wiſ.* 532. 2 *Black.* 934.

So, where the defendant had joined in a bond *to the plaintiff*, as ſurety for the faithful ſervice of one *Baird*, as a broad clerk: in an action of debt brought upon this bond, the defendant prayed over of the obligation and condition, and pleaded, 1ſt, *non eſt factum*; 2d, that the plaintiff *Wright*, the obligee, ought to be barred; becauſe, at the time of the making the obligation, the plaintiff carried on the trade of a brewer, *on his own account* only, without a partner, and until ſuch a day and year: when the plaintiff entered into partnerſhip with one *J. D.* that *Baird* entered into the ſervice of the plaintiff, and continued with him until he entered into partnerſhip with *J. D.* when *Baird* quitted the ſervice of the plaintiff in the buſineſs carried on by him alone; and afterwards, on the ſame day, entered into the ſervice of the plaintiff and *J. D.* in their partnerſhip trade; and that, during all this time, that *Baird* continued in the ſervice of the plaintiff alone, he duly, faithfully, and honeſtly, according to the beſt of his ſkill and knowledge, performed the condition of the bond to the ſaid plaintiff. The plaintiff replied, admitting the facts laſt ſtated, and farther ſaid, that upon his taking *J. D.* into partnerſhip, *Baird* was continued as broad clerk from thence until ſuch a day; and afterwards he received

143l.

143l. 13s. on account of the plaintiff and his partner, which he did not pay over. The defendant having demurred to the replication, and the plaintiff joined in demurrer, the caſe was argued. And BY THE COURT, Courts of equity are favourable to ſureties, for where they are not ſtrictly bound at law, a Court of Equity will not bind them; and, in this caſe, the defendant ought not to be bound beyond the ſcope of his engagements, which was to be anſwerable for the fidelity of *Baird* to the plaintiff only, and not to the plaintiff and any other perſon or perſons: when the plaintiff therefore took in a partner, there was an end of the obligation; the condition was confined to the plaintiff only, and the breach aſſigned is for nonpayment of the money to the plaintiff and his partner, or either of them, which is not within the condition; and, where there is the leaſt difference between the condition and the breach aſſigned, the ſurety will not be bound. The defendant's plea is well pleaded: for the rule is, when the defendant craves and ſets out the oyer of the condition, to plead generally the performance thereof; this is a good bar to a common intent, until the plaintiff replies, and alleges a breach within the condition of the bond, which he has not done in this caſe, and therefore judgment muſt be entered for the defendant. This does not decide how *far* the bond may or may not be at an end, with reſpect to the plaintiff's own proper money, but it certainly cannot extend to the money of other people; which is the caſe now before the court.

But in an action of debt on bond, the defendant, after craving oyer of the condition of the bond which (reciting, that the plaintiffs, at the requeſt of the obligors, had agreed to take one *P. G. into their ſervice, and employ him as a clerk in their ſhop and compting-houſe*, and that the obligors had agreed to become ſecurity for his fidelity) declared, that if the ſaid *P. G.* ſhould faithfully account for and pay to the plaintiffs all ſums of money, &c. &c. then the condition to be void; pleaded, 1ſt, *non eſt factum*; 2dly, that from the date of the bond till 24 June, 1780, the plaintiffs carried on the buſineſs of bankers, as copartners, in their own names only; and on that day they received into partnerſhip *R. B.*; that *P. G.* then quitted the ſervice of the ſaid plaintiffs, and again, on the ſame day, entered into the ſervice of the plaintiffs and *R. B.*; that *P. G.* during all the time he remained in the ſervice of the plaintiffs alone, well and faithfully accounted, &c.: 3dly, that *P. G.* entered into the ſervice of the *plaintiffs* on 23d Feb. 1779; continued in the ſame till 24th June, 1780, and then quitted the ſervice of the plaintiffs, and during that ſervice accounted, &c. The plaintiffs *replied* to the ſecond plea, proteſting againſt the intention of ſerving the plaintiffs only; that the ſervice was meant and intended to be performed to them,

Barclay and others *v.* Lucas, *Hil.* 24 Geo 3. B. R. 1 *Ter. Rep.* 291.

them, in the buſineſs ſo then carried on by them, during all the time they ſhould continue in the ſame buſineſs, and the ſaid *P. G.* ſhould continue to ſerve therein; that on 24th June, 1780, they admitted *R. B.* to one-fourth ſhare of the ſaid trade; that on the 23d February, 1779, the ſaid *P. G.* entered into and continued in the ſervice of the plaintiffs till 16th February, 1781. The replication then aſſigned the breach, that after the ſaid partnerſhip, *P. G.* received, in his ſaid office and employment, 20l. 16s. three-fourths of which, to wit. 15l. 12s. was received by him on account of the plaintiffs. The plaintiffs replied to the third plea, that *P. G.* did not quit the ſervice of the plaintiffs, from 23d February, 1779, till 16th February, 1781, and then aſſigned a ſimilar breach. *Rejoinder* to the firſt replication (proteſting that the ſervice was not intended to be performed, as in the replication mentioned; proteſting alſo, that the plaintiffs did not take the ſaid *R. B.* into partnerſhip in their ſaid trade and in the ſame houſe) that, after the partnerſhip, all the monies received by *P. G.* were received by him, on the joint account of the plaintiffs and *R. B.* as copartners, traverſing the receipt of one-fourth of the money in the replication mentioned by *P. G.* on account of the plaintiffs. *Rejoinder* to the ſecond replication, that the ſaid *P. G.* quitted the ſervice of the plaintiffs in manner and form, &c. on which iſſue was joined. The plaintiffs *ſurrejoined* to the firſt rejoinder, that the ſaid *P. G.* did receive the ſaid three-fourths of the ſaid ſum of money, on account of the ſaid plaintiffs, on which iſſue was joined. On the trial of the cauſe there was a verdict for the plaintiffs, ſubject to the opinion of the Court, whether, under the circumſtances of the caſe, the defendant was liable to the plaintiffs in this action. By the Court, The queſtion in this caſe turns upon the intention of the parties at the time of entering into the contract; and in queſtions upon intention we muſt look to the ſubject-matter of the contract. Now, to diſcover the intention of the parties in the preſent caſe, we muſt look at the recital in the condition of the bond; this is very material, for it ſtates that the ſervice is to be performed *in the ſhop and 'compting-houſe, and not to the plaintiffs*; therefore it appears, on the face of it, to be a ſecurity to *the houſe*, and not to the perſons of the plaintiffs, and as long as the clerk continued in that houſe the defendant was liable. The partners in a banking-houſe are perpetually changing; and where a number of clerks are employed, the inconvenience of demands for freſh ſecurities from each, upon every ſuch change, would be enormous. The introduction of a new partner does not increaſe the riſque to the ſureties; for a bond of this kind is an undertaking for the clerk's honeſty. As to the caſe of *Wright* v. *Ruſſel*, this is diſtinguiſhable from that; for there the breach aſ-

ſigned

ſigned was for embezzling the whole partnerſhip money, whereas it ſhould have been for the plaintiff's money only. And here the plaintiffs have confined the breaches to that proportion of the money which was actually their property.

In debt on bond for 3000l. the defendant craved oyer of the condition of the bond which (after reciting that the ſociety had, by a letter of attorney, appointed one *H. H.* their general, or chief agent, or officer and receiver of all and ſingular their rents, in the ſaid letter of attorney, and the ſchedule or rental, thereunder-written, mentioned; and alſo that by certain articles of agreement of the ſame date, the ſaid *H. H.* had covenanted with the ſociety to receive the rents, and thereout to make the ſeveral payments, and to render account thereof, from time to time, and to anſwer and pay the reſidue of ſuch rents to the ſociety) was that if the ſaid *H. H.* his heirs, executors, and adminiſtrators, ſhould, from time to time, and at all times thereafter, well and truly pay, execute, and keep all and every the covenants, articles, payments, &c. and obſerve, obey, perform, fulfil, and keep the directions, orders, or inſtructions, of the ſaid ſociety in writing, then the obligation to be void. He then pleaded that the ſaid deed of covenants was made on 16th of July, 1755, between the ſociety of the one part, and *H. H.* of the other part; whereby after reciting that the ſaid ſociety had appointed the ſaid *H. H.* to be their *general or chief agent and alſo receiver of their rents*; *and, during their pleaſure, to manage and inſpect, overſee, take care of, and regulate the whole affairs, concerns, and intereſts, of the ſaid ſociety in Ireland*, at a ſalary of 350l. per annum; he, the ſaid *H. H.* covenanted to collect and receive the rents, and thereout pay yearly the ſums therein mentioned: and further, that the ſaid *H. H.* ſhould remit, by good and ſolvent bills, or otherwiſe, to the ſaid ſociety, or ſhould anſwer, pay, and diſcharge, to them, or their order or direction, in ſuch manner as they ſhould think fit, by letter or otherwiſe, ſignified by their order, by their clerk or ſecretary, or any other perſon by them authoriſed, *the whole rents* mentioned and contained in the ſaid ſchedule or rent-roll, *as alſo the increaſe and improvements that might or ſhould be made thereof, by or upon any new contracts or renewals of the then leaſes*, duly and punctually at the end of every ſix months. The defendant then pleaded the death of *H. H.* performance and ſatisfaction by him in his life time, and by the executors, ſince that time, of all the covenants, &c. and obſervance on his and their part of the directions, orders, and inſtructions of the ſociety. The *replication*, after (proteſting that the covenants had not been kept) was, that in the life-time of *H. H.* 1864l. 17s. 11d. became due and payable to the ſociety, and was received by the ſaid *H. H. for the rents, increaſe,*

Iriſh Society v. Needham, M. 27. Geo. 3. B.R. 1 Ter. Rep. 482.

increaſe, and improvements of the ſaid eſtate; yet he did not pay, &c. To this replication, there was a general demurrer and joinder in demurrer: in ſupport of the demurrer, it was contended that the replication was bad in point of law, becauſe it attempted to put in iſſue more than the covenant, on which the breach was aſſigned, comprehended, and no iſſue could be taken upon it, under which the plaintiff might not give in evidence the receipt and non-payment of money by *H. H.* to which the covenant, for the performance of which the defendant was bound, did not extend: for the replication was, that *H. H.* had received for *the rents, increaſe, and improvements of the ſaid eſtate*; whereas the covenant was for the payment of particular rents, ſpecified in a ſchedule, and the increaſe and improvements *thereof*, that is, of thoſe rents; but the replication was framed ſo as to take in the caſe in diſpute between the parties, viz. *fines paid for the renewal of leaſes*, and received by *H. H.* in his life-time, to which the covenant did not extend; and in the caſe of a ſurety the court will not extend a covenant beyond the ſtrict letter: it was alſo objected that the replication was bad on another ground, viz. becauſe it did not allege that the ſociety had made an order for the payment of a particular ſum, and that *H. H.* had not paid it. By the Court, The condition of the bond extends to all ſums which *H. H.* received as the general agent of the ſociety: he was to remit, by good and ſolvent bills, the whole rents, as alſo *the increaſe and improvements that ſhould be made thereof upon any new contracts or renewals of the leaſes*. Now *a fine is certainly an increaſe and improvement on a new contract*: it was received by him as general agent and receiver, and is both within the ſpirit and letter of the condition: as to the laſt objection, there was no neceſſity to allege, in the replication, that the ſociety made an order for remitting the ſums which *H. H.* received; for he was bound by the covenant *to remit*, &c. and if they had given any ſpecial direction, that ſhould have been ſhewn on the part of the defendant; and though the expreſſions in the covenant and the replication are varied, they are the ſame in ſubſtance: and if it had been neceſſary, on iſſue joined, the court would have rejected the word eſtate.

Duffield v. Scott and others, Executors of Balcher. Tr. 29 Geo. 3. B R. 3 *Ter. Rep.* 374.

And in an action on a general bond of indemnity, the defendant will be liable to anſwer *any coſts* that the plaintiff may have incurred, in an action brought againſt him *on the* default of the party for whom the defendant was ſurety.—In debt, on a bond given by the defendants' teſtator to the plaintiff, the defendants craved oyer of the condition of the bond, which was for the performance of covenants in an indenture of ſeparation between the plaintiff and his wife of the one part, and the teſtator of the other part, and alſo of that deed, which contained a covenant, by the teſtator, to indemnify the

the plaintiff from all debts whatſoever, which the plaintiff's wife ſhould, during the ſeparation, contract, and againſt *all coſts, charges, expences, and damages whatſoever*, which the plaintiff ſhould at any time thereafter pay, ſuſtain, or be put unto, &c. The defendants then pleaded *a general performance*; the replication was, that a judgment was recovered againſt the plaintiff by a creditor of his wife, for 82l. 14s. 10d. damages, *and* 23l. 15s. 2d. *coſts*; the plantiff then averred that he was obliged to pay to the plaintiff, in that ſuit, 120l. in diſcharge of the damages, *coſts, and charges* ſo recovered, and alſo, that, in his defence of that ſuit, *he neceſſarily laid out* 40l. *of all which premiſes the defendants afterwards had notice*, yet the defendants had not indemnified the plaintiff of and from the damages *and coſts*, nor *for the ſaid expences*. To this replication there was a general demurrer and joinder: the caſe was argued on two grounds, 1ſt, on a rule of pleading, which is, that a replication (when entire) which is bad in part, is ſo in the whole; 2dly, that it was not alleged that the defendants had notice of the demand. By the Court, As to the firſt, though there is ſuch a rule in law, it is miſapplied in this caſe; the common caſe in the books, to which the rule applies, is where two perſons join in a juſtification in treſpaſs, and there, if the plea be bad for one, it is alſo bad for both; but the rule cannot apply to any caſe where the objection is merely on account of ſurpluſage; this replication ſtates matter ſufficient to enable the plaintiff to maintain an action on the bond, and even though it had ſtated ſomething afterwards which was inaccurate, yet that would not have vitiated the whole. With reſpect to the ſecond point, it is ſaid that the plaintiff has demanded three things by his replication; now *if he is entitled to one of theſe*, he muſt have judgment: he is undoubtedly entitled to recover the amount of the debt for which he was ſued; and the queſtion is, whether he is not alſo entitled to *the coſts and expences?* there are caſes which ſay, that to entitle a perſon to recover on a bond of indemnity, he muſt ſhew that he was compelled by law to pay the debt; they go a great way to prove that the plaintiff, in this caſe, is entitled to recover the coſts and expences: if it had been intended by the parties that the obligor ſhould have notice of each demand, that ſhould have been inſerted as a condition in the articles of ſeparation, as is frequently done; and if they meant to take advantage of the want of notice, they *ſhould* have taken iſſue on that part of the replication, which ſtates, *of all which premiſes the defendants had notice:* they might have replied that they had no notice, if that were a material part of their caſe; inſtead of this they have demurred. But the purport of giving notice, is not in order to give a ground of action; but if a demand be made, which the perſon indemnifying is bound to pay, and notice be given to him,

and he refuſe to defend the action, in conſequence of which the perſon indemnified is obliged to pay the demand, that is equivalent to a judgment, and ſtops the other party from ſaying that the defendant, in the firſt action, was not bound to pay the money.

Rudder v. Price, *Hil.* 31. Geo. 3. C B. 1 *Hen. Black.* 547.

2. *Debt on ſimple contract.*]—An action of debt will not lie on a promiſſory note, payable by inſtalments till the laſt day of payment be paſt. This was an action of debt on a promiſſory note, payable by inſtalments; the firſt count, after ſtating the debt to be 452l. 10s. which the defendant owed to, and unjuſtly detained from, the plaintiff, went on, "for that whereas the ſaid defendant, on 30th March, 1790, made his certain note, &c. by which he promiſed to pay to the plaintiff, by the name of *R. R.* or order, 52l. 10s. for value received by him the ſaid defendant the ſame to be paid in manner following, viz. 20l. on 1ſt July then next; 20l. on 1ſt October then next; and 12l. 10s. on 1ſt January next; there were alſo the common money counts." To the firſt count there was a ſpecial demurrer, and the cauſes aſſigned were, that the 52l. 10s. in the ſaid note mentioned, was not then due or payable, nor could the ſame be ſued for by the plaintiff *till after the 1ſt day of January*, 1791; and alſo, that no cauſe of action is alleged againſt the defendant. To the other counts the defendant pleaded *nil debet*, on which iſſue was joined: the caſe was argued on the demurrer, and fully conſidered. *Per Cur.* In debt, there is a juſt rule of law, that for one contract, there ſhall be but one action; and, as a contract, to pay a certain ſum on ſeveral days of payment, is conſidered as one contract, it follows that no action can be brought till all the days of payment are elapſed; therefore as the note in queſtion, in this caſe, is for the payment of a ſum certain at different times, it muſt be conſidered as an entire debt for the amount of that ſum, and being ſo conſidered, no action of debt can be maintained upon it till all the days of payment be paſt.—Judgment for the defendant.

Aylett v. Lowe, Tr. 18. Geo. 3. C B. 2 *Black*, 1221.

In debt, on a *mutatus* for 250l. and *nil debet* pleaded, the jury found a verdict for 100l. and *nil debet* as to the reſt: it was moved to enter up a nonſuit, on the ground, that debt being an entire thing, part of the ſum could not be ſo recovered; but the court refuſed to ſet the nonſuit aſide; and the plaintiff had judgment for the ſum ſo given by the verdict.

Mac Quillin v. Cox, 29 Geo. 3. C.B. 1 *Hen. Black.* 249.

So, in an action of debt on ſimple contract, the declaration, after reciting that the defendant was ſummoned to anſwer the plaintiff, in a plea that *he render to him* 500*l.* &c. contained five counts: 1ſt, that the defendant was indebted to the plaintiff in 100l. for goods ſold and delivered; 2d, 100l. on a *quantum meruit*; 3d, 100l. on a *mutuatus*; 4th, 50l. for money had and received; 5th, 100l. on an account ſtated: the breach

aſſigned

aſſigned was, that the defendant *had not rendered the ſaid ſum of* 500l. *above-mentioned, or any part of it.*—There was a ſpecial demurrer, and the cauſe aſſigned was, that the plaintiff, by his declaration, demanded of the defendant 500l. and yet the ſeveral ſums claimed upon the counts did not amount in the whole to 500l. but to the ſum of 450l. only: *The Court* were clearly of opinion, that the demurrer could not be maintained, becauſe the plaintiff might, in an action of *debt on a ſimple contract*, prove and recover a leſs ſum than he demanded in the writ. Judgment for plaintiff.

In an action of debt, the firſt count in the declaration ſtated, that "the defendant on, &c. at Weſtminſter, in the county of Middleſex, was indebted to the plaintiff in the ſum of 2l. 12s. 6d. for goods ſold and delivered to the defendant at his ſpecial inſtance and requeſt." There were other counts in the ſame form: to this declaration there was a ſpecial demurrer, aſſigning for cauſe, that the ſuppoſed contracts were not ſufficiently or in any manner ſtated; that it was not ſtated when or where the ſaid ſuppoſed contracts or cauſes of action aroſe; and that it did not appear that they were made in the county where the venue was laid. By the Court, As to the firſt objection, that no contract is ſtated in the declaration; the words *ſold and delivered*, imply a contract, for there cannot be a ſale unleſs two parties agree: this would be ſufficient in a *mutuatus*, or for money lent; as to the other point, the venue cannot be laid in a plainer manner; the declaration ſtates, that the defendant at Weſtminſter, in the county of Middleſex, was indebted to the plaintiff; if it were neceſſary for the plaintiff to prove that the contract were made at Weſtminſter, it may be done under this deſcription; but it is not neceſſary; for it may be proved any where, which ſhews that the venue is merely added for form ſake; and it is ſufficiently laid here. Emery *v.* Fell, Tr. 27 Geo. 3. B.R. 2 *Ter. Rep.* 28.

In an action of debt, to recover 1066l. as expreſſed in the writ; the *firſt* count, in the declaration, was for 1000l. borrowed by the defendant of the plaintiff, and one *J. M.* whom the plaintiff had ſurvived; the *ſecond* count alleged that the defendant was indebted to the plaintiff in the further ſum of 66l. for legal intereſt, due and payable from the defendant to the plaintiff, *upon a certain other ſum* of money before that time lent and advanced: the defendant pleaded in abatement, and prayed judgment of the writ; becauſe the ſaid *ſum of money in the ſaid writ mentioned and thereby ſuppoſed to be borrowed*, was borrowed by the defendant and five others (naming them) jointly and not by the defendant only: to this plea the defendant *demurred*, and aſſigned for cauſe, that the plea, although pleaded in abatement of the whole demand, did not apply to the whole of the money demanded; that it did not extend to both the cauſes of action, but only to one of them; Herries *v.* Jamieſon, Ea. 34 Geo. 3. B.R. 5 *Ter. Rep.* 553.

that the defendant had not pleaded in abatement of the declaration, but in abatement of the writ merely, and had relied nevertheleſs upon matter appearing only in the count, without ſhewing any defect in the writ. By the Court, We muſt take the two ſums mentioned in the two counts to be two diſtinct ſums, that are not connected with each other; for it is ſtated, that the firſt count is for money borrowed, and that the ſecond count is for the intereſt of *another ſum* of money lent by the plaintiff; and one queſtion here is, whether the plaintiff may not demand, on the face of the declaration, the intereſt of that ſecured ſum by itſelf: in the caſe of money ſecured by a note at a diſtant day, with intereſt half-yearly in the interim, could not the lender recover the intereſt in aſſumpſit by itſelf, without waiting until the principal is due? If he can, he may alſo recover in an action of debt, if he chooſe to run the riſk of the defendant's waging his law, according to the authority of the caſe of *Walker* v. *Witter*, in *Doug.* 1, in which it was held, that where a party can maintain an action of *indebitatus aſſumpſit*, he may, if he pleaſe, bring debt: but the defendant ſhould have demurred *to that count if he thought it could not be ſupported*: at all events, however, the defendant's plea is bad, and cannot be ſupported: for the rule in pleading is, that if the plea in abatement be to the writ, it muſt anſwer the whole demand: now this plea is to the writ, and profeſſes to be a plea to the whole of the plaintiff's demand; but it does not amount to that; for it is in terms confined to the firſt count only, which is *for money borrowed*, and cannot be extended to the ſecond, which is not for money borrowed: it has been ſaid, however, by way of anſwer, that the count is only an expoſition of the writ, be it ſo: but this declaration contains two demands, the one for principal, the other for intereſt for another ſum, and the plea only gives an anſwer to the firſt—*Reſpondeat ouſter.*

Crawford v. Whittal, Hil. 13 Geo. 3. B.R. 1 *Doug.* 4. [1.]

3. *Debt on a foreign judgment.*]—Debt will lie on a foreign judgment; for where *indebitatus* aſſumpſit will lie, debt will alſo lie: and it has been determined in the court of king's bench, that *indebitatus* aſſumpſit may be maintained on a foreign judgment. This was an action of *indebitatus* aſſumpſit, brought by the plaintiff, as adminiſtrator of one *H.* in which he declared, that the defendant was indebted to him, as adminiſtrator, in the ſum of 74l. ſterling, for 6904 rupees, 10 annas, and 9 pice, of current money of Bengal, in the Eaſt Indies, by a certain judgment of the honourable the mayor's court at Calcutta, adjudged and awarded; the defendant demurred ſpecially to the declaration, and on the argument two points were made for the defendant; 1ſt, that aſſigned for cauſe of demurrer, viz. that there was no profert of the letters of adminiſtration; 2dly that the grounds of the judgment abroad and the cauſe of action

action there, ought to have been ſhewn. But the Court ſaid that profert of the letters of adminiſtration was unneceſſary; becauſe, in this action, the plaintiff had no occaſion to have deſcribed himſelf as adminiſtrator; as to the *ſecond* point, we are not to ſuppoſe it an unlawful debt; this has never been doubted, aſſumpſit has often been brought on judgments in foreign courts: the judgment is a ſufficient conſideration to ſupport the implied promiſe—Judgment for the plaintiff.

Sinclair v. Frazer, Dom. Proc. 1 *Doug.* 5 [1.]

So, where an action had been brought in the court of ſeſſion of Scotland, upon a judgment of the ſupreme court in Jamaica, the court of ſeſſion determined, that the plaintiff was bound to prove before them, the ground, nature, and extent, of the demand on which the judgment in Jamaica had been obtained; but, upon an appeal to the houſe of lords, they reverſed this deciſion, and declared, that the judgment of the ſupreme court of Jamaica ought to be received as evidence, *prima facie*, of the debt, and that it lies upon the defendant to impeach the juſtice thereof, or to ſhew the ſame to have been irregularly or unduly obtained.

Plaiſtow v. Van Uxem, Tr. 18. Geo. 3, 1 *Doug.* 5 [1.]

Alſo, in an action of aſſumpſit, in the court of king's bench, on a foreign judgment, in a court, called the court of ordinance, at Ghent; the plaintiff, *Van Uxem*, had a verdict and judgment, whereupon the defendant, after having moved in arreſt of judgment, and been refuſed a rule to ſhew cauſe, brought a writ of error in the exchequer-chamber, aſſigning errors ſpecially, that it did not appear upon what account the judgment abroad was given, nor that it was given on account of any juſt debt, or for any other good and ſufficient cauſe of action: the cauſe was ſet down for argument on 26th June, Tr. 18 *Geo.* 3, but no one appeared to argue on the part of the plaintiff in error: and the judgment was affirmed of courſe.

Walker and others, v. Witter, Tr. 19 Geo. 3. B.R. 1 *Doug.* 1.

This was *an action of debt* on a foreign judgment in the ſupreme court in Jamaica, ſet forth with the words *prout patet per recordum*, the defendant, beſides *nil debet*, pleaded *nul tiel record:* upon the *nil debet*, the plaintiffs took iſſue, and at the trial a verdict was found for the plaintiff: to the plea of *nul tiel* record, the plaintiffs replied that there was ſuch a record, concluding, and this *they are ready to verify by the ſaid record.* This iſſue in law came on to be argued, and the judgment, on which the action was brought, was brought into court, under the ſeal of the court of Jamaica. By the court, wherever *indebitatus aſſumpſit* is maintainable, debt alſo is, and it has been admitted, on the part of the defendant, that *indebitatus aſſumpſit* would have lain: debt may be brought for a ſum capable of being aſcertained, though not aſcertained at the time of the action brought, and it is not neceſſary that the plaintiff, in debt, ſhould recover the exact

ſum demanded (1). As to the point, that the judgment is not a record, and that the defendant muſt have judgment on the plea *nul tiel record*; there is no foundation for it; becauſe it is ſtated to be a judgment of a court in Jamaica: as ſuch it is to be tried by the country (as it might have been in this caſe on the *nil debet*) and not by the court; the *prout patet per recordum* in the declaration is abſurd, and may be rejected, and the plea of *nul tiel* record is a mere *nullity*; the plaintiffs have done right to ſtate the judgment in the manner they have done, becauſe that is matter of deſcription; the difficulty in the caſe has ariſen from not fixing accurately what a court of record is in the eye of the law; that deſcription is confined properly to certain courts in England, and their judgments cannot be controverted: foreign courts and courts in England, *not of record*, have not that privilege, nor the courts in Wales, &c; but the doctrine, in the caſe of *Sinclair* v. *Fraſer* was unqueſtionable: foreign judgments are a ground of action every where, but they are examinable; and *Lord Mansfield* ſaid, he recollected a caſe of a decree on the chancery ſide, in one of the courts of great ſeſſion in Wales, from which there was an appeal to the houſe of lords, and the decree affirmed there: afterwards a bill was filed in the court of chancery, on the foundation of the decree ſo affirmed, and Lord *Hardwicke* thought himſelf entitled to examine into the juſtice of the deciſion of the houſe of lords, becauſe the original decree was in Wales, whoſe deciſions were clearly liable to be examined; he alſo mentioned a caſe on the *mortmain* acts to the ſame purpoſe.

Galbraith v. Neville, Ea. 29 Geo. 3. B.R. 1 *Doug.* 5 ‡ [2.]

So, where an action of debt was brought on a judgment in the ſupreme court of Jamaica, and there was a verdict for the plaintiff, the court being moved for a new trial, *Buller*, J. ſaid The doctrine which was laid down in *Sinclair* v. *Fraſer*, has always been conſidered as the true line ever ſince, namely, that the foreign judgment ſhall be *prima facie* evidence of the debt, and concluſive till it be impeached by the other party. I have often heard Lord *Mansfield* repeat what was ſaid by Lord *Hardwicke*, in the caſe from Wales; and the ground of his Lordſhip's opinion was this: when you call for my aſſiſtance to carry into effect the deciſion of ſome other tribunal, you ſhall not have it, if it appears that you are in the wrong; and it was on that account that he ſaid he would examine into the propriety of the decree. As to actions of this ſort, it was held in *Walker* v. *Witter*, that the foreign judgment was only *prima facie* to be taken to be right; that is, we will allow the ſame force to a foreign judgment that we do to thoſe of our own courts of record. But if the matter were carried further, we ſhould give them more credit, we ſhould

(1) It had been ſaid in the courſe of the argument at the bar, that the value of Jamaica currency was fluctuating and uncertain.

give

give them equal force with thoſe of courts of record here. Now a foreign judgment has never been conſidered as a record, it cannot be declared on as ſuch, and a plea of *nul tiel* record in ſuch a caſe is a mere *nullity:* how then can it have the ſame obligatory force? In ſhort, the reſult is this: that it is *prima facie* evidence of the juſtice of the demand in an action of aſſumpſit, having no more credit than is given to every ſpecies of written evidence, viz. that it ſhall be conſidered as good till it is impeached.

4. *Pleadings in debt.*]—In debt on a bond, the defendants craved oyer of the condition, which was, that one *Carruthers* ſhould faithfully and diligently ſerve the plaintiff as his clerk in the diſtillery buſineſs; and if he ſhould loſe, embezzle, deſtroy, purloin, conſume, miſpend, or unlawfully make away with any money, notes, bills, drafts, &c. that ſhould be entruſted to him, or *in any way* come to his hands, that the defendants, or one of them; ſhould, on notice thereof, make good the loſs. They then pleaded, that *Carruthers* did faithfully and diligently ſerve the plaintiffs, and did not at any time loſe, embezzle, &c. The *replication* was, that during *Carruthers'* continuance in the plaintiff's ſervice, 13l. 14s. 9½d. came to his hands on account of the plaintiff, which he, on the ſame day, &c. embezzled and miſpent: to this replication there was a demurrer, and the cauſe aſſigned was, that it did not appear whether *Carruthers* had received the money for the plaintiff in his buſineſs of a diſtiller, or in what capacity he had received it; and that it was not ſhewn from whom he had received it. On the argument, it was urged, on the behalf of the plaintiff, that in ſuch a retail buſineſs as that of a diſtiller, the money was received in very ſmall ſums at different times, and it could not be neceſſary that each fraction ſhould be aſſigned as a different breach, and iſſues taken on each; and that, perhaps, the money might have been taken out of the till, and then it could not be known of whom in particular it was received. But by the Court, The breach muſt be particularly aſſigned: if the money was taken out of the till, that ſhould have been alleged.

Jones *v.* Williams and others, Tr. 19 Geo. 3. B.R. *Doug.* 214.

In an action of debt on a bond, with a penalty of 2000l. the condition was, that if *A.* who had been appointed treaſurer of a pariſh, ſhould and did *render to the plaintiffs, a true, juſt, and perfect account in writing*, of all and every ſum and ſums of money that he ſhould receive for the relief and maintenance of the poor of the ſaid pariſh, the bond ſhould be void. The defendant having prayed oyer, and ſet forth the condition, pleaded, 1ſt, *non eſt factum*; 2dly, that *A.* did, from time to time, and at all times, *render to the plaintiffs a true, juſt, and perfect account.* The plaintiffs replied to the 2d plea, that by the laſt account in writing, given and rendered by *A.* there appeared to be due from *A.* as ſuch treaſurer to the plaintiffs, 276l. 6s. 5d. which he was requeſted

Bache and others *v.* Proctor, Ea. 20 Geo. 3. B.R. *Doug.* 382.

to render and pay, according to the form and effect of the condition, but had neglected and refuſed, and ſo the ſaid plaintiffs ſay, that the ſaid *A.* did not, from time to time, render to the plaintiffs a true, juſt, and perfect account," &c. There was a *demurrer* to this replication, and the principal cauſe aſſigned was, that the *rendering* and *paying* the ſum ſuppoſed to be due, was not a matter required by the condition, nor was the refuſal of payment a breach of the condition. But by the Court, It was clearly the intention of the parties, and the fair conſtruction of the condition is, that the money ſhould be paid by *A.* or on his default, by the defendant: it reſembles the caſe in the common pleas, where the condition of a bond was, that it ſhould be void if the obligor *did not pay*; and performance being pleaded, on the ground of the literal expreſſion, the Court held, that the palpable miſtake of a word ſhould not defeat the true intention of the parties. Here it never could be meant, that ſo large a penalty ſhould be taken merely to enforce the making out a paper of items and figures.—Judgment for the plaintiff.

Ankerſtein *v.* Clarke *& al.* Ea. 32 Geo. 3 B.R. 4 *Ter. Rep.* 616.

The plaintiff declared on a bond, as given by the defendants' teſtator to himſelf. The defendants pleaded the general iſſue, and it was objected, that the bond produced appeared to be given to the plaintiff and his wife, adminiſtratrix of *A. B.*; and that therefore it varied from that declared on: and the plaintiff was nonſuited. On a motion to ſet this nonſuit aſide, The Court noticed the caſes in 3 *Lev.* 403, 1 *Strange* 229, and 2 *Mod.* 217; and held, that if a bond be given to baron and feme, the huſband may refuſe, *quoad* her, and bring the action alone; and if he do bring the action alone, it ſhall be looked upon to be his refuſal as to her; and in this caſe, though the bond would not ſurvive to the huſband if ſhe died, as it was given to her as adminiſtratrix, yet that could make no difference, as the huſband might reduce all the aſſets into poſſeſſion, and would only be liable on a devaſtavit, if he did not pay the debts of the inteſtate.

Homer *v.* Moor, cited per *Aſton*, J. Ea. 10 Geo. 3. B.R. 5 *Burr.* 2614.

Upon a *joint bond*, the action cannot be brought againſt one of the obligors only: for where *non eſt factum* was pleaded, and the jury found it to be the deed of both, it was moved in arreſt of judgment, upon the face of the declaration: the counſel who made the motion acknowledged, that it could not have been moved in arreſt of judgment, if it had not appeared upon the face of the declaration: but that here it did appear, as both had ſealed the obligation, and both were living; and if it had not appeared upon the face of the declaration, it muſt have been pleaded. The counſel for the plaintiff admitted this, and the judgment was arreſted.

Meaſe, Executrix, *v.* Meaſe, Ea. 14 *Geo.* 3. B.R. *Comyn.* 47.

In an action of debt, upon bond conditioned for payment at a certain day, it was pleaded, that it was given as an indemnity to the plaintiff's teſtator againſt another bond, and not

not damnified. On demurrer, it was held to be bad, and that the agreement could not be given evidence, it being ſettled that no parol evidence can be given to abate or extend a bond.

If the condition of the bond is not a good one, the defendant cannot take advantage of it upon *non eſt factum*; he muſt pray over of the condition, and demur: this was debt on a bond for 200l. plea *non eſt factum*, and iſſue thereon. On the trial, the condition appeared to be, that if the defendant, during the life of the plaintiff, married any other woman, then, on payment of 100l. to the plaintiff, the bond to be void; there was a verdict, ſubject to the opinion of the Court, whether the plaintiff ought to recover? By the Court, The verdict for the plaintiff muſt ſtand; order and method ought to be obſerved; unleſs oyer be prayed of the condition, no matter of law can ariſe: on the iſſue of *non eſt factum*, only queſtions of fact can be tried. Colton v. Goodridge, Tr. 16 *Geo.* 3. C. B. 2 *Black.* 1108.

It was moved to plead three pleas: 1ſt, *non eſt factum*; 2dly, the inſolvent debtor's act of 1761; 3dly, *ſolvit poſt diem:* no cauſe was ſhewn, and the rule made abſolute as to the laſt two pleas, but diſcharged as to the firſt, as being contradictory to the others. Fox v. Chandler, Tr. 13 *Geo.* 3. C.B. 2 *Black.* 903.

So, in debt on bond, the Court would not ſuffer *non eſt factum* and *ſolvit ad diem* to be pleaded together, being inconſiſtent pleas. Arnold v. Baas, Ea. 15 *Geo.* 3. C.B. 2 *Black.* 993.

In an action of debt, on a bond given by the defendant, as ſurety for another, and plea of *non eſt factum*; it was moved to withdraw this plea, and plead infancy of the obligor, on an affidavit of ſurpriſe, the defendant being adviſed he might give his nonage in evidence on *non eſt factum:* this was oppoſed on the behalf of the plaintiff. But by the Court, We cannot overturn all the laws made for the protection of infants: this plea goes to the merits and ſubſtantial juſtice of the caſe. Olding v. Arundel, Hil. 2 *Geo.* 3. B.R. 1 *Black.* 357.

If a bond has lain dormant without payment of any intereſt for twenty years, it ſhall be preſumed to have been paid: and in ſuch caſe the defendant may plead *ſolvit ad diem*, and rely on the preſumption. 1 *Burr.* 414. 4 *Burr.* 1963.

But no leſs time than 20 years can of itſelf form a preſumption that a bond has been paid; and even with regard to the rule of 20 years, where no demand has been made during that time, that is only a circumſtance for the jury to found a preſumption upon, and is in itſelf no legal bar; for there is a diſtinction between length of time as a bar, and where it is only evidence of it: in the former it is poſitive, and the jury are concluded by the length of time that operates, as where the ſtatute of limitations is pleaded, it is a bar: but as there is no ſtatute of limitations, that bars an action upon a bond, length of time is there uſed merely by way Oſwald v. Legh, Tr. 26 Geo. 3. B.R. 1 *Ter. Rep.* 270. *Cowp.* 108, 109.

way of evidence, to be left to the conſideration of the jury to be credited or not, and to draw their inference one way
1 *Ter. Rep.* 271. or the other, according to circumſtances: in ſome caſes, therefore, ſatisfaction of a bond may be preſumed within a leſs period than 20 years, if ſome other evidence be given in favour of ſuch a preſumption, ſuch as having ſettled an account in the intermediate time, without any notice having
Cowp. 109. been taken of ſuch a demand; and Lord *Raymond* has left it to the jury, even on 16 years, where no intereſt appeared to have been paid during that period.

1 *Ter. Rep.* 271. And in *Walden* v. *Davis*, at Guildhall, Sitt. af. Tr. 1760, Lord *Mansfield* held, that 18 years were ſufficent to raiſe a preſumption upon, unleſs ſome reaſon was aſſigned for not calling on the party: and in that caſe, the caſe of *Moyle* v. *Lord Roberts*, was cited, where the plaintiff, in order to obviate the preſumption, ſhewed two writs of *teſtatum capias* to have been ſued out, but not ſerved, becauſe the party could not be found; in which laſt caſe Lord *Mansfield* ſaid, there was no foundation for the preſumption.

1 *Ter. Rep.* 271. This doctrine of 20 year's preſumption, was firſt taken up by Lord *Hale*, who only thought it a circumſtance from whence a jury might preſume payment. In this he was followed by Lord *Holt*, who held, that if a bond be of 20 years' ſtanding, and no demand proved thereon, or good cauſe of ſo long forbearance ſhewn (1), on *ſolvit ad diem*, he ſhould intend it. This doctrine was afterwards adopted by Lord *Raymond*, in *Conſtable* v. *Somerſet*, Hil. 1 *Geo.* 2: that was debt upon bond, where the defendant, an executor, craved oyer of the bond, and of the condition, which appeared to be for the payment of ſo much money, ſix months after the death of the defendant's teſtator. The defendant, in his plea averred, that the teſtator died on 15th March, 1711; and that he had paid the ſaid ſum on the 16th of March, 1711, within ſix months after the teſtator's deceaſe, and thereon iſſue was joined. The defendant relied on the ground, that as he, after the death of the teſtator, his father, had an eſtate in the plaintiffs' neighbourhood, and was conſtant and regular in all his payments; it ſhould be preſumed that the money was paid to the plaintiff. In anſwer to this objection, evidence was given of a demand of the money on the defendant himſelf, in 1725; and the chief juſtice ſaid, that the preſumption of money having been paid which was due on bond, if it were put in ſuit after 20 years' ſtanding, was not the old, but a new doctrine, which had been introduced in Lord *Hale*'s time; and that he would never ſuffer a plaintiff to be ſtripped of a juſt debt, by ſuch a preſumption as was then contended for.

(1) As if a witneſs is produced to prove that the party was not in circumſtances to pay, or a recent acknowledgment of the debt.

In

In an action on a bond, *non eſt factum*, and a tender as to part, cannot be pleaded. To debt on bond, conditioned to pay by inſtalments till the whole was paid, the defendant pleaded, 1ſt, *non eſt factum*; 2dly, that the whole, except 63l. had been paid, and that that ſum was tendered to the plaintiff before the day on which it became due. It was moved on the part of the plaintiff, that the rule obtained by the defendant for pleading theſe ſeveral matters might be diſcharged, on the ground of their being inconſiſtent: and the Court ſaid, they had, by the ſtat. 4 *Ann*, c. 16. ſ. 4, a diſcretion either to permit, or to refuſe ſeveral matters to be pleaded; and that in their diſcretion they ought not to permit ſuch matters as the preſent to be pleaded, leſt there ſhould be an incongruity on the record; ſince if the defendant ſucceeded on the firſt plea, it would appear that there never exiſted ſuch a bond as that declared on, and yet that the defendant had admitted that ſomething was due on the very ſame bond. Jenkins *v.* Edwards, Hil. 33 Geo. 3. B.R. 5 *Ter. Rep.* 97.

In debt on a bond, with condition to pay a certain ſum of money, *on or before* ſuch a day, the defendant craved over of the bond, and ſet forth the condition, and then pleaded payment of the money before the day, to wit, that he paid it on ſuch a day; the plaintiff demurred, and the defendant joined in demurrer. By the Court, The defendant has pleaded that he paid the money *before* the day, according to the condition which is in the diſjunctive, to pay *on or before* the day; and the demurrer admits the plea to be true, and confeſſes the money was paid before the day, ſo the defendant muſt have judgment, but the defendant had leave to amend on payment of coſts. Anonymous, Tr. 3 Geo. 3. C.B. 2 *Wilſ.* 173.

In debt on a bond, with condition for the payment of a certain ſum of money, *on a certain day*, the defendant pleaded payment *before* the day: the plaintiff replied, that the defendant did not pay before the day, *et de hoc ponit ſe ſuper patriam:* the defendant demurred, and the plaintiff joined in demurrer. The counſel for the defendant admitted that *the plea at firſt was bad*, but inſiſted the plaintiff had made it good by replying and tendering iſſue upon it; or that if the iſſue was immaterial, there ought to be a repleader. By the Court, This is a caſe where the defendant has not joined iſſue to the country, but has put himſelf upon the judgment of the court; and though the replication be bad, yet whenever the caſe is upon a demurrer, the court looks for the firſt fault, which is in the plea here, and therefore judgment ought to be for the plaintiff. Anonymous, Hil. 3 Geo. 3. C.B. 2 *Wilſ.* 150.

But the defendant may plead a payment made *before* the day as a payment *at the day*; per *Buller*, J. in Sturdy, *v.* Arnaud, Ea. 30 *Geo.* 3. B.R. 3 *Ter. Rep.* 601.

In

Knight v. Preſton, Ea. 7 Geo. 3. C. B. 2 *Wilſ.* 332.

In debt upon a bond, the defendant pleaded, 1ſt, *non eſt factum*; 2dly, that the defendant, by force and reſtraint of impriſonment, executed the bond; 3dly, admitting the bond to be his deed, the plea was, that the defendant, before 25th Oct. 1760, was a fugitive for debt beyond the ſeas, at Canada, and entitled to the benefit of the inſolvent debtors' act, made in the firſt year of the king; and on February 1ſt, returned to take the benefit of ſuch act: that before he went abroad, and beyond the ſeas, and long before the 25th of October, he was indebted to the plaintiff *in a large ſum of money*, to wit, *the ſaid ſum of money in the ſaid condition mentioned*; and being ſo indebted, the plaintiff arreſted him, and put him in priſon for it, before he could take the benefit of the act, where he continued until 27th November, 1762, when he executed the bond to obtain his releaſe and diſcharge; and by and through the force and reſtraint of impriſonment: that being diſcharged, he, on 21ſt February, 1763, ſurrendered himſelf to the king's-bench priſon, in order to take the benefit of the act; and on 31ſt March, 1793, he was diſcharged at the quarter ſeſſions. The plaintiff *replied*, and joined iſſue upon the 1ſt plea of *non eſt factum*; to the 2d plea, he replied that the defendant executed the bond of his own free will, and not by force and reſtraint of impriſonment; to the 3d plea there was a general demurrer. The defendant joined iſſue on the 2d plea, and in demurrer as to the third plea. Upon the demurrer, three exceptions were taken: 1ſt, that the defendant ſaid he was indebted to the plaintiff *in a large ſum of money*, to wit, *the ſaid ſum of money in the ſaid condition mentioned*, and that this, coming under a *videlicet*, is not directly alleged, and therefore is not traverſable. But by the Court, The office of the *videlicit* is to explain what went before, and where it is not repugnant or contradictory, it is material and traverſable (1), and they held the plea good in this point.—The 2d exception was, that the new bond had extinguiſhed the old debt, and therefore the defendant was not entitled to be diſcharged from the bond, which was a debt created in 1762. The court ſeemed to differ on this point, but gave no opinion.—The 3d exception was, that it appeared that the defendant had been returned from Canada to England above a year, viz. from February 1ſt, 1762, till Feb. 21ſt, 1763, before he ſurrendered himſelf. This was held a good exception by the whole Court; for the defendant ought to have ſurrendered himſelf in a reaſonable time; but he laid by, was arreſted, and continued in gaol five months, when he might have brought his *habeas corpus*, and been ſurrendered to a proper priſon, in order to take the benefit of the inſolvent

(1) 1 *Saund.* 170, 118. *Hob.* 172. *Salk.* 561.

debtors'

debtors' act; but inſtead of doing that, he gave this bond; and upon this exception alone, judgment was given for the plaintiff.

If a defendant plead performance generally to an action on a bond for the performance of covenants, and the plaintiff in his replication *aſſign a particular breach*, he ought to conclude *et hoc paratus eſt verificare*, in order that the oppoſite party may have an opportunity of anſwering the whole matter.—This was an action of debt upon bond, brought by the plaintiffs, who were the Sheriffs of Middleſex, againſt the defendant, a ſurety of one *Stanhope*, one of their bailiffs: upon oyer prayed of the bond and condition, it appeared that the condition was for the performance of covenants in a certain deed of indenture, bearing even date with the bond: the defendant pleaded 1ſt, *non eſt factum*; 2dly, a ſpecial plea, ſetting forth the indenture in the condition mentioned, and the ſeveral covenants therein agreed to be performed by the defendant, the affirmative of which were, that the ſaid *J. S.* ſhould duly and lawfully execute and ſerve all briefs, precepts, &c. and make true return in writing, &c. The plea as to this was generally, that the ſaid *J. S.* had performed the covenant: to this plea the plaintiff *replied*, and ſet forth *a particular warrant*, directed to *J. S.* alleging, that he, *J. S.* had not made a due return to it, concluding, and this *they further pray may be enquired of by the country.* To this the defendant demurred, and aſſigned for cauſe, that it concludes to *the country*, when the ſame ought to have concluded with a *verification.* By the Court, It is a rule in pleading, that you cannot go to iſſue on a general averment of performance; and the reaſon is this, that the queſtion may be brought to ſome degree of certainty, and notice given of what is to be agitated at the trial. When a particular breach is aſſigned, there is an affirmative offered on one ſide, upon which the other may take iſſue, but here there is a general averment, and no iſſue is offered by the replication; upon this objection therefore there muſt be judgment for the defendant. But the plaintiff had leave to amend.

Sayre & *al.* v. Minns, Hil. 17 Geo. 3 B.R. *Cowp.* 575.

In debt for an annuity, granted by the defendant to the plaintiff. The plaintiff *declared*, that the defendant, by a certain deed-poll, for the better ſupport, proviſion, and maintenance of the plaintiff, then a faithful ſervant of him, the defendant, and for other good cauſes and conſiderations, did grant to the plaintiff, one annuity, or yearly payment of 40*l.* for the term of her natural life, *to be paid* quarterly, *at the defendant's manſion houſe* in Ipſwich, whereby the plaintiff *was ſeiſed of the ſaid annuity, or yearly rent of* 40*l. in her demeſne, as of freehold*, viz. for the term of her natural life, and that an arrear became due, &c. and had not been rendered and paid by the defendant. The defendant craved oyer of the

Hope v. Colman, Hil. 4 Geo. 3. C. 3. 2 *Wilſ.* 221.

the deed, whereby it appeared that the defendant had covenanted to pay the annuity to the plaintiff during her natural life (*if the ſame ſhould be perſonally demanded by the ſaid* E. Hope) and there was a proviſo, that if the grantee, the plaintiff, married with any perſon in the life-time of the defendant, without his approbation and conſent in writing, the annuity ſhould ceaſe, and the deed thereupon be void: the defendant then proteſting that he was always ready to pay, pleaded, 1ſt, that *the plaintiff did not perſonally demand the annuity at the defendant's houſe*; 2dly, with a like proteſtation of his readineſs to pay, that the plaintiff did not demand the annuity perſonally of the defendant. The plaintiff demurred generally to each of the defendant's pleas, and he joined in demurrer. On the argument of this demurrer, the defendant objected; 1ſt, that the whole deed was before the court, and ought to be taken together, and the *perſonal demand* to be coupled with the grant; 2dly, that in the declaration it was laid, that by virtue of the grant, the plaintiff became and *was ſeiſed of the annuity in her demeſne*, as of freehold, which was ill, this being a grant of a mere perſonal *thing*, and not a rent iſſuing out of land. By the Court, The grant is ſubſtantive, and ſo is the covenant ſubſtantive, and the demand is not traverſable, whatever it might have been, if an action had been brought upon the covenant; but we think it would not be traverſable in that caſe, as it is contained in a parentheſis in the deed; 2dly, as to the manner of pleading in the declaration, that the plaintiff was ſeiſed of the annuity in her demeſne; that is a mere matter of form, and this being upon a general demurrer, it is helped by the ſtat. 4 & 5 Ann.

Baldee & *Ux.* *v.* Elers, Ea. 33 Geo. 3. B R. 5 *Ter. Rep.* 250.

To debt on bond for 786l. 13s. 4d. dated 18th July, 1782, given by the defendant to the plaintiff's wife, when ſole, and conditioned for the payment of 393l. 6s. 8d. on 18th July, 1783, with lawful intereſt. The defendant pleaded, *inter alia*, certain articles of agreement, of the ſame date as the bond between the plaintiff's wife, two ſiſters, and the defendant, their brother; in which (after reciting that the three ſiſters had placed their fortunes in their brother's hands, for which he had given them ſeparate bonds; that the ſiſters had agreed to live together, that the defendant ſhould pay intereſt for the whole to any one, whoſe receipt ſhould be a diſcharge: but if one or two married, the intereſt of her or their portions ſhould be paid to the unmarried one; and that if all ſhould marry, then the whole principal money ſhould be equally divided between the three ſiſters) the parties covenanted with each other for the performance of the above agreement: *the plea* then ſtated, that the bond, on which the action was brought, was one of thoſe mentioned in the articles, and was given to the plaintiff's wife, for her portion, upon

upon the terms and conditions in the articles; and that one of the ſiſters was ſtill alive, and unmarried. To this plea there was a general demurrer and joinder: in ſupport of the demurrer it was contended, that the plea could not be ſupported, becauſe it did not allege performance of the covenant to which the bond referred, namely, payment of intereſt, either to the plaintiff's wife, or to her unmarried ſiſter. To this it was anſwered, that by the articles, the plaintiff's wife was not entitled to any intereſt at preſent; that in fact it had been paid to the unmarried ſiſter; and if the articles had not been performed, the plaintiffs had their remedy on them. But *Per Cur.* The bond is alſo in force as an additional ſecurity to the articles; and as performance of the articles is not alleged in this plea, it cannot be ſupported.—Judgment for the plaintiff.

In an action of debt, on a bond for 6000l. conditioned for the payment of 3000l. by the heirs or executors of the obligor, to the plaintiff, her executors, adminiſtrators, or aſſigns, at the expiration of twelve calendar months, from and after the death of the obligor, the defendants, after craving and ſetting forth over of the condition of the bond, pleaded, that after the making of the writing obligatory, to wit, on ſuch a day, the obligor took to wife and married the plaintiff; and the plaintiff then and there became covert of, and wife to the obligor, and continued ſo to be, until, and at the death of the obligor. The plaintiff replied, that the bond was made in contemplation of marriage, and with intent, in caſe ſuch marriage took effect, that the plaintiff ſhould have the full benefit thereof: to this replication there was a general *demurrer*, and joinder in demurrer. By the Court, The general principle is, that if a man marry a woman, to whom he is indebted, the debt is thereby extinguiſhed *(Co. Lit. 264. b.)*; but it does not follow that a caſe may not be ſo circumſtanced as not to come within that rule. The firſt queſtion in this caſe is, whether this replication be or be not good: it ſtates ſhortly, that the bond was given before marriage, in contemplation of the marriage, and with an intent to ſecure a certain ſum of money to the wife, on the event of her ſurviving her intended huſband. The facts diſcloſed by this replication are perfectly conſiſtent with the bond; therefore it does not appear that there is the leaſt objection to the replication. The other point is ſo ſettled that it ought not now to be queſtioned; for in *Cage* v. *Acton*, (1) "where to an action of debt for rent, againſt an adminiſtratrix, ſhe pleaded, that the inteſtate, in his life-time, in conſideration of a marriage to be ſolemnized between him and herſelf, became bound to her in a bond of 2000l. con-

Milbourn *v.* Ewart and others M. 34 Geo. 3. B.R. 5 *Ter. Rep.* 381.

(1) Lord *Raym.* 515; *Salk.* 325; *Carth.* 511; *Com.* 67; *Holt*, 309, 12 *Mod.* 288.

ditioned for the payment of 1000l. within a certain time after the inteſtate's death, if ſhe ſurvived him: and then averred, that the marriage took effect; that the obligor died inteſtate, and that the 1000l. had not been paid to her; that ſhe had taken out adminiſtration, and that 250l. aſſets came to her hands, which ſhe retained, in ſatisfaction of the bond. Upon demurrer, the judges, *Gould* and *Turton*, held that the bond was not extinguiſhed, *contra Holt*, Ch. J. who contended that it was;" and that caſe, in which all the arguments on this point are to be found, does not appear in any of the printed reports of the caſe to have been reverſed. The caſe of *Cage* v. *Acton* is alſo confirmed by another, alluded to in *Foord* v. *Foord*, Tr. 9. *Geo.* 3. B.R. (which was a long ſpecial verdict, brought by writ of error from Ireland, on a long and intricate will, 2 *Black.* 698): there the counſel, in arguing it, and ſpeaking of the different conſtruction and rules which in many caſes prevailed in equity, contrary to what were allowed in courts of law, ſaid, that "in the caſe of a bond given before marriage, by a man to a woman, by way of a ſettlement; at law, the bond was extinguiſhed by the marriage, but that equity would ſet it up again after the death of the huſband." But Lord *Mansfield* ſaid, "that was a miſtake, for the bond was not extinguiſhed at law; and Mr. Juſtice *Wright*, who was one of the ſtricteſt law judges that ever ſat in Weſtminſter hall, allowed ſuch a bond which had been paid to be given in evidence, on a plea of *plene adminiſtravit*; and Lord *Mansfield* ſaid that he thought he did quite right."—Judgment for plaintiff.

Shetelworth *v.* Neville, Mic. 27 Geo. 3. 1 *Ter. Rep.* 454.

In debt on two bonds made by the defendant's father, the one in 80l. and the ſecond in 480l. the pleas were, 1ſt, the general iſſue; 2dly, nothing by deſcent; 3dly, a bond given to the defendant by his father, upon which there was due 70l. 10s. for principal and intereſt. The plea then ſtated, that the defendant had not any lands or tenements which were the lands or tenements of his father, by hereditary deſcent, in fee ſimple from his father, except a certain meſſuage, with the appurtenances, and alſo except a certain windmill, with the appurtenances; *which ſaid lands and tenements are in the firſt place, ſubject and liable to the payment* of the ſaid ſum of 70l. 10s. ſo due and owing to the defendant, *and alſo to the payment and ſatisfaction of a certain other ſum of* 100l. *laid out and expended by the defendant ſince the death of his father, for, in, and about the repairing of the ſaid windmill, with the appurtenances, over and beyond the amount of the rents, iſſues, and profits thereof*; 4th, that there were no aſſets, except the ſaid meſſuage and windmill, which were firſt ſubject to the payment of the 70l. 10s. due to the defendant; 5th, that there were no aſſets, except the ſaid meſſuage and windmill. To the third plea there was a general demurrer, and joinder in demurrer. *By the Court*, It is a ſtrong preſumptive argument

argument that this plea is bad, that it is the firſt time it has ever been attempted to be pleaded; but on the reaſon of the thing it is not good: the caſe of an heir at law is not like that of a truſtee for the payment of debts: a truſtee is not at liberty to apply the rents and profits to his own uſe, they muſt go in diminution of the juſt debts; but that is not the caſe with reſpect to an heir at law; for till the poſſeſſion is recovered againſt him, he is entitled to the rents and profits, and he is entitled to receive them till judgment is given againſt him. In the mean time, he may have received more than ſufficient to pay for the repairs; but there is a defect in point of form, which is deciſive in this caſe, namely, that it is not ſtated that theſe were for *neceſſary repairs*; the word *repairs*, is not a technical, definite expreſſion, it may be uſed fraudulently: if the repairs were not neceſſary, it is undoubtedly bad; therefore there is no occaſion to go into any other part of the caſe.

In debt on a bond from the defendant to the bankrupt, before his bankruptcy, conditioned for the payment of an annuity of 100l. to be payable quarterly; the defendant pleaded, that at the time of bringing the action, only four quarterly payments were due; that before this action was brought, and alſo before the bankruptcy, the defendant lent to the bankrupt and another, on their promiſſory note, 200l. bearing intereſt; that the bankrupt, before his bankruptcy, agreed, and *by a writing under his hand, of the ſame date, authoriſed and empowered the defendant to retain out of the annuity*, as the ſame ſhould become due, the 200l. and intereſt; which 200l. and the intereſt, remained unpaid, *otherwiſe than by retaining* the ſame out of the annuity ſo due; and that the arrears of the annuity are ſtill inſufficient to ſatisfy the ſame. The plaintiffs *replied* the bankruptcy of *B.* after the above authority given; and the aſſignment of his effects to the plaintiffs, before either of the quarterly payments of the annuity became due. To this replication there was a demurrer, and joinder in demurrer. *By the Court*, The defence ſtated in the plea, does not contradict the annuity bond; on the contrary, it is perfectly conſiſtent with it, and proceeds on the ſuppoſition of there being ſuch a bond. The plea affirms the bond, and ſpecifies the mode by which the money lent to the obligee was to be repaid, namely, by retaining the payments ſecured by the annuity bond; and it was competent to the bankrupt to enter into ſuch an agreement before his bankruptcy: but it is ſaid that theſe payments did not become due till after the bankruptcy of the obligor, and that therefore they cannot be retained againſt his aſſignees: now in juſtice and conſcience, it is impoſſible to raiſe any doubt, neither is there any doubt in point of law; for the condition of the bond has not been broken, and conſequently no action can be maintained upon it. It cannot

Sturdy & *al.* aſſignees of B. *v.* Arnaud, Ea. 30 Geo. 3. B.R. 3 *Ter. Rep.* 599.

be ſaid that the condition has been broken, when it appears that payment has been made, according to the terms of it; for though this is not a formal plea of *ſolvit ad diem*, yet it is equivalent to it, for this would be evidence of ſuch payment. The aſſignees can only have that property to which the bankrupt is entitled, and they muſt take it ſubject to his equity; and here the payments on the annuity bond were anticipated. Indeed, if the ſtrict law were with the plaintiffs, their conduct is ſo unconſcientious, that if the defendant were to apply to a court of equity for relief, that court would not only give ſuch relief, but would alſo decree the plaintiffs to pay the coſts, both in law and equity.—Judgment for the defendant.

Folliott *v.* Ogden, Hil. 29 Geo. 3. C.B. 1 *Hen. Black.* 123, affirmed in error, B.R. Tr. 30 Geo. 3. 3 *Ter. Rep.* 726.

The acts of confiſcation, paſſed in the ſeveral States of North America, after the declaration of independence, and before the treaty of peace, by which this country acknowledged their independence, are conſidered as nullities in the courts of law in this country; conſequently, a creditor is not precluded from recovering againſt his debtor in England, upon a contract entered into between them in America, although both the parties have been attainted, and their property confiſcated, and veſted in the reſpective ſtates of which they were inhabitants, by the legiſlative acts of thoſe ſtates. This was debt on a bond, dated New York, October 10th, 1769, for 4000*l.* currency, being 2250*l.* ſterling. PLEA, (by which it appeared that the defendant, and one *R. M.* and *L. M.* were jointly and ſeverally bound) 1ſt, *R. M.* and *L. M. ſolverunt poſt diem*; 2dly, defendant *ſolvit poſt diem*; 3dly, that at the time of making the bond, the plaintiff and the defendant, and the other obligors, reſided in America, and continued ſo till after 22d October, 1779; that on that day the money being due and unpaid, and the plaintiff then reſiding at New York, he was *ipſo facto attainted of the offence of adhering to the enemies of the ſaid ſtate of New York, and all and ſingular the eſtate, both real and perſonal, held or claimed by him on 22d October, 1779, was forfeited to, and veſted in the people of New York*, &c.; 4thly, that at the time of the making the ſaid bond, the parties were reſident in America; that the defendant was bound only as a ſurety for *R. M.* and *L. M.*; that the defendant, at the time he was ſo reſident, had *more than ſufficient to pay the ſaid ſum of* 4000*l.* and his other debts; that on 2d January, 1779, being ſo poſſeſſed, *he was attainted, according to the laws and ſtatutes of New Jerſey, and all his real and perſonal eſtate forfeited to, and veſted in the ſaid ſtate of New Jerſey*, but liable in the firſt place *to the payment of all his debts*; that in conſequence of his attainder, all his property was ſeized, and *more than ſufficient to pay the ſaid ſum of* 4000*l.* and all his other debts; that after his attainder, the plaintiff was at liberty to make,

and

and might have made, demand of the ſtate of *New Jerſey*, of the money, &c.; 5th, to the ſame effect as the fourth, averring, that the plaintiff might, *and ought* to have demanded, payment of the bond from that ſtate. *Replication*, iſſue tendered on the 1ſt and 2d pleas; to the 3d plea, that at the time of making the ſuppoſed law at *New York*, it was not one of *the United States*, but was *one of his Majeſty's colonies in America, then in open rebellion*, &c.; general demurrer to the 4th and 5th pleas. *Rejoinder*, iſſue joined on the 1ſt and 2d pleas in the 3d replication; the rejoinder ſet forth, that on 4th July, 1776, the ſeveral colonies (naming them, and among them, New York, and New Jerſey) were by the people, *declared free and independent States*; that on 3d September, 1783, his Majeſty, by the definitive treaty of peace, *acknowledged the ſaid States* to be free and independent, and thereby *the ſeveral laws for the confiſcation of the property of perſons, were recognized and admitted to be valid.* Joinder in demurrer to the 4th and 5th pleas.—*Surrejoinder*, that by the treaty of peace, the laws, &c. were not recognized and admitted to be valid. *Rebutter*, that by the 1ſt article of the treaty, his Majeſty acknowledges the ſaid United States, to be free, ſovereign, and independent ſtates. That the 5th article provided that the congreſs ſhould recommend it to the legiſlatures of the reſpective ſtates, to make reſtitution of all eſtates and properties which had been confiſcated, belonging to real Britiſh ſubjects, or to perſons reſident in diſtricts in the poſſeſſion of his Majeſty's army, and who had not borne arms againſt the United States; and that no perſons, who then had any intereſt in confiſcated lands, either by *debts*, or otherwiſe, *ſhould meet with any impediment in the proſecution of their juſt rights*; that at the time, &c. the plaintiff was reſident in a diſtrict in poſſeſſion of his Majeſty's arms, and had not borne arms againſt the ſaid United States; and alſo, that by the ſixth article it was agreed, that there ſhould be no future confiſcation, and that *no perſon ſhould ſuffer any loſs*, &c. GENERAL DEMURRER to the rebutter, and joinder in demurrer. The two material queſtions which aroſe on theſe pleadings were, 1ſt, whether under the circumſtances of this caſe, the plaintiff had a right to ſue? 2diy, whether under theſe circumſtances, the defendant was liable to be ſued in England, on a bond made in America? After the caſe had been argued at conſiderable length, and fully conſidered, Lord *Loughborough*, Ch. J. delivered the judgment of the Court: The only two material queſtions aroſe on the 3d and 4th pleas; the third plea is, that *the plaintiff was attainted* by the ſtate of New York; that all his eſtate and effects were confiſcated, and forfeited to the people of that ſtate, and that in conſequence the bond in queſtion, and all money due upon it, was forfeited to, and veſted in them: now there is

no occaſion to enter into a diſcuſſion of the matters contained in the replication, rejoinder, ſurrejoinder, or rebutter: for admitting this act of the State of New York to be of as full validity as the act of any independent ſtate, which the defendant contends, *and which it certainly was* (1), ſtill it cannot operate as a bar to the plaintiff's demand in this action: if it were a bar, it muſt either be in reſpect of his perſon, as diſabled to ſue, or in reſpect of the ſubject-matter of the ſuit. It was admitted in the argument, that by the criminal ſentence of attainder of one ſovereign independent ſtate, no perſonal diſability to ſue in another was created; but it was contended, that the property of this bond was diveſted out of the plaintiff, by act of the law of that country, to which both he and his property were ſubject: but if the penal laws of a foreign country do not in themſelves import a perſonal diſability to ſue in this; neither do they, by diveſting the property of a perſon in that country, take away his right of action in England. The ſubject-matter of this action, being a bond, it could only be ſued for according to the laws of England relating to bonds. Suppoſing, therefore, the right of the plaintiff to be gone, that could not be ſet up in bar of the action, which muſt be brought in the name of the preſent plaintiff, whoever might be in poſſeſſion of the bond, ſince a choſe in action is not aſſignable at law, and the defendant could not plead that the obligee had aſſigned it. I would even go further, and ſay, a right to recover any other ſpecific property, ſuch as plate, or jewels, in this country would not be taken away by the criminal laws of another. The penal laws of foreign countries are ſtrictly local, and affect nothing more than they can reach, and which can be ſeized by virtue of their authority: a fugitive, who paſſes hither, comes with all his tranſitory rights: he may recover money held for his uſe, ſtock, obligations, and the like; and cannot be affected in this country by proceedings againſt him in that which he has left, beyond the limits of which, ſuch proceedings do not extend. The other queſtion ariſes on the 4th plea, which ſtates, that the defendant was attainted by the State of New Jerſey; that all his eſtate and effects were confiſcated, and veſted in the people of that ſtate, and in the firſt place made liable to the payment of all his debts; that a fund was raiſed, more than ſufficient to pay them, to which the plaintiff might and ought to have reſorted. This plea has the ſame tendency with the third, to prevent the plaintiff from recovering; but the whole amount of it is a ground in equity for relief againſt a creditor, who would

(1) *Vide* what fell from lord *Kenyon* in the court of king's bench, on this part of the caſe.

make

make an oppreſſive uſe of one ſecurity in preference to another. If the plaintiff, in this action, might have recovered his debt out of the fund appropriated to that purpoſe in New Jerſey, and has wilfully omitted ſo to do, I think there would be a good reaſon for equity to interfere: if he might have recovered the whole, this action might, on equitable grounds, be entirely ſtopped; if only a part, equity would relieve *pro tanto*. This is every thing, except what it ought to be, and comes as near it as it could, to a plea of payment; but in a court of law, nothing ſhort of actual payment is good; upon the whole, therefore, as the caſe ſtands, there is nothing to prevent this court from giving judgment for the plaintiff.

Ogden v. Folliott, in error, B.R. Tr 30 Geo. 3. C. B. 3 *Ter. Rep.* 726.

The defendant in the above action afterwards brought a writ of error in the court of king's bench, and that court, after argument and full conſideration of the caſe, affirmed the judgment given by the court of common pleas.—*Lord Keynon*, Ch. J. Whether or not the report in 1 *Hen. Black.* 135. of what paſſed in the court of common pleas, in this caſe be accurate (1), I will not preſume to ſay; but I was induced to think that the word *not* had been omitted in that part of the judgment, where the acts of the ſtate of New York paſſed during the war, are conſidered to be "of as full validity as the act of any independant ſtate (2): for ſuppoſing that the language, as reported to have been uſed by that court, had in fact been uſed, and that the caſe was to be determined on that ground, I ſhould have wiſhed to have heard it once argued, in anſwer to the objection made by the plaintiff in error: if we were to conſider the act of the province of New York as binding, as has been contended, I am at loſs to know why all the property of thoſe perſons, which was ſaid to be confiſcated, did not paſs to the executive power of that ſtate to whom it was ſaid to be forfeited; and why an action might not have been brought in the name of ſuch executive power to enforce the payment of this bond, and how an action could have been brought in the name of the obligee: having ſaid thus much, I can only ſay that at preſent I cannot aſſent to the reaſoning on which the Court of Common Pleas gave judgment, although I am of opinion that it ſhould be affirmed on different grounds. The Court of Common Pleas in giving judgment ſtopped at the plea; but the judgment, which I am prepared to give, is founded on the whole of the pleadings, which are in ſubſtance

(1) Mr. Erſkine declared, that he had heard from *the beſt authority*, that the report was accurate.

(2) See the Note (1) in the preceding page.

theſe: the plea ſtates that the province of New York, in 1779, at the time when the confiſcatory law paſſed, was part of the dependencies of Great Britain, in open rebellion againſt the king, and that the plaintiff and defendant were reſident in that ſtate; what became of them afterwards does not appear, and it is not alleged that they were reſident in or ſubject to the laws of that ſtate, when the treaty of peace was ſigned. It is not neceſſary to ſay what effect that would have had, but thus it ſtands: in 1779, that province ſet about a reform, and to aſſert what is called their rights, but which I, ſitting here, am bound to ſay was an act of rebellion againſt the ſovereign power of the ſtate, and that their act was illegal at that time, whatever confirmation it might afterwards receive by the ſubſequent treaty of peace. Then when theſe parties came into this country, before the independence of America was acknowledged, was their property confiſcated? could it have been pleaded here to an action brought *at that time*, that thoſe ſtates had made what they called a law, forfeiting the property of thoſe who adhered to the government of this country? certainly not: and yet, as between theſe parties, they muſt be underſtood to be in the ſame ſituation now as at that time. For whatever operation the treaty of peace might have on the perſons reſident in that country, it is impoſſible to ſay that it was intended to, or did, give effect to the acts of the aſſembly, by which the property of our own ſubjects reſident here was confiſcated: the conſequence of the argument for the plaintiff in error would be, that every act done by the loyaliſts in America, previous to the treaty of peace, was admitted by that treaty to be an act of high treaſon againſt the ſtate of New York; but that can never be ſupported. The plaintiff came into this country ſubject to all his legal contracts, and armed with all the legal rights which any other ſubject had; it would be enough to ſtop here: but it has been ſaid, that where the property of a ſubject of one country is confiſcated, and veſted in the ſovereign ſtate, every other country ought to take notice of the confiſcation: but that was not the caſe, for theſe perſons never were attainted by any act of a ſovereign ſtate, thoſe acts were paſſed by the ſubjects of this country, who, at this time, withdrew themſelves from the ſovereign ſtate, and aſſumed to themſelves a power of making laws. I am, therefore, moſt clearly of opinion, that the act of confiſcation, which paſſed in 1779, cannot be conſidered in this country as competent to transfer the property of *Folliot* to any perſon whomſoever; and, conſequently, that the right of action which accompanied him when he came into this country, is not diveſted out of him. It has been ſaid in the argument, that the plaintiff in error could have no remedy againſt his co-obligors in America, notwithſtanding the

the judgment here, and who might even be ſued again on this very bond in that country; but that argument ought not to guide our judgment, for I have always underſtood it to be clear law, that *all judicial acts* done in one country over the property of the ſubjects within their juriſdiction, are concluſive on the property of thoſe parties in any other country. *Aſhhurſt*, J. concurred. Theſe parties came here as ſubjects of this country, before the treaty of peace; and, therefore, any acts done by the ſtate of New York at that time, could not alter the rights of our own ſubjects. The plaintiff and the defendant came into this country in the character of creditor and debtor, and their ſituation, as individuals, was not affected by the acts of confiſcation. *Buller*, J. It is a general principle, that the penal laws of one country cannot be taken notice of in another; then apply that principle to the preſent caſe: this is an action on a bond, to which the defendant has pleaded that by the penal laws of another country, the property of the plaintiff in the bond has been diveſted out of him: but this court cannot take notice of that defence: and then all the pleadings are a *nullity*, and conſequently the action remains unanſwered: that is as much as is neceſſary to ſay in the determination of this particular caſe; another queſtion, however, having ariſen in the argument, whether or not it was neceſſary that there ſhould have been a ſeizure on the part of the ſtate of New York, in order to diveſt the property out of the plaintiff, I will give my opinion on it. He here reaſoned on the doctrine of attainder and forfeiture in this country (1), and concluded in opinion, that an actual ſeizure was neceſſary. *Groſe*, J. concurred with the other judges, and, in particular, for the reaſons aſſigned by *Buller*, J. that the judgment ought to be affirmed.—Judgment affirmed.

Evidence in Debt.]—It is a general rule, that the ſubſcribing witneſs to a bond, muſt, in an action on it, be always produced to prove the execution of it; and this cannot be diſpenſed with, unleſs it appear that his attendance could not be procured; neither will the confeſſion of the obligor himſelf, to a third perſon, be ſufficient, for if it were, he would be deprived of the benefit of croſs-examining him, concerning the time of the execution of the bond, which might be material: but if the ſubſcribing witneſs denies the deed, other witneſſes may be called to prove the execution. Abbot *v.* Plumbe, Tr. 19 Geo. 3. B. R. *Doug.* 216.

Thus in an action of debt upon a bond, and *non eſt factum* pleaded, it appeared on the trial, that the ſubſcribing witneſs was one *Steele*, who not being produced, the plaintiff proved that a perſon of that name had gone out to India, in a ſhip of which the defendant was purſer; but that enquiries had Coghlan, *v.* Williamſon, Hil. 19 Geo. 3. B. R. *Doug.* 93.

(1) He here noticed the ſtat. 33 *Hen.* 8, c. 20, and *Cro. Car.* 427, 460.

been

been made after him, and he could not be found. The plaintiff proved further, that he had applied to the defendant to ſettle the bond, and that he then offered 80l. and to ſettle the reſt, with intereſt, at the end of the year; which being refuſed by the plaintiff, the defendant ſaid that he could not recover, for the bond was executed on ſhipboard, and he could get no witneſs: the defendant's hand-writing was then proved, and alſo a receipt and ſubſcription to a bond to the Eaſt-India company, by *Steele*. Upon this evidence, the judge directed the jury to find for the plaintiff; and it being afterwards moved to enter a nonſuit, the queſtion was, whether, under the above circumſtances, the evidence of the defendant's hand-writing was admiſſible? but the defendant's counſel admitted it was impoſſible for them to ſupport the poſition that it was not.

Forbes v. Wale, ſittings in London, 26 November, 1764. 2 *Black. Rep.* 532.

In debt on bond, dated 20th March, 1732, the pleas were, 1ſt, *non eſt factum*; 2dly, *ſolvit ad diem*; 3dly, *ſolvit poſt diem*. At the trial, the plaintiff inſiſted on reading the bond, without any proof of the execution, being of ſo old a date, viz. 32 years old. It was objected by the defendant, that it could not be read till proved; there having been no payment of intereſt, or any other marks of authenticity; and that if the length of date was alone ſufficient to eſtabliſh it, a knave has nothing to do but to forge a bond, with a very ancient date. Lord *Mansfield*, Ch. J. allowed the diſtinction, and directed the bond to be proved. The plaintiff then proved, by two perſons, that it was the defendant's hand-writing, and that one of the ſubſcribing witneſſes was dead; but being himſelf examined, he acknowledged the other to be living, whereupon he was non-ſuited.

Swire v. Bell and others, M. 34 Geo. 3. B.R. 5 *Ter. Rep.* 371.

In an action on a bond given by the defendants to the plaintiff, as one of the inhabitants and payers of the townſhip of Elſlack, to indemnify the townſhip from a baſtard child; it appeared at the trial, that the only ſubſcribing witneſs to the bond was, at the time of the execution, and ſtill was, a payer of the townſhip. It was contended that he was an incompetent witneſs, on the ground of intereſt, notwithſtanding which, he was admitted to prove the execution, being conſidered as a mere inſtrumental witneſs: however, another perſon was called, who proved the hand-writing of the firſt witneſs, and a verdict was given for the plaintiff. It was afterwards moved to ſet this verdict aſide; and the Court were of opinion, that the ſubſcribing witneſs to the bond being intereſted, as well at the time of his atteſtation, as at the trial, could neither be examined himſelf, nor would proof of his hand-writing be ſufficient; and that it was not like the caſe of a ſubſcribing witneſs being afterwards appointed executor to the obligee, in which caſe, proof of his hand-writing might be given: however, on its being mentioned that the hand-writing of the obligor had alſo

alſo been proved, the court ſaid the matter had better reſt as it was.

Damages in debt.]—In this caſe it was decided, on a bond for ſecuring the payment of rent, that the bond is only a ſecurity to the amount of the penalty.—The defendants had entered into a bond in the penal ſum of 600l. conditioned, *inter alia*, for the payment of a yearly rent of 750l. by another perſon. The rent being in arrear, the bond was put in ſuit, and judgment, by default, entered againſt the defendant: afterwards another action was brought on the ſame bond, and a ſecond judgment entered up; then a third action was commenced, in bar of which the defendants pleaded the 1ſt judgment, and then obtained a rule to ſhew cauſe why the ſecond ſhould not be ſet aſide, with coſts, and why *upon payment of the penalty* and coſts of the firſt action, the plaintiff ſhould not acknowledge ſatisfaction on record? one of the queſtions were whether the bond, in this caſe, was a ſtanding ſecurity for all the payments of rent, during the term or only to the amount of the penalty? *Buller*, J. at firſt was ſtrongly of opinion that by the ſtat. 8 & 9 W. 3, c. 11, an obligee of ſuch a bond as this might, from time to time, aſſign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond, and that the judgment would ſtill remain as a ſecurity for all ſubſequent breaches. But the Court afterwards decided that the defendants were not liable for more than the whole penalty upon the true conſtruction of the ſtatute of *Will.* 3. the meaning of which, only was, that a plaintiff ſhould not, upon every breach, be obliged to go into a court of equity to have iſſues directed of *quantum damnificatus*; and *Buller*, J. concurred in this conſtruction of the act.

White *v.* Sealy and others, M. 19 Geo. 3. B.R. *Doug.* 49.

But afterwards *Buller*, J. in another caſe, declared, that he was not ſatisfied with the determination in the laſt caſe; and ſaid; I was perſuaded that many caſes had been determined upon the point, though they did not occur to the court then; and that caſe was not moved again, becauſe it was the caſe of a ſurety; on ſearching, I find ſeveral caſes where the doctrine had been before eſtabliſhed: in *Elliot and Davis*, *Bunb.* 23, intereſt upon a bond was decreed to be paid, though it exceeded the penalty; and in a caſe in this court, Tr. 3, *Geo.* 3, Lord *Mansfield* ſaid, the penalty is merely a ſecurity, and where it is not ſufficient, the plaintiff may recover damages as well as the penalty. Nothing can prove the principle ſtronger than the conſtant practice, where an action is brought on a bond, of giving 1s. damages. In *Collins* v. *Collins*, 2 Burr. 820, which was an action of debt on a bond, conditioned for the payment of an annuity, where part had been paid before the action, yet there was judgment for the whole penalty. *Holdipp* v. *Otway*, 2 *Saund.* 106, was an action of debt, on a bill, obligatory of 68l. conditioned

Ld. Lonſdale and others *v.* Church, Ea. 28 Geo. 3. B.R. 2 *Ter. Rep.* 388.

ditioned to pay the third part of the coſts when taxed; the prothonotary taxed 50l. for intereſt, and damages for detaining the debt, and judgment was there given that the plaintiff ſhould recover his debt, and 50l. for his damages, by reaſon of the detention; and no writ of error being afterwards brought, it was held that ſuch damages might be aſſeſſed; and in *Duvall* v. *Price*, debt was brought on a bond with a penalty of 140l. a bill was filed in Chancery, and it was referred to a maſter to compute the principal, intereſt, and coſts, who computed the principal and intereſt at 154l. and the coſts at 67l. and on appeal this was held well in *dom. proc.* However in this caſe (which was debt on three ſeveral bonds of 2000l. each, conditioned to account to the plaintiffs for all ſums received by the defendant, who had been appointed by them receiver of the harbour dues of Whitehaven) the Court ſaid, on a motion to ſtay the proceedings, on payment of the penalties into court; that as there appeared to be ſome hardſhip in the defendant's caſe, they would let him pay the penalties into court, but they would not ſtay the proceedings; and then if the plaintiffs choſe to proceed further, they would do it at the riſk of a jury's not giving more than the amount of thoſe reſpective penalties.

Wilde v. Clarkſon, Ea. 35 Geo. 3. B. R. 6 *Ter. Rep.* 303.

However, in an action on *a bond of indemnity*, the Court will order ſatisfaction to be entered on the record, on the defendant's paying the penalty of the bond, and the coſts of the action. In this caſe, the defendant, and other pariſh officers of Aſhby de la Zouch, were ſued on a bond, which they had given to indemnify the pariſh of Ripley againſt any expence that they might be put to, by reaſon of the then expected birth, in the pariſh of Ripley, of a baſtard child of *J. Shaw* (a pariſhioner of Aſhby de la Zouch, but then reſident in Ripley). The defendant obtained a rule, calling on the plaintiff to ſhew cauſe, why, on payment of 40l. the penalty of the bond, together with the coſts, ſatisfaction ſhould not be entered on the record. The counſel for the plaintiff relied on the caſe of lord *Lonſdale* v. *Church*, to ſhew that in an action on a bond, damages may be recovered beyond the amount of the penalty. But Lord *Kenyon* ſaid, he could not accede to the doctrine in the caſe cited; that according to that, an obligor, who became bound in a penalty of 1000l. conditioned to indemnify the obligee, may be called upon to pay 10,000l. or any larger ſum, however enormous. Here the defendant is willing to pay the whole penalty, and the coſts of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal ſums, for performance of covenants, &c. the act of parliament, 8 & 9 *W.* 3. c. 11, § 8, expreſsly ſays, that there ſhall be judgment for the penalty; and that the judgment ſhall ſtand as a ſecurity for further breaches; but the obligor is not anſwerable, on the whole, beyond the amount of the penalty.

And

And this laſt caſe was agreeable to the deciſion of the court of common pleas in a former caſe—there it was moved for leave to pay 40l. being the whole penalty of a bond, to indemnify a pariſh againſt a baſtard child, into court, with coſts. It was objected that this was an action for a ſimple breach of the bond, in which the pariſh was entitled to recover; after which the penalty ſhall ſtill remain in force, to anſwer ſubſequent breaches, as they may ariſe in *infinitum*. But this the court would not allow; and *De Grey*, Ch. J. ſaid, this was ſo plain a caſe, that nothing that could be ſaid could make it plainer; the bond aſcertains the damage by conſent of the parties; if therefore the defendant pays the plaintiff the whole ſtated damages, what can he deſire more?

Brangwin *v.* Perrot, Ea. 18 Geo. 3. C.B. 2 *Black.* 1190.

In debt on bond for 60l. and on a *mutuatus* by note of hand for 30l. there was a verdict for the plaintiff for the whole debt of 90l. and damages: the taxed coſts, including the damages, were 29l. 5s. ſo that judgment was entered, and the defendant charged in execution for 119l. 5s. It was now moved to reduce that ſum to 97l. 11s. 10½d. in order to bring the defendant within the lord's act: the ſums actually due for principal and intereſt upon the bond, for the damages and coſts; and upon this note of hand, amounted only to 97l. 19s. 10½d.; but the plaintiff inſiſted that he had a right to add to this ſum 13l. 3s. 5d. for intereſt due on the note of hand, and cover it under the penalty of the bond, which would make the true ſum for which the defendant was chargeable, amount to 111l. 3s. 3½d. but as the plaintiff had neglected to have this intereſt found as damages for the detention of the money due on the *mutuatus*, which he might have done, it was ruled, by the court, that he had no right to cover this under the penalty of the bond, which, according to the equity of the ſtatute of 4 *Ann* (1), conformably to the

Amery *v.* Smallbridge, Ea. 11 Geo. 3. C. B. 2 *Black.* 760.

(1) By 4 & 5 *Ann.* c. 16, ſ. 13, it is enacted, that in all actions brought upon bonds, in which is a condition or defeaſance to be void, on payment of a leſſer ſum, at a day certain, if the defendant ſhall bring into court, all the principal, intereſt, and coſts of ſuch action, the money ſo brought in ſhall be deemed a full diſcharge, and the court ſhall give judgment accordingly.

Before this ſtatute, the courts of law conſidered *the penalty* of the bond as the debt, and gave judgment accordingly. This compelled the defendants to reſort to courts of equity, where the decree would give only what was actually due for principal, intereſt, and coſts.

This act, therefore, reforms, in ſome inſtances, an erroneous courſe of proceeding in the courts of law and equity, which ought never to have prevailed, and which *the courts themſelves might and ought to have remedied*, but did not; therefore it ſhould not only have the moſt liberal conſtruction, but the courts ought to exerciſe their own authority, to extend the ſpirit and reaſon of this parliamentary interpoſition, for the eaſier, ſpeedier, and better advancement of juſtice, to caſes not mentioned in the act. Per Lord *Manſfield*, 3 *Burr.* 1373.

common

common law, is to be considered as only a security for the principal money due, together with interest and costs, and they therefore directed the sum to be reduced.

Marsen v. Touchett, Ea. 10 Geo 3. B.R. 2 *Black.* 706.

Judgment in debt.]---Where the bond was for a sum of money, payable at the end of three years, but the interest by half-yearly instalments: on default of payment of one half year's interest, the Court allowed the plaintiff to sign judgment for the whole sum, though not then due, but with stay of execution on payment of the interest then due.

Howel v. Hanforth, M. 13 Geo. 3. C. B. 2 *Black.* 843.

Judgment having been entered upon a bond given by the defendant, for the payment of an annuity of 80l. by quarterly payments; in consequence of a default made in one of the quarterly payments, a writ of *fieri facias* was sued out, marked to levy 20l. which was accordingly done: afterwards another *fieri facias* was sued out, but satisfied before execution, and the annuity was regularly paid for about three years, when the defendant, making default, another *fieri facias* was sued out, marked to levy 78l. it was moved to set this *fieri facias* aside, as being irregularly issued. The Court inclined strongly to think, that though at common law, if the sheriff only levies part of the debt on a *fieri facias*, marked for the whole, the plaintiff may have subsequent writs till the whole is levied; yet the plaintiff shall not mark it for part, and afterwards sue out subsequent writs for the residue, which would tend to great oppression: but on mentioning the case of *Marsen* and *Touchet*, they pronounced this rule: that on payment by the defendant of the arrears now due on this annuity, and all costs, the *fieri facias* be set aside; but the judgment to stand as a security for future arrears, with liberty to apply to the court, from time to time, to sue out fresh executions thereon.

Ogilvie v. Foley, Tr. 16. Geo. 3. C. B. 2 *Black.* 1111.

So, where there was judgment on a bond, in the penalty of 2100l. for securing an annuity of 150l. and the plaintiff sued out a *fieri facias*, and levied the whole penalty, the Court made a rule to refund the overplus, beyond what would satisfy the arrears of the annuity, and that the judgment should stand as a security, with liberty to take out execution as future arrears should arise.

Judd v. Evans, Tr. 35 Geo. 3. B.R. 6 *Ter. Rep.* 379.

So, where a bond was given in a penalty of 1000l. for securing an annuity of 70l. per ann. there having been a default in the three first payments, judgment was entered upon the bond, for the 1000l. and 3l. for the costs, and the defendant was charged in execution for the whole sum, which prevented his being discharged under the insolvent act, 34th *Geo.* 3. c. 69: it was therefore moved, on the part of the defendant, that it might be reduced on the books of the prison, to 214l. 14s. 6d. the sum actually due, with a view of his taking the benefit of that act. But by the Court, The defendant, by paying the arrears now due, may procure his

diſcharge out of cuſtody; but as the bond was forfeited by the nonpayment of the firſt inſtalment, the penalty of the bond is the debt in law, and the judgment muſt ſtand as a ſecurity for the growing arrears of the annuity.

Gowlett v. Hanforth, M. 15 Geo. 3. C. B 2 *Black.* 958.

In debt on a bond, conditioned to pay 496l. by inſtalments, and if default were made in the payment of any one or more of the inſtalments, then the bond to ſtand in force for the whole principal and intereſt then remaining due and unpaid; on default made, the plaintiff put the bond in ſuit, and obtained a verdict. It was now moved, on the behalf of the defendant, that all proceedings might be ſtayed, on payment of the inſtalments now due, with coſts, and to let the judgment ſtand, with a ſtay of execution till the ſeveral inſtalments became due. But the Court held, that upon this ſpecial condition, the defendant was not entitled to this indulgence; the plaintiff had agreed to give time to the defendant, and to forbear proſecuting his juſt demand, provided the defendant would punctually diſcharge it by inſtalments: by neglecting ſo to do, he has loſt the benefit of this condition, and remains in the ſame caſe as other debtors upon bond.

Bonafous v. Rybot, Ea. 3 Geo. 3. B.R. 3 *Burr.* 1370.

So, where a bond was given for the payment of a groſs ſum of money at a day certain, without any mention being therein made of paying the money by inſtalments; and afterwards the parties entered into articles of agreement, for the money to be paid by inſtalments, and there was inſerted, in ſuch articles of agreement, a defeaſance of the bond "*provided* that the ſaid ſums, agreed to be taken by inſtalments, ſhould be punctually and regularly paid by the defendant, at, and upon the very days ſpecified in the defeaſance, for making the reſpective payments; and that the defendant ſhould live till all the ſaid days be paſt, otherwiſe this defeaſance to be void:" the defendant paid the two firſt payments, and part of the third, but totally neglected to pay the fourth inſtalment: ſubſequent, however, to this, the defendant paid to the plaintiff, and the plaintiff received of him, the whole intereſt then due upon the whole debt, up to that time, including intereſt for the laſt inſtalment, as well as for all the remaining money, not then become payable. This bond being put in ſuit, a rule was obtained, calling upon the plaintiff to ſhew cauſe why it ſhould not be referred to the maſter, to compute what was due to the plaintiff of the ſeveral inſtalments; and why, upon payment of what ſhould appear to be due, with intereſt for the inſtalment unpaid, together with coſts, all further proceedings ſhould not be ſtayed? By the COURT, This proviſo in the defeaſance, makes the whole money due, upon failure of any of the payments by inſtalment: the defeaſance being dated at a ſubſequent time, and written on a diſtinct and ſeparate

parate paper from the bond, makes no difference. But what makes the difference is this: the bond is conditioned for payment of a groſs ſum, then due, to be paid at a certain fixed day; then there is a ſubſequent agreement made in favour of the debtor, eaſing him of that ſtipulated ſingle payment at that fixed day, and allowing him to pay it by inſtalments, *provided* that he pays it punctually on the days agreed upon; and that he live till they ſhall be all paſt, otherwiſe this agreement and defeaſance to be void; and conſequently, as the debtor has not paid the money punctually, they are void, and the groſs ſum is due to the obligee: it is a condition unperformed, therefore the debtor cannot have relief in a court of equity, any more than he can have it at common law: but the creditor has a right to have recourſe to his bond, neither has the plaintiff waved the forfeiture by receiving the intereſt: it could, at moſt, be only a conſtructive waver; but in reality it is none at all: for the intereſt (even upon the ſums, payable by inſtalment) is part of the original debt, due upon, and ſecured by the bond; and therefore the plaintiff was entitled to receive it as part of the original debt. Unleſs the defendant pays the whole money, he cannot be relieved from the penalty.

IV. *The Action of Covenant.*

Foſter v. Allanſon, Ea. 28 Geo. 3. B. R. 2 *Ter. Rep.* 479.

Where aſſumpſit will lie as well as covenant.]—In an action on an account ſtated, and other common counts, it appeared on the trial, that the plaintiff had entered into articles of copartnerſhip for ſeven years, in which there was a *covenant* to ſettle yearly at Michaelmas, and to adjuſt and make a final ſettlement at the expiration of the partnerſhip, when the profits were to be equally divided, and general releaſes given: afterwards the plaintiff committed an act of bankruptcy, which was known to the defendant, but no commiſſion had ever been taken out on it. Some time after this, the parties came to an agreement, that the defendant ſhould carry on the buſineſs alone; and they then came to a ſettlement of accounts, in which ſeveral items were included, not relating to the partnerſhip account; and the balance being found in favour of the plaintiff for 140*l.* the defendant promiſed to pay it. A verdict having been found for the plaintiff, it was moved to ſet that verdict aſide, on the ground that *the action ſhould have been covenant, and not aſſumpſit.* But by the Court, *Prima facie*, the plaintiff was entitled to bring an action on the covenant: if it reſted there, the objection muſt prevail; but on the diſſolution of the partnerſhip, the parties ſettled an account; and it is to be obſerved, that the account was not confined to matters relating to the partnerſhip,

partnerſhip, but it includes other articles, for which covenant will not lie; therefore, when the defendant promiſed to pay the balance, there was an end of the covenant: and even if no other articles had been introduced into the account but thoſe relating to the partnerſhip, ſtill aſſumpſit would lie: for the queſtion then would be, whether a previous partnerſhip being diſſolved, and an account ſettled, is or is not, in point of law, a ſufficient conſideration for a promiſe? there can be little difficulty in ſaying that it is: and here there was an expreſs promiſe by the defendant to pay the balance. It is objected that the judgment in this action cannot be pleaded to an action brought upon the covenant; but it certainly might, with proper averments; for a plaintiff cannot recover a double ſatisfaction: if he has recovered a judgment in one form of action, he cannot afterwards recover in another for the ſame cauſe of action.

So where in aſſumpſit, it appeared that the plaintiff and defendant had entered into articles of partnerſhip, which contained a covenant to account at certain times; and the demand aroſe upon the partnerſhip account, for the amount of the balance ſtruck, which the defendant expreſsly promiſed to pay. It was objected by the defendant, that there being a covenant between the parties, aſſumpſit would not lie: but per *Buller*, J. it does not ſignify in this caſe how the debt aroſe: there is an expreſs promiſe to pay the balance which had been ſtruck, and that is the ground of the action; otherwiſe the objection would have been good. Moravia *v.* Levy, ſittings after M. 1786, cor. *Buller*, J. 2 *Ter. Rep.* 483. n. (a)

Covenants in groſs.]—If a mortgagor and mortgagee of leaſehold premiſes make an under-leaſe of the mortgaged premiſes, in which the covenants are only with the mortgagor and his aſſigns, *the aſſignee of the mortgagee*, if he has alſo taken an abſolute conveyance of the reverſion in fee, cannot maintain an action for the breach of the covenants in the under-leaſe, becauſe the original term is merged in the fee, which he has acquired, and the covenants in the under-leaſe are only collateral to the grantor's intereſt in the land, and do not run with it. This was an action of covenant: the declaration ſtated an indenture of leaſe, by which one *William Stokes*, and the plaintiff's teſtator (who was deſcribed to be the mortgagee of the premiſes in queſtion) demiſed them to the defendant for 11 years, at the yearly rent of 200l. payable to *Stokes*, or *his aſſigns*; in which were contained, covenants on the part of the defendant, with *Stokes* and his aſſigns, *inter alia*, to pay the rent, and to keep the premiſes in repair: it then ſtated, that the plaintiff's teſtator, at the time of the leaſe, was poſſeſſed of the premiſes for the reſidue of a term of 99 years, ſubject to an equity of redemption by *Stokes*, on payment of a certain Webb *v.* Ruſſel, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 393.

ſum, with intereſt, to the plaintiff's teſtator: that *the defendant entered and became poſſeſſed for the term of* 11 *years, the reverſion thereof for the term of* 99 *years belonging to the plaintiff's teſtator, ſubject to ſuch equity of redemption; and the further reverſion in fee belonging to one Medley.* It then ſtated, that by indentures of leaſe and releaſe, *Medley* granted the reverſion in fee, expectant on the determination of the leaſe for 99 years, to *Stokes* and *Morgan Thomas*, who afterwards, by other indentures of leaſe and releaſe, made between *Stokes* and *Thomas* of the firſt part, the plaintiff's teſtator of the ſecond part, and one *Thackeray* of the third part, granted it to *Thackeray*, his heirs and aſſigns, in truſt for the plaintiff's teſtator, his heirs and aſſigns, *ſubject to a proviſo of redemption*, on payment of a certain ſum and intereſt, by *Stokes*, to the plaintiff's teſtator: that afterwards, the plaintiff's teſtator died, having firſt made his will, by which he bequeathed to the plaintiff all his worldly eſtate, and appointed her ſole executrix: that ſhe proved the will, took upon herſelf the burthen of the execution of it, *aſſented to the ſaid bequeſt, and claimed to have the reverſion of the premiſes for the reſidue of the term of* 99 *years* (ſubject to *Stokes*'s equity of redemption) and the money thereupon ſecured to the plaintiff's teſtator, as legatee; *and by virtue of that bequeſt, aſſent, and claim*, ſhe became poſſeſſed of the ſaid reverſion for the reſidue of the term of 99 years, ſubject, &c. That afterwards, by indentures of leaſe and releaſe, between *Thackeray* of the firſt part, *Stokes* of the ſecond part, and the plaintiff of the third part, *Thackeray* and *Stokes conveyed the reverſion in fee* to the plaintiff, *freed and diſcharged from all right and equity of redemption whatſoever*; by virtue whereof, ſhe became, and was, and ſtill is *ſeized in fee of the reverſion of the premiſes*, immediately expectant on the determination of the term of 11 years. The declaration concluded with ſetting forth two breaches of covenant; the one for non-payment of one year and one quarter's rent, and the other for not keeping the premiſes in repair—to this there was a *general demurrer* and joinder. By the Court, If there was no other objection againſt the plaintiff's recovering in this action, the pleader has raiſed ſome difficulty to himſelf by ſtating that the plaintiff, who was executrix, *aſſented to the legacy to herſelf*, and took the term *in her own right*; for in ſome view of this queſtion, the action poſſibly might have been ſuſtained, if the plaintiff had ſued as executrix; becauſe nothing is clearer, than that *a term, which is taken in alieno Jure is not merged in a reverſion acquired ſuo Jure.*—It is extremely well ſettled at common law, without referring to the ſtat. 32 *Hen.* 8, c. 34, that *covenants, which run with the land, will paſs to the perſon to whom the land deſcends*: and

that

that ſtatute enacted, for the benefit of *the grantees of reverſions*, that they ſhould have the like advantages againſt the leſſees, their executors, adminiſtrators, and aſſigns, by entry for non-payment of the rent; and ſhould have and enjoy all and every ſuch advantages, benefits, and remedies, by action only for not performing other conditions, covenants, or agreements, contained in the leaſes, againſt the leſſees, as the leſſors or grantors had. The ſtatute alſo contains a clauſe, giving the leſſees the ſame remedy againſt the grantees of the reverſion which they might have had againſt their grantors; therefore, under this ſtatute, the grantees, or aſſignees, ſtand in the ſame ſituation, and have the ſame remedy againſt their leſſees, as the heirs at law of individuals, or the ſucceſſors, in the caſe of corporations, had before the ſtatute. It becomes therefore neceſſary to inquire, *whether this action of covenant could have been maintained by the heirs of the perſon from whom the plaintiff derives her title.* It is ſtated that *Stokes* was only a mortgagor, who had parted with his whole term to the mortgagee; and the declaration goes on to ſtate, that the whole intereſt which was veſted in him, he had transferred to the mortgagor; therefore, in point of law, how can this covenant, made with *Stokes*, be ſaid to run with the land; for *Stokes* is ſtated in the declaration, to have no intereſt whatever in the land, and yet both the *implied* covenant, ariſing from the yielding and paying, and alſo *the expreſs* covenants are entered into with *Stokes*. It is not ſufficient that a covenant is concerning the land, but in order *to make it run with the land, there muſt be a privilege of eſtate* between the covenanting parties: but here *Stokes* had no intereſt in the land of which a court of law could take notice; therefore he had an equity of redemption, an intereſt which a court of equity would take notice of: theſe, therefore, are collateral covenants; and though a party may covenant with a ſtranger, to pay a certain rent, in conſideration of a benefit to be derived under a third perſon, yet ſuch a covenant cannot run with the land: but even ſuppoſing that theſe covenants had been entered into not with *Stokes*, but with the plaintiff's teſtator, who had an intereſt in the land, the ſubſequent tranſaction, which is ſtated in the declaration, puts an end to this queſtion. It appears that the perſon entitled to the reverſion of the 99 year's term, expectant on the determination of the 11 year's term, created, by the leaſe afterwards acquired, in her own perſon, the abſolute inheritance of the land; in conſequence of which, the reverſion, attendant on the leaſe granted to the tenant, no longer exiſted. Another eſtate, totally different, aroſe by the extinguiſhment of the intervening eſtate. In *Moor*, 94, there is a caſe very applicable: there a perſon made a leaſe for 100 years, and

the leſſee made an under-leaſe for 20 years, rendering rent, with a clauſe of re-entry: afterwards the original leſſor granted the reverſion in fee, and the grantee purchaſed the reverſion of the term; and it was held that the grantee purchaſed the reverſion of the term; and it was held that the grantee ſhould not have either the rent, or the power of re-entry for the reverſion of the term, to which they were incident, was extinguiſhed in the reverſion in fee; and although this caſe was only determined at the aſſizes, yet it was afterwards recognized in the court. Conſidering, then, that there are covenants entered into with a ſtranger, that do not run with the land; conſidering, alſo, that the rent is incident to the reverſion, out of which the term is carved, and that that reverſion is gone, it ſeems (with all the inclination which we have to ſupport the action) that it cannot be ſupported. The defence which is made, is of a moſt unrighteous and unconſcientious nature; but, unfortunately for the plaintiff, the mode which ſhe has taken to enforce her demand cannot be ſupported, and conſequently there muſt be judgment for the defendant.

Stokes v. Ruſſel, Tr. 30 Geo. 3. B.R. 3 *Ter. Rep.* 678, affirmed in error in the Exchequer chamber Hil 31 Geo. 3. 1 *Hen. Black.* 562.

But in the above caſe, if the action had been brought by the mortgagor, it might have been ſuſtained, becauſe the covenants with him, on the part of the leſſee, were *expreſs*.—In this caſe (the plaintiff, who was the mortgagor mentioned in the laſt caſe) declared on the demiſe of the ſame premiſes to the defendant for eleven years under the ſame indenture; in this indenture, the plaintiff and *Webb* demiſed, leaſed, and confirmed unto the defendant, *according to their reſpective eſtates and intereſts*, the premiſes for the term of eleven years, at the yearly rent of 260l. payable quarterly; and the defendant, in this indenture, covenanted with the plaintiff *Stokes*, to pay the rent to *him*, and to keep the premiſes in repair: the declaration aſſigned two breaches, one for not repairing, the other for non-payment of *rent*: the defendant pleaded 1ſt, *non eſt factum*; 2dly, that *Webb*, at the time of the demiſe, was poſſeſſed of the premiſes for a term of ninety-nine years, ſubject to an equity of redemption in *Stokes*, on payment of a certain ſum of money; that the covenants were made by him with *Stokes*, in reſpect of the ſeveral eſtates and intereſts of the plaintiff and *Webb*, *or one of them*, in the demiſed premiſes, and not otherwiſe: the plea then introduced a recital of the conveyance of the inheritance of the premiſes from *Medley* to the plaintiff, and *Morgan Thomas* in truſt for the plaintiff: the conveyance by *Morgan Thomas* and the plaintiff to *Thackeray*, in truſt for *Webb* and his heirs, *ſubject to redemption* by the plaintiff on payment of a certain ſum to *Webb*, his executors, adminiſtrators, or aſſigns: it then ſtated that the defendant being poſſeſſed of the term for eleven years,

years, the reverſion of the term for ninety-nine years, and alſo the reverſion in fee, belonging reſpectively, as aforeſaid, ſubject to ſuch equity of redemption, that is, the reverſion of the term, and alſo the reverſion of the inheritance, as *ceſtui que truſt*, being in *Webb*, as mortgagee.—*Webb* died, by will having bequeathed all his worldly eſtate to Sarah, his wife, and appointed her executrix: that ſhe proved the will, and aſſented to the bequeſt, by virtue whereof, ſhe became poſſeſſed of the reſidue of the term for 99 years, the reverſion of the inheritance being in *Thackeray*, ſubject to ſuch truſt as aforeſaid, that is, for *Webb* as *ceſtui que truſt* in fee, ſubject to an equity of redemption in *Stokes*, the plaintiff; that *Thackeray* and *Stokes*, afterwards conveyed to Sarah *Webb* the reverſion, *diſcharged from all equity of redemption*, and the plea concluded, that by virtue thereof, *the reſpective eſtates and intereſts of Webb, and the plaintiff, Stokes*, in the ſaid demiſed premiſes, *in reſpect whereof the covenants were made by the defendant with Stokes, the plaintiff, became merged, extinguiſhed, and determined.* The 3d, 4th, and 5th pleas were alſo in bar, containing an abridgment of this ſtate of the title, with the ſame concluſion. The plaintiff demurred to the four pleas in bar ſpecially, and the defendant joined in demurrer. The court were clearly of opinion (without hearing any argument) that the plaintiff was entitled to recover; and Lord *Kenyon* obſerved, that the conſequence of their opinion, on the former occaſion, when they held that *theſe covenants, not being made with the perſon who had the legal eſtate, did not run with the land*, and that the aſſignee of the mortgagee could not maintain an action on the covenants (and with the legality of which judgment they were perfectly ſatisfied) was, that theſe muſt be conſidered as *covenants in groſs*, and that of courſe the mortgagor might maintain an action upon them.—Judgment for the plaintiff.

The defendant, in the above caſe, afterwards brought a writ of error in the Exchequer Chamber, and aſſigned for errors, "That by the declaration, it appeared that the ſeveral covenants were made by the plaintiff in error, with *Stokes*, the defendant in error, in reſpect of the eſtate and intereſt of the ſaid *Stokes*, in the ſaid demiſed premiſes, and it did not appear thereby that the ſaid covenants were made with the ſaid *Stokes*, or that the action was brought by him in truſt for any other perſon; and although it was ſtated in and by the ſeveral pleas, that the eſtate and intereſt of the ſaid *Stokes*, in the ſaid premiſes, in reſpect of which the ſaid covenants were ſo made, became, and was wholly ended and determined before the breaches of covenant in the ſaid declaration mentioned; yet by the record, it is adjudged, that thoſe pleas and matters are not ſufficient in law to bar the ſaid *Stokes*, Ruſſell *v.* Stokes in error, in the Exch. 1 *Hen. Black.* 562.

the defendant in error, from having and maintaining his action, &c." Lord *Loughborough* delivered the judgment of the court.—If it were material to enter into a diſcuſſion of the defects of the plea, it ſeems liable to every objection of uncertainty and contradiction. The firſt and capital averment, viz. "That the covenants by *Ruſſel*, with *Stokes*, were made in reſpect of the eſtates and intereſts of *Stokes* and *Webb*, *or one of them*," is a propoſition merely vague, on which no iſſue can be joined, nor one traverſe taken. The ſame defect occurs in the concluſion drawn by the plea, from the ſtatement of the title: the plea itſelf is an inconcluſive, imperfect, and vague argument: the merger, the extinguiſhment, and the determination of a term, are ſeparate and diſtinct propoſitions: a term may be merged in the inheritance; it is determined by the effluxion of time, or by the act of the parties; it is extinguiſhed by the re-entry of the leſſor, on an act of the leſſee forfeiting his term: but it cannot be both merged and determined, nor would it be quite accurate to ſay that it was extinguiſhed and determined, but it is certainly abſurd to ſay that it was extinguiſhed and merged; to ſtate it then to have been merged, extinguiſhed, and determined, is manifeſtly incongruous; and theſe various concluſions are not warranted by the premiſes: the term of 99 years could not merge in *Webb* by the conveyance to *Thackeray*, under which *Webb* became *ceſtui que truſt* of the inheritance in fee, the legal eſtate being in *Thackeray*: as little could it merge by the conveyance from *Thackeray* to Mrs. *Webb*; for it does not appear by any thing ſtated in the plea, that the equitable eſtate in fee paſſed to her by the will of *Webb*. A bequeſt of all his wordly eſtate to his executrix, which is all that is ſtated, would not veſt the eſtate in fee, of which he was ſeized in equity by the conveyance to *Thackeray*: and Mrs. *Webb*, if ſhe took no more than the plea diſcloſes under her huſband's will, was as much a truſtee of a legal reverſion as *Thackeray*. That the term was not determined, the poſſeſſion of the defendent ſhews—The opinion of the court, however, has not been formed on objections to the form of the plea: we are for affirming the judgment on reaſons which apply directly to the merits of the caſe: the defendant, a leſſee in poſſeſſion, objects to the payment of rent ſued for under an EXPRESS covenant in the leaſe, that the perſon to whom he had bound himſelf to pay the rent, was the mortgagor in poſſeſſion of the eſtate demiſed; that he covenanted to pay the rent in reſpect of *the intereſt or eſtate*, which, at the date of the demiſe, the plaintiff had in the land; and that the plaintiff has ſince aſſigned over that intereſt to the mortgagee: in this leaſe, the mortgagee is alſo a party joining in the demiſe: now it is obvious on this ſtate of the defence, that the defendant would likewiſe

object

object to the mortgagee, that he had not covenanted to him to pay the rent, and that his intereſt or eſtate was not the ſame (though better) as it was at the time of the demiſe: the defendant has in fact, done this with the mortgagor: it would be a ſtrange reproach to the law, if it were to allow ſuch a defence as this, "I have contracted with both of you "in reſpect of your eſtates, you have each of you performed "your part, and I hold the poſſeſſion, but I will pay neither, "becauſe between yourſelves you have transferred your "eſtates without any prejudice to me," but no ſuch abſurd injuſtice is to be imputed to the law of England. The preſent caſe is the demand of that leſſor, to whom the defendant is bound to pay for the occupation of the land: I will add, in reſpect of his intereſt in the land, can there be any diſcharge of that obligation, but that he has been deceived, or that the obligation has been transferred to another? The firſt is not pretended; the ſecond is the aim of the plea, but is totally groundleſs, becauſe on the defendant's own ſhewing, that other perſon is the repreſentative of the party to the demiſe, who has aſſented to the payment to the plaintiff. The defence now made is as abſurd as if the defendant had ſet up a right in *Webb*, againſt the firſt payment of rent to *Stokes*; there would then be little difficulty in deciding this plain queſtion, whether *Ruſſel*, holding under this demiſe, could ſet up the right of *Webb* againſt the action of *Stokes*: but ſhutting out every conſideration of juſtice, and taking law for a moment to be an abſtract ſyſtem of poſitive rules, the defence ſet up is as unſcientific as it is unjuſt. *Webb* and *Stokes* demiſe, according to their reſpective eſtates and intereſts; *Ruſſel* covenants with *Stokes*, to pay the rent to him: what was the eſtate and intereſt of *Stokes*? the argument does not require me to ſtate; that in a court of law *Stokes* had no eſtate, that his intereſt was only a poſſeſſion as tenant at will to *Webb*, and that the covenant in reſpect of ſuch an intereſt muſt continue as long as the poſſeſſion, which was ceded by him, continued; otherwiſe it would ceaſe the moment it could begin to operate. I will ſtate his intereſt to be more than the plea explicitly ſtates, and all that a court of equity takes it to be: let him be *ceſtui que truſt* of the land ſubject to the mortgage to *Webb*. I then apply to that ſtate of the caſe, the known and eſtabliſhed rule of the common law, that if *ceſtui que uſe*, and his feoffees join in making a feoffment, it ſhall take effect as the feoffment of the feoffees by the common law, and not of *ceſtui que uſe*, by the ſtat. 1 Ric. 3. c. 1. *Co. Lit.* 49, *a.* So it is of a demiſe by *ceſtui que uſe*, and his feoffees; the term of the leſſee ſhall take effect out of the eſtate of the feoffees, though *ceſtui que uſe* had by the ſtatute full power to demiſe by himſelf, 2 *Co.* 356, *Hayward's* caſe. *The term then in this caſe, took effect out of*

the eſtate of Webb: *the covenant with* Stokes *could not be incident to that eſtate, nor run with the land; it muſt be a covenant in groſs, and conſequently not aſſignable.* In ſtrict law, therefore, as well as ſubſtantial juſtice, the judgment of the court of king's bench muſt be affirmed.

Shubrick *v.* Salmond, Hil. 5 Geo. 3. B. R. 3 *Burr.* 1637.

Expreſs covenants.]—An expreſs covenant ſhall bind to performance.—This was an action of covenant upon a charter-party of affreightment, by the merchant who hired the ſhip, againſt the maſter of the ſhip, for a breach of contract, in not going to the port of Winyaw, in South Carolina, as he had covenanted to do. The declaration ſtated, that the defendant, being bound out on a voyage to the iſland of Madeira, by charter-party, under hand and ſeal, covenanted, that he would, directly as wind and weather would permit, *after the diſcharge* of the outward-bound cargo at the iſland of Madeira, ſail and proceed to Winyaw, in South Carolina, or as near thereto as he could ſafely get, and there ſtay 40 running days, and load his ſhip with ſuch rice and other goods as the plaintiff's agents ſhould tender to be laden: in conſideration whereof, the plaintiff agreed to pay him freight at a certain rate. In this charter-party there was a proviſo, that if the ſhip ſhould not be arrived at Winyaw by the 1ſt day of March next, enſuing the date of the deed, it ſhould be in the option of the plaintiff and his factors or aſſigns, on the arrival of the ſhip at Winyaw, either to load on the terms agreed on, or at the then current price of freight, or to refuſe the ſhip entirely, on notice to the maſter within 48 hours after his application to the plaintiff's factors at Winyaw. The declaration aſſigned two breaches, 1ſt, that the ſaid ſhip *did not ſail and proceed to Winyaw*, or as near thereto as ſhe could ſafely get, in order to load, &c. but on the contrary, the defendant *did wilfully abſent himſelf* therefrom; 2dly, that the defendant did not, on the ſaid 1ſt day of March, or at any time ſince, arrive at Winyaw; but wilfully abſented himſelf therefrom. *Plea* (in bar of the action) that he did proceed with all convenient ſpeed, and ſail to the iſland of Madeira, but *by reaſon of contrary winds, and bad weather*, and from no other cauſe, was prevented arriving there till February 16th, ſo that it was impoſſible for him to diſcharge his outward-bound cargo to Madeira. To the 2d breach he made the ſame plea, and that *it was impoſſible*, after the diſcharge of his cargo, to arrive at Winyaw by the 1ſt day of March: to this the plaintiff *demurred* generally, and the defendant joined in demurrer. By the Court, The diſtinction between implied covenants by operation of law, and expreſs covenants, is, that expreſs covenants are taken more ſtrictly: a man may, without conſideration, enter into an expreſs covenant, under hand and ſeal: here each has bound himſelf by expreſs covenant

venant under hand and ſeal; and the defendant has broken the covenant on his part. The plaintiff wanted a ſhip at Winyaw in Carolina, to load with rice; and therefore he covenanted with the defendant *to freight his ſhip there*, and the defendant covenants *abſolutely to go thither at all events*; *and in order to quicken the ſloop's arrival*, there is a proviſo, that if he do not arrive before the 1ſt of March, the freighter is to have his option to load his ſhip or not; the defendant, therefore, thereby became the inſurer of the riſk of his getting there before the 1ſt of March. The conſideration to him is, his being ſure of a freight, in caſe he got there by the 1ſt of March: but he ſtill had a general chance of getting a freight, even though he ſhould not arrive there till after that time; and this proviſo cannot excuſe him for not going thither at all, becauſe he could not get there ſo ſoon as that day, when he had *expreſsly covenanted* to go to that port.

In an action of covenant, the declaration ſtated, that by an indenture of a certain date, the plaintiff's inteſtate demiſed to the defendant a meſſuage and certain premiſes for 21 years, at the yearly rent of 22l. payable quarterly, in which indenture was *a covenant on the part of the defendant for the payment of rent*, that the defendant entered, &c.; it then ſtated, a breach of the covenant for non-payment of half a year's rent, due at Lady-day, 1784. In a plea to this declaration, the defendant, after ſetting forth the ſeveral covenants reſpecting repairs to be done by him during the term, in all of which there was the uſual exception in the following terms *(caſualties by fire only and always excepted)* pleaded (in bar) that *the demiſed premiſes, with the appurtenances, againſt the will and without the default of the defendant, were burned and conſumed by fire*, before Michaelmas-day, 1783, to wit, on September 28, 1783, whereof the plaintiff's inteſtate had notice; and was then and there requeſted by the defendant to *rebuild* the premiſes, but that the premiſes were not rebuilt by the inteſtate for half a year next following Michaelmas, 1784, nor were the ſame then rebuilt; and that during all the time aforeſaid, the defendant neither had and enjoyed, nor could have or enjoy, *any uſe, benefit, or occupation*, of the demiſed premiſes. To this plea, there was a general demurrer, and joinder in demurrer. The court did not hear any argument on this caſe, being of opinion, that the point had already been determined by the authorities in *All.* 27, 2 *Strange*, 763, and 2 *Lord Raymond*, 1477, and *Buller*, J. mentioned the caſe of *Ainſley* and *Rutter*, at the ſittings at Weſtminſter after Michaelmas Term, 1767, which was an ejectment brought by a tenant to recover the poſſeſſion of ſome houſes which had been burned down during the term, and rebuilt by the landlord: in the leaſe there was

Belfour *v.* Weſton, Tr. 26 Geo. 3. B.R. 1 *Ter. Rep.* 310.

was an *expreſs covenant* on the part of the tenant to pay the rent, but he had paid none ſubſequent to the time of the fire. Lord *Mansfield* there ſaid, the conſequence of *the houſe being burned down, is, that the landlord is not obliged to rebuild*, but the tenant is obliged to pay the whole rent during the term; and if the landlord inſiſted on the rigour of the law, he may oblige the tenant to pay the rent for nothing during the remainder of the term; that the premiſes being inſured by the landlord, is nothing to the tenant; therefore, he left it to the jury to conſider, whether it was not to be preſumed, that the tenant had abandoned the premiſes at the time of the fire: and accordingly the defendant had a verdict.

Wegall v. Waters, M. 36 Geo. 3. B. R. 6 *Ter. Rep.* 488.

To an action of covenant for half a year's rent, for a houſe, due at Chriſtmas, 27l. 10s. the defendant pleaded, that by the ſaid indenture (on which the action was brought) the defendant covenanted to repair, and to ſurrender to the plaintiff, at the end of the term, the ſame premiſes well, and ſufficiently repaired *(caſualties happening by fire or tempeſt excepted)*; that before the Midſummer-day preceding the Chriſtmas, at which the rent was claimed to be due, a violent tempeſt aroſe, and threw down a ſtack of chimnies belonging to the houſe on the roof, and damaged the houſe ſo much, that it would have been uninhabitable, if he, the defendant, had not immediately repaired: that he was obliged to lay out on the repairs 30l. which the plaintiff became liable to repay to him: that that ſum was ſtill due, and exceeded the damages ſuſtained by the plaintiff, by reaſon of the breach of covenant, and that he was ready to ſet off that 30l. &c. To this plea, the plaintiff demurred, and aſſigned for cauſe, that it was not in the plea alleged, that the plaintiff had notice of the tempeſt, or of the damage, nor that he was requeſted to repair. By the Court, one objection to the plea is, that it does not ſet off any certain debt, but uncertain damages: and in fact, it does not appear by what covenant the landlord is bound to repair damages occaſioned by fire and tempeſt; the exception was introduced in the leſſees covenant for his benefit, and to exempt him from repairs: but if the defendant can maintain any action againſt the plaintiff (his landlord) the ſum to be recovered is uncertain; it muſt be aſſeſſed by a jury, and there is no pretence to ſay that thoſe uncertain damages may be ſet off to the preſent action. If the plaintiff has fairly laid out money on repairing what he was not bound to repair, perhaps a court of equity will give him relief.

Bullock v. Dommitt, Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 650.

In an action of covenant on a leaſe of a houſe, brought by the plaintiff againſt the defendant as aſſignee of the original leſſee; the breaches aſſigned were, 1ſt, for non-payment of half a year's rent; 2dly, for not repairing; the covenant for repairs, was, that the leſſee, his executors, adminiſtrators

miniſtrators and aſſigns would during the term repair without any exception as to fire. The defendant to the firſt breach pleaded payment; and to the ſecond, that on ſuch a day the houſe was by accident, and againſt the will, and without the default of the defendant, or his ſervants or family, viz. by means of a fire, which accidentally broke out in an adjoining houſe, burned down and deſtroyed, and has not ſince been rebuilt. To this there was a general demurrer, and joinder in demurrer. By the Court, On a general covenant like the preſent, there is no doubt but that the leſſee is bound to rebuild in caſe of an accidental fire; the common opinion of mankind confirms this; for in many leaſes an exception of accidents by fire is cautiouſly introduced into the leaſe, to protect the leſſee: this liability of the tenant, is founded on the old law, it is ſo laid down in *Bro. Cov. pl.* 4. referring to 40 *Ed.* 3. 5. So in *Walton* v. *Waterhouſe*, reported in 2 *Sound*, 420. and 3 *Keb.* 40. Judgment for the plaintiff (1).

In an action of covenant, it appeared that the defendants covenanted by articles of agreement, to erect and finiſh in a ſubſtantial and workman-like manner, a bridge acroſs the river Uſke, on or before the 10th December then next; and to uphold and keep it in complete repair for ſeven years. The declaration ſtated, that though the defendants did build and finiſh the bridge, they had not upheld and kept it in repair, for on ſuch a day it was waſhed, broken, and fell down, and that the defendants had not upheld and rebuilt it, &c. To this the defendants pleaded *(inter alia)* that the ſaid bridge, by the act of God, by a great, unuſual, and extraordinary flood of water, ſuch as ſuch bridge could not reaſonably be expected to reſiſt, was, without the default of the defendants, or its being in their power to prevent, waſhed, broken, and fell down, &c. The plaintiffs demurred to this plea. By the Court, It has been uſual for many years paſt to inſert covenants of this kind in contracts for building bridges. If the defendans had choſen to except any loſs of any kind, it ſhould have been introduced into the contract by way of exception: it is ſufficient to ſay here, that the contract of the defendants extends to this caſe, that they have not fulfilled it, and therefore that they are anſwerable. Judgment for the plaintiffs.

Brecknock and Abergavenny canal navigation v. Pritchard and others, Tr. 36 Geo. 3. B.R. 6 *Ter. Rep.* 750.

Joint covenants.] In an action of covenant by the plaintiff, as heir of the late Duke, againſt the defendant as executor of *G. Errington*, deceaſed. The declaration ſet forth a leaſe, by which the late Duke demiſed to *G. E.* and *John Ward*, certain collieries to hold unto the ſaid *G. E.* and *J. W.*

Duke of Northumberland v. Errington, Hil. 34 Geo. 3. B.R. 5 *Ter. Rep.* 522.

(1) This preciſe caſe was determined in *Com. Rep.* 626. Earl of *Coeſterfield* v. Duke of *Bolton*, where a houſe being burned down, the leſſee was held liable to rebuild under a general covenant to repair.

their

their executors and adminiſtrators, for twenty-one years. After the *rendendum* follows a long ſtring of covenants on the part of the leſſees, that they would work the collieries in a proper manner; and would once in every fortnight deliver in an account in writing of the quantity of coals worked, &c. &c. which were thus introduced: *and the ſaid* G. E. *and* J. W. *for themſelves jointly and ſeverally, and for their ſeveral and reſpective heirs, executors, and adminiſtrators, do, and each of them doth covenant, promiſe, and agree to and with the ſaid Duke of* N. *his heirs and aſſigns, in manner following*, that is to ſay:" after theſe followed a covenant by the late Duke to pay to the leſſees, their executors or adminiſtrators, 6l. 15s. for every ton of coals worked by them fit for the London market, which ſaid allowance they the ſaid *G. E.* and *J. W.* did, *and each of them did agree* to accept in full ſatisfaction and diſcharge of all expences attending the working, &c. Then came a proviſo, that declared it to be lawful for the leſſees to ſell and diſpoſe of not more than 1000 tons of an inferior ſort of coals, not fit for the London market, *they, the ſaid* G. E. *and* J. W. their executors, &c. *paying and accounting to the Duke*, after the rate of 15s. per ton; the ſame to be paid at the end of every year. And it was further agreed by and between the parties, that an account ſhould be ſtated and ſettled between them once in every ſix months, as well of *the working*, as of *the vend* of the ſaid coals; and that the monies appearing to be due ſhould *be acounted for and paid by the ſaid* G. E. *and* J. W. their executors or adminiſtrators to the ſaid late Duke, his heirs or aſſigns, at the end of each ſuch ſix months. "The declara-
"tion then aſſigned two breaches, one that ſince the death
"of the late Duke, and the defendants teſtator, divers ac-
"counts had been ſtated and ſettled between the preſent
"Duke, the plaintiffs, and *J. Ward*; and that although
"20,000l. appeared to be due to the plaintiff, the ſame had not
"been accounted for and paid by *J. W.* or the defendant."
The other breach was, that *J. Ward* had ſold divers quantities of inferior coals, and that neither he nor the defendant had paid or accounted for the ſame: the defendant pleaded, *inter alia*, that the ſaid *J. Ward* at the time of the making of the ſaid indenture, ſealed, and to the ſaid late Duke delivered the ſaid indenture, &c. To this there was a general demurrer. By the Court, The firſt covenant in the leaſe, whereby the leſſees *for themſelves jointly and ſeverally, and for their ſeveral and reſpective heirs, executors, and adminiſtrators*, covenant with the Duke, muſt according to the general rules of conſtruction, extend to all the ſubſequent covenants on the part of the leſſees throughout the deed, unleſs there be ſomething in the nature of the ſubject to reſtrain them to the former part of the leaſe: and there is nothing in this caſe that ſhould, from the

the nature of the ſubject, reſtrain them, ſo as to make the ſubſequent covenants only joint covenants: it is admitted that the ſeparate liability of each of the leſſees extends to the covenants that regards the working of the collieries; and there is nothing in the nature of the thing to prevent that reſponſibility attaching on the latter covenants reſpecting the fruits of that work, the produce of the mines: it was not neceſſary to repeat in every covenant throughout the deed that each of the leſſees covenanted for himſelf and his repreſentatives; the general words introductory to the covenants are ſufficient to extend to all the ſubſequent covenants on their part: it would not have anſwered the leſſor's purpoſe that each of the leſſees ſhould be bound ſeparately by the covenants that relate to the working of the mines, unleſs each were alſo anſwerable for the produce of thoſe mines. If the two covenants on which the breaches are aſſigned had preceded the leſſees covenants, there could have been no queſtion raiſed as to the defendants being liable ſeparately. But it is immaterial in what part of a deed any particular covenant is inſerted; for in conſtruing it, we muſt take the whole deed into conſideration, in order to diſcover the meaning of the parties. Judgment for the plaintiff.

Covenants for peaceable enjoyment.] In an action of covenant, the declaration ſtated, that the defendant, by an indenture, dated 24th May, 1771, granted to the plaintiff in fee a certain meſſuage with the appurtenances in Oſweſtry, and alſo all other the meſſuages of the defendant in Oſweſtry, together with all and ſingular outhouſes, &c. and that the defendant, by that indenture, covenanted with the plaintiff, "that the plaintiff, his heirs and aſſigns, ſhould thereafter for ever *peaceably and quietly* have, hold, &c. *without the lawful let, ſuit, entry, eviction, or interruption* of the defendant, his heirs, executors, adminiſtrators, or aſſigns, or any other perſon or perſons claiming by, from, or under him, them, or any of them, &c." The breach ſtated was, that the plaintiff had not from time to time, and at all times peaceably and quietly *had, held*, &c. *(purſuing the words of the covenant negatively)*; but that the defendant, on 1ſt July, 1783, and on divers days and times, &c. *diſturbed and hindered the plaintiff in the uſe and enjoyment of two pews*, appertaining to the firſt mentioned meſſuage, viz. the defendant ſometimes ſat in the ſaid pews, at others of thoſe times put other perſons to ſit in the ſaid pews, without the leave and againſt the will of the plaintiff, and at other of thoſe times locked up the ſaid pews, and kept the ſame locked up, without the licence or conſent, and againſt the will of the plaintiff, &c. *per quod, &c.* to this there was a general demurrer. In ſupport of the demurrer, it was urged, that though the injury complained of might be the ſubject of an action of treſpaſs, it could

Lloyd *v.* Tomkies, Ea. 27 Geo. 3. B.R. 1 *Ter. Rep.* 671.

could not be the foundation of this action: for the covenant on the part of the grantor being to indemnify the grantee againſt *all lawful* diſturbance; and the breach aſſigned being *an unlawful treſpaſs* of the grantor himſelf, the covenant did not extend to ſuch tortious acts. By the Court, It is not neceſſary in this kind of action, that the party againſt whom it is brought ſhould have *a title*; it is ſufficient if he does the act *under a claim* of one. Here the act itſelf aſſerts a title, for the defendant locked up the pew, which is as ſtrong an aſſertion of right as can well be imagined. Judgment for the plaintiff.

Hurd *v.* Fletcher & *al.* Executors of Sir John Aſtley, Mic. 19 Geo. 3. *Doug.* 43.

Lady *Aſtley* being ſeized in fee of certain premiſes intermarried with Sir *John Aſtley:* after their marriage, in 1716, ſhe and her huſband, by indenture, covenanted to levy a fine, the uſes whereof were declared to the huſband for life, *with power to make leaſes*, with the uſual reſtrictions, remainder to truſtees to ſecure the wife's jointure, remainder over, with a joint power of revocation during their joint lives, and to declare new uſes: a fine was accordingly levied; and afterwards by a joint deed, executed in 1753, they revoked all thoſe uſes declared in the indenture of 1716, which followed the huſband's eſtate for life, and leaſing power, and limited new uſes to the wife for life; and after ſeveral intermediate remainders, to Lord *Tankerville* in tail: after this new declaration of uſes, viz. in 1771, Sir *John Aſtley* made a leaſe to the plaintiff of the premiſes in queſtion, containing a covenant on the part of Sir *John Aſtley*, "that the plaintiff, his "executors, adminiſtrators, and aſſigns, ſhould have, hold, "uſe, occupy, poſſeſs, and enjoy all and ſingular the ſaid de"miſed premiſes, &c. without any let, ſuit, trouble, inter"ruption, or diſturbance of the ſaid Sir *John Aſtley*, his "heirs or aſſigns, *or any perſon or perſons claiming, or to* "*claim by, from, or under him.*" This leaſe was not agreeable to the leaſing power reſerved by the ſettlement; and Lord *Tankerville*, after the death of Sir *John Aſtley*, and the determination of all the intermediate eſtates, took advantage of the defect, and evicted the plaintiff: *This action was therefore brought by the leſſee againſt the defendants, executors of Sir* John *upon the covenant abovementioned*; and the defendants pleaded, that Lord *Tankerville did not claim, nor was intitled to the premiſes by, from, or under the ſaid Sir* John Aſtley. At the trial of the cauſe, there was a ſpecial verdict ſtating the above facts; and the queſtion was, whether Lord *Tankerville* claimed under Sir *John*, or only under Lady *Aſtley*; if under Sir *John*, the plaintiff was entitled to maintain this action of covenant. By the Court, A fine, and the deed to lead the uſes are to be conſidered as one conveyance; but as Sir *John Aſtley* was a neceſſary party to the ſecond declaration of uſes, by which the eſtate was limited to Lord *Tanker-*

ville, his Lordſhip certainly claimed under him, within the meaning of this covenant. Sir John had covenanted againſt his *own* acts, and the new limitations were created by one of his acts. Judgment for the plaintiff.

But though a covenant for peaceable enjoyment is conceived in the moſt general terms, it ought to be reſtrained to *lawful interruptions*. This was an action of covenant, and the declaration ſtated indentures of leaſe and releaſe, of the date of 27th and 28th April, 1780, whereby the defendant granted in fee, to one *Boos*, certain lands, within the province of New York, in North America; and covenanted that he was ſeized, &c. and had full power and authority to grant, &c.; and alſo that the ſaid *Boos*, and his heirs and aſſigns, might for ever thereafter have, hold, occupy, poſſeſs and enjoy the premiſes, &c. without the let, &c. of him, the ſaid defendant, his heirs, &c. *and of and from all and every other perſon or perſons whomſoever*, &c. The declaration then ſtated a grant in fee of the premiſes, from *Boos*, by indentures of leaſe and releaſe, of 15th and 16th May, 1782; and then aſſigned as breaches, that the defendant, at the time of making the indentures between him and *Boos*, was not ſeized, &c. nor had any power to grant, &c.; but on the contrary, the premiſes, long before, and at that time, were forfeited to, and veſted in the people of the State of New York, by virtue of an act of the ſenate and aſſembly; 2dly, that the plaintiff could not hold and enjoy the premiſes, but on the contrary thereof, was evicted by certain perſons, commiſſioned under the authority of the ſaid act. The pleas were, 1ſt, *non eſt factum*; 2dly, that the defendant was ſeized, and had authority to grant; 3dly, that the plaintiff did occupy and enjoy the premiſes, *on each of which iſſue was joined*; 4thly, that at the time of making the ſuppoſed act, the people of New York were ſubjects to the king, and in open rebellion againſt him and his government; 5thly, that at the time of the ſuppoſed act of the State of New York, the plaintiff and defendant were ſubjects reſiding in New York, under the government and protection of the king; and that the ſaid indentures were executed to *Boos*, as truſtee for the plaintiff; and that at that time, the people of New York were ſubjects of the king, in open rebellion, &c. *The replication* to the 4th plea, ſtated the declaration of independence by the American people, on 4th October, 1776, and finally the acknowledgment of their independence by the king, on 2d September, 1783; and that the king did relinquiſh all claims to the government and territorial rights of the United States. The replication to the 5th plea was the ſame, ſtating the city of New York to be part of the State of New York, and that the plaintiff and defendant, after 4th October, 1776, reſided in the city, under the protection of the king, during

Dudley v. Folliott, Ea. 30 Geo. 3. B. R. 3 *Ter. Rep.* 584.

during ſuch time only as his armies kept hoſtile poſſeſſion of the place: to both theſe replications there was a *general demurrer*, and joinder in demurrer: on the behalf of the plaintiff it was urged, 1ſt, that the defendant, at the time of entering into the covenant, that he was ſeized, &c. had not a good title to the premiſes, as they were then veſted in the State of New York by an act of confiſcation; 2dly, that the words of the covenant were very comprehenſive, being *without the let, &c.* of the defendant and his heirs, *and all and every other perſon or perſons whatſoever*. But the Court having no doubt about the law on the firſt queſtion, and thinking it would tend to the diſcuſſion of improper topics, would not permit it to be argued; and as to the ſecond queſtion, they thought it equally clear, for even a general warrantry, which is conceived in terms more general than the preſent covenant, has been reſtrained to *lawful* interruptions.

Ludwell *v.* Newman, M. 36 Geo. 3. B.R. 4 *Ter. Rep.* 458.

In an action of covenant on a leaſe for years determinable on lives granted by the defendant to the plaintiff, in which the defendant covenanted that the plaintiff ſhould enjoy, &c. "without the lawful let, ſuit, trouble, hindrance, or "denial of or by him, or any other perſon lawfully claiming "under him, &c." The declaration alleged, that the term was ſtill ſubſiſting, and that the plaintiff was never in poſſeſſion, or received the rents. That the plaintiff applied to the tenant to attorn, and on his refuſal, brought an ejectment to recover the poſſeſſion, which was defended under a leaſe granted by the defendant to one *Rogers* for a term commencing before the plaintiff's term; and that on the trial of that ejectment, the plaintiff was prevented recovering by reaſon of the leaſe: by means of all which premiſes, the plaintiff was prevented holding, &c. The defendant *pleaded*, that for the firſt half year of the plaintiff's leaſe, the plaintiff might have enjoyed, &c. but that for non-payment of the rent for twenty-one days after that half year, the defendant had a right to reenter, according to a proviſo in the leaſe, and that he did reenter, &c. To this plea the plaintiff *demurred* ſpecially, and aſſigned for cauſe, that the defendant did not by his plea deny that the term granted by the defendant to the plaintiff was ſubſiſting, but only gave an argumentative anſwer to it, and that the plea admitted a cauſe of action, and was no anſwer to the declaration. By the Court, The plea cannot poſſibly be maintained, becauſe it gives no anſwer to the plaintiff's demand; the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment, without the interruption of any other perſon, which could not have taken place here, on account of the prior leaſe granted to *Rogers*, and which was averred to be then ſubſiſting. Judgment for plaintiff.

In an action of covenant brought againſt the defendants in *their own right*, who were executors of one *J. K.* for a breach of covenant, it appeared that the defendants had aſſigned a leaſe, belonging to their teſtator, to the plaintiff, by way of mortgage, and therein covenanted that they had good title, and that it ſhould be lawful for the plaintiff from and after breach or default, &c. peaceably and quietly to enter, &c. (*in the uſual way*) without the lawful ſuit, let, trouble, or denial, of or from the ſaid *M. R.* and *S. S.* (*the defendants*) or either of them, their or either of their executors, adminiſtrators, or aſſigns, *or any other perſon or perſons whomſoever*; the breach aſſigned was, "that the plaintiff was evicted in conſequence of a judgment in ejectment obtained by one *J. Y.* having lawful title to the premiſes." To this declaration the defendant demurred, and aſſigned for cauſe, "that it did not appear that *J. Y.* had any lawful title to the ſaid premiſes, by, from, or under the ſaid *M. R.* and *S. S.* (*the defendants*) or either of them, or by reaſon of any thing done by the ſaid defendants, or either of them." The plaintiff joined in demurrer: in the argument it was urged in ſupport of the demurrer, "that it did not appear that the title of *J. Y.* commenced by any act of the defendants, or prior to the aſſignment made by them to the plaintiff, who might therefore have been evicted by means of ſome act done by himſelf ſince the aſſignment:" and on this point the Court gave judgment for the defendants, and refuſed the plaintiff liberty to amend the declaration, on the ground that they would not interfere to aſſiſt the plaintiff in an action brought againſt executors in their own right, who appeared only to have acted in the diſpoſition of the teſtator's effects. Noble *v.* King and Smith, Tr. 28 Geo. 3. C.B. 1 *Hen. Black.* 34.

Covenant to pay the land-tax.] In covenant for 77*l.* 10*s.* for two years and a half of rent, due to the plaintiff under a leaſe of two houſes and a piece of ground, for ſixty-one years, at 31*l.* the defendant pleaded *riens in arrere*, and a ſet off for money paid, and on an account ſtated; and he alſo paid 55*l.* into court. Iſſues were taken on the two pleas, and on the trial there was a verdict taken for the plaintiff, ſubject to the opinion of the Court, on a caſe, which ſtated in ſubſtance, beſides (the uſual and formal parts of a building leaſe) a covenant on the part of the tenant to pay all taxes (*the land-tax only excepted*) that the land-tax at the time of the leaſe made was only 3*l.* 8*s.* but in conſequence of houſes being built, an addition was made to the land-tax of 5*l.* 12*s.*; the queſtion was, whether the defendant was to be allowed *this increaſe of land-tax on the improved rent?* if he is, the poſtea to be delivered to him; if not, a verdict to be entered for the plaintiff. By the Court, The tenant has ſtipulated by this covenant to pay all the taxes except the land-tax; that is, Hyde *v.* Hill, Tr. 29 Geo. 3. B.R. 1 *Ter. Rep.* 377.

the land-tax which by law the landlord was then liable to pay. Now the land-tax act directs the tenant to pay the land-tax in the first instance, *and to deduct out of the rent so much of the rate as, in respect of the said rent*, the landlord should and ought to pay and bear; and the landlords, both mediate and immediate, according to their respective interests, are required to allow such deductions: then the legislature did not mean that the whole of the land-tax, in respect of *all* the rent, should be borne by the original landlord, but each was to make that allowance, in proportion to the rent which came to him: and *Buller*, J. mentioned a case in this court in the year 1765, where *A.* having granted a building lease to *B.* at the yearly rent of 7l. which estate *B.* improved, and afterwards underlet for 54l. *per ann.* was held only liable to pay the land-tax in proportion to the old rent (1).

Lowe *v.* Peers, Ea 8 Geo. 3. B.R. 4 *Burr.* 2225.

Void covenants.] In an action of covenant, *upon a marriage contract*, it appeared to arise on a promise under the defendant's hand and seal, and in his own hand-writing, to the effect following: "I do hereby promise Mrs. *Catharine Lowe* "that I will not marry with any other person besides her-"self: if I do, I agree to pay to the said *Catharine Lowe* "1000l. within three months next after I shall marry any "body else; witness my hand, *N. P.* and seal." This deed was executed in 1757, and in 1767 the defendant *Peers* married another woman, whereupon this action was brought. The plaintiff averred in her declaration, that she had remained single, and was always ready and willing to marry him whilst he continued single: but he married *E. G.* the breach was assigned in non-payment of the 1000l. though demanded: the defendant pleaded *non est factum.* On the trial, there was a verdict for the plaintiff, damages 1000l. with leave for the defendant to move for a new trial, without costs. a new trial was afterwards moved for, with liberty also to move afterwards in arrest of judgment: upon shewing cause, the questions were, 1st, "Whether the jury could give any "more or less damages than the 1000l. the specific sum in "the deed?" 2dly, "Whether this instrument is good enough "in law to support any action whatever?" Both motions (viz. for a new trial and in arrest of judgment) came on to be argued together by consent. *The motion for a new trial* was founded upon an objection to the direction given by the judge to the jury; which raised the 1st question. *And the motion in arrest of judgment* was founded on reasons tending to shew the invalidity of the instrument, as being in restraint of marriage; and this raised the second question. By the Court, As to the first point, where the precise sum is not

(1) Same point, 1 *Wilf.* 21. 2 *Strange*, 1191. and *Barnfather* v. *Lee*, E. 26 Geo. 3.

the

the eſſence of the agreement, the quantum of the damages may be aſſeſſed by the jury; but where the preciſe ſum is fixed and agreed upon between the parties, that very ſum is the aſcertained damage, and the jury are confined to it. Now this deed was the only evidence upon which damages could be given. It is a covenant to pay a ſtipulated ſum upon a particular event: the event has happened; the action is brought upon it; the ſpecified ſum of 1000l. is found in damages: it is the particular liquidated ſum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages. What elſe could the jury have found but this 1000l. unleſs they had given intereſt after the three months? (1) In reſpect to the validity of the deed, *this agreement is in reſtraint of marriage, and therefore illegal and void:* it is not an agreement to marry the plaintiff, but *not to marry any one elſe*; and yet ſhe was under no obligation to marry him: ſo that it reſtrained him from marrying at all, in caſe ſhe had choſen not to permit him to marry her. An action of covenant muſt be founded on the covenant, and the breach aſſigned within the words of it: now, if ſhe had requeſted him to marry her, and been refuſed by him, how muſt ſhe have aſſigned the breach? why, "that he being requeſted by her to marry her, he had refuſed to do ſo;" but what obligation was he under *to marry her*, or where was the breach of his covenant? his covenant ſays no ſuch thing as that *he would marry her:* tender and refuſal muſt apply to the thing ſtipulated; but he has not ſtipulated that he would marry her: as to mutuality of contract, the deed does not import ſhe ſhall marry him, neither doth her acceptance of it import any ſuch thing. It does not follow from her acceptance of the deed, that ſhe either underſtood he meant to marry her, or that ſhe engaged to marry him: poſſibly he might not at all mean to marry her, though he bound himſelf not to marry any one elſe: they are two quite different things; one does not follow from the other: beſides, this penalty is ſet up againſt the defendant after ten years have paſſed without any intercourſe between the plaintiff and him. Theſe engagements are liable to many miſchiefs; to many dangerous conſequences, and therefore ought not to be extended by implication. Another reaſon why we ſhould not ſtrain in favour of this contract is, becauſe if there was really any mutual contract, under fair and equal circumſtances, the plaintiff will ſtill be at liberty to bring her action; for a void bond can never ſtand in her way: THEREFORE, we think, that what paſſed at the trial was perfectly right; that the meaſure of damages was the 1000l. and that this was ſuch a contract, as ought not to be carried into exe-

(1) And *Yates*, J. ſaid, that, on a writ of inquiry, the inquiſition would have been ſet aſide, if leſs than the ſum ſpecified had been found.

cution; CONSEQUENTLY, let the rule for a new trial be discharged; but the judgment must be arrested.

Gallini *v.* Laborie, Ea. 33 Geo. 3. B.R. 5 *Ter. Rep.* 242.

The plaintiff brought this action upon a contract, by which the defendant, a foreigner, undertook to come over to England, in order to dance ballets at the Italian opera in the Haymarket, called the King's theatre, or at such other place as the plaintiff should appoint. The defendant never came at all; but it appeared, that during the time for which the defendant had engaged, there had been no licence from the lord chamberlain for the Opera-house, under the statute 10 *Geo.* 2. c. 28. though the plaintiff's company had exhibited dancing entertainments there: but the plaintiff had a licence for performing musical entertainments at a house in Hanover-square, under the statute 25 *Geo.* 2. c. 36. § 2. no request however was made to the defendant to perform there. A verdict having been given for the plaintiff, it was now moved to set that verdict aside; and by the Court, Under the statute 10 *Geo.* 2, c. 28, no entertainment of the stage, of which dancing is one, can be exhibited without the lord chamberlain's licence; and none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement, which, without such licence it was unlawful for him to execute. As to the circumstance of other performers having recovered on similar agreements against the plaintiff for their salaries, those verdicts are right, for being engaged to the plaintiff, and ready to execute the agreement on their part, they ought not to suffer because he did not obtain a licence, which it was his business to have procured: if the plaintiff had wished the defendant to dance elsewhere, he ought to have given him notice of it.

Lowe *v.* Peers, Ea. 8 Geo. 3. B.R. 4 *Burr.* 2228.

Covenants secured by a penalty or forfeiture.] There is a difference between *covenants in general* and *covenants secured by a penalty or forfeiture.* In the latter case, the obligee has his election; he may either bring an action of debt for the penalty, and recover the penalty (after which recovery of the penalty, he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole); or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*. *Per Lord Mansfield.*

And upon this distinction they proceed in courts of equity. They will relieve against a penalty upon a compensation; but where the covenant is to pay *a particular* liquidated sum, a court of equity cannot make a new covenant for a man: nor is there any room for compensation or relief; as in leases containing a covenant against ploughing up a meadow: if the covenant be *not to plough*, and there be a penalty, a court of equity will relieve against the penalty, or will

will even go further than this (to preſerve the ſubſtance of the agreeement); but if it is worded, "to pay 5l. an acre for every acre ploughed up," there is no alternative, no room for any relief againſt it, no compenſation; it is the ſubſtance of the agreement. *Per Lord Mansfield.*

The defendant, in a leaſe of a farm from the plaintiff, agreed therein not to cut any tree or trees growing thereupon, under a penalty of 500l. The defendant, notwithſtanding this covenant, very much miſuſed the farm, and cut down almoſt every tree growing thereupon; in conſequence whereof the plaintiff brought debt for the penalty of 500l. and upon *nil debet* pleaded, there was a verdict for the plaintiff, that the defendant owed the debt, and they found 1s. damages and 40s. coſts. It was now moved for the defendant upon the 8th & 9th Wil. 3, c. 10, (1) that the jury ought to have aſſeſſed the real damages; for if this verdict were to ſtand, the plaintiff might take out execution for the whole penalty of 500l. and his coſts, and the plaintiff will be obliged to go into chancery, which the ſtatute was made to prevent. *The Court*, on conſideration, were of opinion, that a *venire facias de novo* ought to be awarded; and ſaid that the ſtatute was made for the benefit of defendants, and the plaintiff was bound by the ſtatute, and obliged to aſſign as many breaches in the caſe as he pleaſed, that the damages might be aſſeſſed by the jury upon each breach; and that it was not in the plaintiff's election to take a verdict for the whole debt as he had done in the preſent caſe; they therefore awarded a *venire facias de novo*, the verdict being defective. Drage v. Brand, Ea. 8 Geo. 3. C.B. 2 *Wilſ.* 377.

In error from C. B. in an action of debt, to recover a penalty for the non-performance of articles of agreement between the plaintiff and the defendant's teſtator; the agreement was, that the defendant in the original action, now the plaintiff in error, ſhould ſink a pit for the teſtator, and *begin to work within fourteen days*, and continue working and ſinking the ſame, day and night, the ſix working days in the week, till it ſhould be completed: the breach aſſigned was, Goodwin v. Crowle, M. 16 Geo. 3. B.R. *Cowp.* 357.

(1) By the ſtat. 8th & 9th Will. 3, c. 11, it is enacted, that in debt on a bond, or penal ſum for performance of covenants, the plaintiff may aſſign as many breaches as he pleaſes, and the jury ſhall aſſeſs damages for ſuch as have been broken: and in caſe of *judgment on demurrer, or by nil dicit*, the plaintiff may ſuggeſt upon the roll as many breaches as he ſhall think fit, *upon which a writ of enquiry ſhall go*, to enquire of the truth of the breaches, and to aſſeſs the damages ſuſtained: but the defendant may pay all damages and coſts, &c. and then there ſhall be a ſtay of execution; but the judgment ſhall ſtill remain as a further ſecurity to anſwer the plantiff ſuch damages as may be ſuſtained for further breach of any covenant in the ſame deed or writing, upon which the plaintiff may have a *ſcire facias toties quoties*.

that he *did not begin within the* fourteen days, and *continue* ſinking, &c. the defendant *pleaded*, that he was ready to begin *within the fourteen days*, but that it was agreed between him and the teſtator, that he ſhould firſt drive or ſink a ſlough, or drain, &c. which took up twenty days, and ſo he could not begin to work the pit within the fourteen days. Upon demurrer to this plea, and argument thereon, the court of C. B. gave judgment for the plaintiff, which he accordingly entered up for the whole penalty of 250l. and 23l. 10s. coſts. It was objected for the plaintiff in error, 1ſt, That it did not appear on the record that the plaintiff had ſuſtained any damages; 2dly, That no writ of enquiry had been awarded to aſcertain the damages; 3dly, That the judgment ought not to have been taken for the whole penalty, but only entered up as a ſecurity. *By the Court*, The true conſtruction and ſubſtantial juſtice of the act is, that the penalty ſhall not be levied in any caſe whatever: but the judgment in this caſe being upon demurrer, it muſt be as uſual, to recover the debt. The ſtatute directs, that the judgment ſhall be entered as heretofore; but then it is only to ſtand as a ſecurity for the damages ſuſtained. The plaintiff is not to aſſign the breaches till after the judgment is given; if the plaintiff ſhould take out execution for the whole penalty, then is the time to complain: but there is no objection to the judgment as it ſtands; and on that ground only the court give their opinion, that *the judgment muſt be affirmed*. Lord *Mansfield* added, that in caſes where the Court of Chancery order a judgment to be given *as a ſecurity*, it is entered up in the uſual form; but the party cannot take out execution upon it for the ſum in which it is given.

Hardy *v.* Bern, Ex. Ea. 30 Geo. 3. 5 *Ter. Rep.* 540, 636.

The ſtatute of 8th & 9th *Will.* 3, c. 11, § 8, was made in favour of defendants, and is highly remedial, calculated to give plaintiffs relief up to the extent of the damages ſuſtained, and to protect defendants againſt the payment of further ſums than what are in conſcience due; and alſo to take away the neceſſity of proceeding in equity to obtain relief againſt an unconſcientious demand of the whole penalty in caſes where ſmall damages only has accrued: and it is not in the power of a plaintiff to refuſe to proceed according to that ſtatute in caſes within the proviſions of the ſection referred to; but he muſt aſſign the breach of ſuch covenants, as he proceeds to recover the ſatisfaction for: and if the defendant plead to iſſue, and the cauſe goes to a jury for trial, the jury upon trial of ſuch cauſe muſt aſſeſs damages for ſuch of the breaches aſſigned as the plaintiff upon the trial of the iſſues, ſhall prove to have been broken. This caſe, which was brought by writ of error from the Court of Exchequer, was an action of debt upon articles of agreement, containing divers ſtipulations of things to be done by the defendant;

fendant; and there was a penal clauſe, whereby the parties became mutually bound to each other in the penal ſum of 100l. for the performance of the articles. The action was brought for that penalty, and the plaintiff, in his declaration, alleged the breach of ſeveral of the ſtipulations entered into by the defendant. Theſe breaches were ſeverally denied by the defendant, and iſſues were joined thereon: all the iſſues were found for the plaintiff, and a verdict given for him for 1s. damages, for the detention of the debt, and judgment entered thereon. The defendant brought this writ of error, and aſſigned as error, *inter alia*, that although the plaintiff had aſſigned ſeveral breaches of covenant, and upon the trial the iſſues found the ſeveral breaches ſo aſſigned, yet the jury did not, according to the form of the ſtatute, aſſeſs any damages for the ſaid ſeveral breaches, or any of them. The caſe was argued at Lord *Kenyon*'s houſe, before his lordſhip and Mr. Juſtice *Buller*, on 21ſt June, 1794; and Lord *Kenyon*, Ch. J. and *Buller*, J. reported their opinion to the Lord Chancellor, as follows (after ſtating the facts as above) "Upon the policy of the ſtatute, upon the clear words of it, and upon the authority of *Drage* v. *Brand*, in 2 *Wilſ.* 377, and *Goodwin* v. *Crowle*, in *Cowp.* 357, we are of opinion, that the judgment ought to be reverſed, and a *venire de novo* awarded, to enable another jury to aſſeſs proper damages, adapted to the injury ſuſtained by the plaintiff, by the breaches of covenant complained of by him."

So, in an action of debt, for a penalty of 100l. upon articles of agreement between the plaintiff and the defendant, in which each party bound himſelf to the other in 100l. for the abiding by the opinion of counſel, relative to the right to certain goods, valued at 73l. 18s. 11d. and which were claimed under a bill of ſale by both parties; the breach aſſigned was, that the plaintiff was ready to perform his part of the agreement, and to draw up and ſettle by his attorney, a caſe for the opinion of counſel; and that he prepared a draught of ſuch caſe, and tendered the ſame to the defendant for his approbation; and requeſted the defendant to join in drawing up and ſettling, &c. yet that the defendant had not, &c. The defendant ſuffered judgment to go by default; and the plaintiff, without executing a writ of enquiry, took out execution for the whole penalty, but indorſed on the writ, *levy* 73l. 18s. 11d. *beſides coſts and poundage*. It was moved, that the execution ſhould be ſet aſide, and the money reſtored to the defendant, becauſe the plaintiff had not purſued the mode preſcribed by the ſtat. 8th & 9th *Will.* 3, c. 11, § 8, The Court ſuggeſted, that the preſent record would be erroneous if they did not interfere; and the counſel for the defendant then moved that the rule might be enlarged until

Roles v. Roſewell, B.R. Hil. 34 Geo. 3. 5 *Ter. Rep.* 538.

next term, and that the plaintiff might be at liberty to execute a writ of enquiry at the next aſſizes, which was granted.

Kingſton *v.* Preſton, Ea. 13 Geo. 3. B.R. cited in Jones *v.* Barkley, Tr. 21 Geo. 3. 2 *Doug.* 688, 689.

The different kinds of covenants.]—There are three different kinds of covenants:—Firſt, ſuch as are called *mutual and independant*, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuſe for the defendant to allege a breach of the covenants on the part of the plaintiff.

Secondly, There are covenants which are *conditions and dependant*, in which the performance of one depends on the prior performance of another, and therefore till this prior condition is performed, the other party is not liable to an action on his covenant.

Thirdly, There are alſo a third ſort of covenants, which are *mutual conditions to be performed at the ſame time*, and in theſe, if one party was ready, and offered to perform his part, and the other neglected or refuſed to perform his, he who was ready and offered, has fulfilled his engagment, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the firſt act.

And the dependance or independance of covenants, is to be collected from the evident ſenſe and meaning of the parties: and however tranſpoſed they may be in the deed, their precedency muſt depend on the order of time in which the intent of the tranſaction requires their performance.

Boone *v.* Eyre, Ea. 17 Geo. 3. B.R. 1 *Hen. Black.* 273.n (a).

Mutual and independant Covenants]. One covenant cannot be pleaded againſt another covenant; thus in covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the Weſt Indies, together with the ſtock of negroes upon it, in conſideration of 500l. and an annuity of 160l. *per annum*, for his life; and covenanted, that he had a good title to the plantation, was lawfully poſſeſſed of the negroes, and that the defendant ſhould quietly enjoy: the defendant covenanted with the plaintiff, "that *the ſaid Boone (the plaintiff) well, faithfully, and truly doing, fulfilling, and performing* the ſeveral agreements, covenants, &c. therein contained on his part to be performed; he, the ſaid defendant, would well and truly pay the ſaid annuity." The breach aſſigned was the non-payment of the annuity; plea, that the plaintiff was not at the time of making the deed legally poſſeſſed of the negroes on the plantation, and had not a good title to convey, to which there was a general demurer. *Per* Lord *Mansfield*, the diſtinction is very clear, "where mutual covenants go to "the whole conſideration on both ſides, they are mutual con-"ditions, the one precedent to the other;" but where they only

only go to a part, where a breach may be paid for in damages, there the defendant has a remedy in his covenant, and ſhall not plead it as a condition precedent; if this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action. Judgment for the plaintiff.

Afterwards the ſame party brought another action in the court of common pleas, on the ſame deed, and the breach aſſigned was for two years and an half arrears of the annuity; concluding, and *ſo the defendant hath not kept his covenant*, but hath broken the ſame. The defendant pleaded, 1ſt, That he hath not broken his covenant; 2dly, That the plantation and ſtock were over-valued, and worth leſs than *Boone*, the plaintiff, had covenanted they were; and that *Boone* had no poſſeſſion, no title, and neither could nor did deliver poſſeſſion, &c. &c. all which were contrary to the covenants, &c. of the plaintiff; there were three other pleas to the ſame effect, to the firſt plea the plaintiff *demurred* ſpecially, and among other cauſes, aſſigned, that the breach laid in the declaration was in the negative, "that the defendant *hath not kept* his covenant, and the plea is likewiſe in the negative, that the defendant *hath not* broken the covenant. and in that reſpect is not iſſuable (1). To the other four pleas, the plaintiff demurred generally, and there were joinders in all the demurrers. The court adjudged that theſe were mutual covenants, and not one a condition precedent the performance of the other, and ſo that one could not be pleaded in bar of the other: and per *De Grey*, CH. J. Where the participle *doing*, *performing*, *&c.* is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent.

Boone *v.* Eyre, Tr. 19 Geo. 3. C.B. 2 *Black.* 1312.

In an action of covenant, the declaration ſtated an indenture, in which (after reciting, that the plaintiff had obtained letters-patent for an improved method of bleaching materials uſed in the manufacturing of paper, and that it had been agreed between the plaintiff and the defendant, that in conſideration of 500l. to be paid by the defendant to the plaintiff, in the manner hereinafter mentioned, he, the plaintiff, ſhould teach and inſtruct the defendant, in his new and improved method of bleaching and preparing ſuch materials, and permit him, during the period of the patent, to bleach materials according to his ſpecification) contained a covenant, that "in purſuance of the ſaid agreement, and for and "in conſideration of the ſum of 250l. to the plaintiff paid

Campbell *v.* Jones, Hil. 36 Geo. 3. B.R. 6 *Ter. Rep.* 570.

(1) For *two negatives* cannot make an iſſue which muſt conſiſt of an affirmative and negative of one and the ſame fact. So held in *Walſingham* & *Comb.* B.R. 1 *Lev.* 183. and ſince in *Chitty* v. *Bird.* Exch. 6 Geo. 3.

'by

" by the defendant, and of the further ſum of 250l. cove-
" nanted to be paid by the defendant, to the plaintiff, in the
" manner hereinafter mentioned, he, the plaintiff, would, to
" the beſt of his ſkill, and with all poſſible expedition, teach
" and inſtruct the defendant, in the manner and method of
" bleaching, &c. and the defendant, in conſideration of the
" plaintiff's covenants, covenanted that he would on or be-
" fore February 25th, *or ſooner*, if the plaintiff ſhould before
" that time have ſufficiently taught and inſtructed him, pay
" to the plaintiff the further ſum of 250l." It then ſet forth a breach of covenant by the defendant, in not paying the ſaid further ſum of 250l. on or before 25th February, or at any time ſince; to this declaration there was a ſpecial demurrer, and the cauſe aſſigned was, that it appeared by the declaration, that the plaintiff had covenanted to teach, and that the defendant had covenanted to pay, but it was not averred that the plaintiff had in fact taught the defendant, &c. In ſupport of the demurrer, it was contended, that the plaintiff's teaching the defendant was a *condition precedent* to the plaintiff's right to demand the 250l. By the Court, Whether theſe covenants be or be not independant of each other, muſt depend on the good ſenſe of the caſe; if any thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it ſhould be averred in the declaration, that *that thing was done:* where there are mutual promiſes, yet if one thing be the conſideration of the other, there a performance is neceſſary to be averred, *unleſs a day is appointed for performance.* Per *Holt*, Ch. J. Salk. 113, If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money before the thing be done. *Ibid.* 171, Upon the authority of theſe caſes, the judgment of the Court muſt be in favour of the plaintiff; if upon the true conſtruction of the deed, a certain day be fixed for the payment of the money, and the thing to be done may not happen till after. The plaintiff in this caſe covenants *with all poſſible expedition*, not by any fixed time, to inſtruct the defendant; and, in conſideration of the plaintiff's covenant, the defendant covenants that he will, on or before 25th February, *or ſooner*, in caſe the plaintiff ſhould have inſtructed the defendant, pay him the further ſum of 250l. ſo that the intent of the parties appears clearly to be, that the payment might be accelerated, but not in any event delayed. But another ground on which the plaintiff is entitled to judgment is this, that the teaching of the defendant is not the *whole conſideration* of the covenant to pay; the agreement of the parties is, that in conſideration of one entire ſum of 500l. the plaintiff ſhould teach and inſtruct the defendant in the art of bleaching the materials for making

ing paper, AND permit him, during the period of his patent, to bleach ſuch materials according to his ſpecification; and though this ſum is divided into two ſums of 250l. each, and is to be paid at different times, no part is denominated to be the conſideration of uſing the patent, nor any part as the conſideration of teaching, but one integral ſum is adapted to the whole; under this agreement the defendant has a perfect title to uſe the patent, and the inſtruction of the defendant cannot be taken to be the moſt material part of the conſideration, as the ſpecification muſt be ſuppoſed to contain full inſtruction for that purpoſe, though ſome advantage might ariſe from the aſſiſtance of the inventor. The diſtinction (1) is clear: where mutual covenants go *to the whole* of the conſideration on both ſides, they are mutual covenants; but where the covenants go *only to a part*, and where a recompence may be had in damages, it is a different thing. Now here the covenant to teach is but *part of the conſideration* of the 500l. for not doing which, the defendant may recover a recompenſe in damages, and the agreement of the plaintiff having been executed in part, by transferring to the defendant a right to execute his patent, he ought not to keep that right without paying the remainder of the conſideration, becauſe he may have ſuſtained ſome damage by the plaintiff not having inſtructed him. Judgment for the plaintiff.

So, in an action of debt, the declaration ſtated certain articles of agreement, whereby the plaintiffs, in conſideration of the ſum of 3800l. to be paid as thereinafter mentioned, did jointly and ſeverally covenant with the defendant and others, to erect a certain building for a manufactury at Ottery St. Mary, in the county of Devonſhire, according to certain drawings and plans, and alſo that the ſaid building ſhould be in every reſpect *finiſhed and completed, on or before the 29th day of September then next*: in conſideration whereof, the defendant and the other perſons, parties to the ſaid articles, covenanted to pay the 3800l. in the following manner, that is to ſay, 1266l. 13s. 4d. *as ſoon as the ſecond floor ſhould be laid*; the further ſum of 1266l. 13s. 4d. *as ſoon as the fourth floor* ſhould be laid; and the remaining ſum of 1266l. 13s. 4d. *as ſoon as the whole building ſhould be covered in, and fully finiſhed and completed:* the declaration then averred, that the plaintiffs, after making the ſaid articles, did build, erect, and finiſh the ſaid building, according to the ſaid drawings and plans (except as hereinafter mentioned) and *that the building would have been in every reſpect finiſhed*

Terry and another v. Dintzee, Bart. Hil. 35 Geo. 3. C. B. 2 *Hen. Black.* 389.

(1) *Boone* v. *Eyre.*

and

and completed on or before the 29th day of September, according to the tenor and effect of the ſaid articles, *but that the defendant and the other parties had made divers alterations and variations, and deviated from the drawings and plans*, whereby the plaintiffs were not only hindered and prevented from finiſhing and completing the building on or before the ſaid 29th day of September, but alſo obliged to perform certain other extraordinary work, over and beſides what was originally deſigned and ſtipulated for; it was then averred, that the building and the extraordinary work, &c. had been ſurveyed, and that the plaintiffs reaſonably deſerved to have the ſum of 7059l. 1s. 9½d. excluſive of the ſum of 150l. as a further allowance for divers expences not included in the articles: *the breach aſſigned was the nonpayment of any of the ſums of money in the articles of agreement ſpecified*; there were alſo, the common counts for work and labour, &c. To the firſt count, there was a *general demurrer*, and to the others *nil debet* was pleaded. By the Court, The only queſtion in this caſe is, whether the covenants were dependant, and whether the completing the building was a precedent condition? now it is a rule long eſtabliſhed in the conſtruction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independant (1), and this principle applies to the preſent caſe; for the plaintiffs covenant to finiſh and complete the building on or before 29th September, in conſideration of which, the defendant covenants to pay 3800l. by inſtalments, viz. a certain ſum when the ſecond floor ſhould be laid, a further ſum when the fourth floor ſhould be laid, and the remainder of the money when the whole ſhould be covered in and finiſhed: by the terms of the contract theſe two ſeveral ſums of money were to be paid, before the thing to be done was done; the plaintiffs therefore were clearly entitled to their action for the money, without averring performance, and the defendant to his remedy on the covenants. Judgment for the plaintiff.

Duke of St. Alburns *v.* Shore, Tr. 29 Geo. 3. C.B. 1 *Hen. Black.* 270.

Covenants dependant on the performance of a precedent condition.] In an action of debt for 500l. (the penalty contained in certain articles of agreement) the declaration ſtated an agreement for the ſale of lands, whereby the defendant was to purchaſe of the plaintiff certain lands, at the price of 2594l. to be paid at Lady-day then next, in the manner therein mentioned, viz. the plaintiff was to accept a conveyance and ſurrender of certain premiſes of the

(1) For this *Buller*, J. who delivered the opinion of the Court, cited *Sharpe* v. *Sharpe*, in 1 Salk. 170. 1 Lord *Raym.* 662. *Comyns Rep.* 98. and 12 Mod. 455; alſo *Pordage* v. *Cole*, in 1 *Saund.* 319.

defend-

defendant, at the price of 1820l. and have the remainder of the purchaſe-money paid to him on execution of the conveyances; and it was therein agreed, that *all timber-trees, elms, and willow-trees, which then were upon any of the above eſtates, ſhould be fairly valued by two appraiſers, and the prices or values thereof paid by the reſpective purchaſers of the eſtates at the time before mentioned*; it was alſo agreed, that in caſe the plaintiff ſhould not be able to make a good title to the eſtate before March 24th then next, the agreement ſhould be void; the declaration then proteſting, that the defendant had not done any thing on his part, &c. averred, that *the plaintiff had ever been and was capable, ready, and willing to make a good title to the defendant, and to execute and cauſe to be executed* neceſſary and proper conveyances, &c. &c. &c. and aſſigned a breach in the performance of the articles on the part of the defendant, that he did not nor would accept the title.—The defendant pleaded, 1ſt, That the plaintiff *was not capable, ready, and willing to make, nor could he make a good title to the defendant*, according to the ſaid agreement; 2dly, That after the making of the ſaid agreement, and before the Lady-day next enſuing the date, *the plaintiff cut down divers, to wit, 500 of the ſaid timber-trees, 500 of the ſaid elms, and 500 of the ſaid willow-trees*, by the ſaid agreement agreed to be valued and paid for, *whereby the plaintiff diſabled himſelf from performing, and it became and was impoſſible for him to perform and fulfil the ſaid articles of agreement* on his part, &c. *for which reaſon, he the ſaid defendant declined and refuſed to carry the ſaid articles into execution on his part, as he lawfully might.* The plaintiff replied, and took iſſue on the firſt plea, and there was a general demurrer to the ſecond plea, and joinder in demurrer.—BY THE COURT, Unleſs the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant, he is not entitled to maintain the action. If he has not ſet forth a ſufficient title, judgment muſt be againſt him, whatever the plea is, and if the plea be a good bar, the ſame conſequence muſt follow: it has been argued on the part of the plaintiff, that the agreement reſpecting the trees, was a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. But in *Boone* v. *Eyre*, the court of king's bench laid down a clear and well founded diſtinction, that "where a covenant went "to the whole of the conſideration on both ſides, there it "was a condition precedent, but where it did not go to the "whole, but only to a part, there it was not a condition "precedent, and each party muſt reſort to his ſeparate re-"medy;" and for this plain and obvious reaſon, becauſe the damages might be unequal. Now we found our opinion in the preſent caſe, on the ground of the diſtinction in

Boone

Boone v. *Eyre*, which we think a fair and ſound one: then the queſtion is, Whether the covenant of the plaintiff goes to the whole conſideration of that which was to be done by the defendant? Now the plaintiff clearly covenanted to convey an eſtate to the defendant, in which all the timber growing on the eſtate was neceſſarily included. The timber was not disjoined from the eſtate by the ſeparate valuation of it; it was expreſsly agreed, that all trees, &c. which then were upon the eſtates ſhould be valued; but it is not permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it, between the time of entering into the contract, and that of performing it: there may be caſes, where the timber growing on an eſtate, is the chief inducement to a purchaſe of that eſtate; but it is not neceſſary to enquire, whether it be the chief inducement to a purchaſe or not? for if it may be in any ſort a conſideration to the party purchaſing, to have the timber, the party felling ought not to be permitted to alter the eſtate, by cutting down any of it; this is not an action of covenant, where one party has performed his part, but it is brought for a penalty, on the other party refuſing to execute a contract; but *to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part*; we are therefore of opinion, that the plea is a good bar to the action, and on this we give judgment.

Kingſton v. Preſton, Ea. 13 Geo. 3. B.R. cited 2 Doug. 688.

Where the plaintiff declared, that the defendant covenanted, that at the end of a year and a half, he would reſign his buſineſs of a mercer, in favour of the plaintiff and another, who ſhould execute deeds of partnerſhip for fourteen years, and *that immediately after the execution of ſuch deeds, he would permit the plaintiff and ſuch other, to carry on the ſaid buſineſs* in the defendant's houſe; and that the plaintiff covenanted, that at and before the ſealing of the ſaid deeds, *he would procure good and ſufficient ſecurity* to be given to the defendant, to ſecure to him 250l. per month, until the value of the ſtock ſhould be reduced to 4000l. and aſſigned a breach, that he was always ready to perform his part, but that the defendant *had refuſed to ſurrender and give up his buſineſs* at the time fixed: the defendant pleaded, 1ſt, That the plaintiff *did not offer* ſufficient ſecurity; 2dly, That *he did not give* ſufficient ſecurity for the payment of the 250l. &c. The plaintiff demurred generally to both pleas. *By the Court*, In the caſe before us, it would be the greateſt injuſtice if the plaintiff were to prevail; the eſſence of the agreement was, that the defendant ſhould not truſt to the perſonal ſecurity of the plaintiff, but, before he delivered up his ſtock and buſineſs, ſhould have good ſecurity for the payment of the money; *the giving ſuch ſecurity, therefore,*

muſt

muſt neceſſarily be a condition precedent, and performance ſhould have been averred. Judgment for the defendant.

In an action of debt, to recover 21l. on certain articles of agreement, it appeared on oyer of the articles, that the plaintiff had thereby agreed, that he would on or before 2d September then next, by ſuch conveyances, &c. grant, ſell, and releaſe, aſſign, and ſurrender, or otherwiſe convey to the defendant, certain premiſes, in conſideration whereof the defendant covenanted to pay to the plaintiff 210l. on or before 2d September then next; on failure of complying with the above agreement, the defendant was to pay to the plaintiff the ſum of 21l. and if the plaintiff did not deliver the eſtate according to the before-mentioned agreement, then he was to pay the defendant 21l. It was further agreed between the parties, that the plaintiff ſhould take up the copyhold as follows, viz. that the plaintiff ſhould take it up either for the defendant or his wife as they ſhould agree at the time that the plaintiff ſhould take it up for himſelf; that each party ſhould pay ſhare and ſhare alike, including the expence. The defendant pleaded, 1ſt, *Non eſt factum*; 2dly, That the plaintiff did not on or before 2d September, by ſuch conveyances, &c. grant, ſell, and releaſe, aſſign and ſurrender; 3dly, That the plaintiff did not on September 2, or at any time ſince, grant, ſell, and releaſe; 4thly, That the plaintiff at the time of the making of the articles, *nil habuit in tenementis*. To the three laſt pleas the plaintiff demurred generally. By the Court, Where there are *dependant covenants*, no action will lie by one party, unleſs he have performed, or offered to perform, his covenant; then *the queſtion is, Whether theſe are, or are not dependant covenants?* and they certainly are; the one is to depend on the other: when the one party conveyed his eſtate, he was to receive the purchaſe money, and when the other parted with his money he was to have the eſtate; they were reciprocal acts, to be performed by eachother at the ſame time: and it is a ſettled principle, that if they be dependant covenants, performance, or the offer to perform, muſt be pleaded on the one part, in order to found the action againſt the other.—Judgment for the defendant.

Goodiſon *v.* Nunn, Tr. 32 Geo. 3. B.R. 4 *Ter. Rep.* 761.

This was an action of covenant, brought in the court of common pleas, for non-payment of rent for three years and a quarter, due at Lady-day, 1795, on an indenture of demiſe, from the defendant in error, to the plaintiff in error, for ſeven years, from Chriſtmas, 1791, at the yearly rent of 60l. payable quarterly: the leaſe contained the uſual covenants, that the leſſee ſhould pay the rent, keep the premiſes in repair, &c. and there was a proviſo that the leſſee might determine the term at the end of the firſt three or five years, giving ſix months' previous notice to the leſſee, and that

Porter *v.* Shephard, in Er. Ea. 36 Geo. 3. B.R. 6 *Ter. Rep.* 665.

then and in ſuch caſe, from and after the expiration of the firſt three or five years, and payment of all rents and arrears of rent and duties on the tenant's part to be paid, and performance of the covenant on the part of the leſſee, until the expiration of the ſaid firſt three or five years, *the indenture* and every clauſe therein *ſhould ceaſe and be utterly void.* The defendant pleaded, that as to the rent due at Chriſtmas, 1794, nothing was in arrear, and as to the reſidue of the rent, claimed from Chriſtmas 1794, to Lady-day, 1795, that ſix months before the end of the firſt three years, he gave notice to the leſſee of his intention to quit, which notice the leſſee accepted, and that at the expiration of the ſaid notice, he gave up the poſſeſſion, &c. The plaintiff below replied to the firſt part of the plea, that the rent due at Chriſtmas, 1794, was in arrear and unpaid; on which iſſue was joined, and which iſſue was found for the defendant; and as to the other part of the plea, that the defendant did not pay all rent, and arrears of rent and duties on the tenant's part to be paid, &c. and perform all the covenants contained in the indenture, on the part of the leſſee, *until the expiration* of the firſt three years, &c. There was a demurrer to the latter part of the replication, in which theſe cauſes were aſſigned; that the plaintiff did not thereby traverſe or deny any of the matters contained in that part of the plea, to which the ſame was meant to be a replication, but attempted to introduce a collateral and immaterial iſſue, and that the replication did not ſuſtain the action or ſupport the declaration; the plaintiff below having joined in demurrer, the court of common pleas gave judgment in his favour; and then the defendant below brought a writ of error, and aſſigned errors, &c. By the Court, there is no ground to impeach the judgment given in the court of common pleas; conditions are to be conſtrued to be either precedent or ſubſequent, according to the fair intention of the parties, to be collected from the inſtrument, that technical words, if there be any to encounter ſuch intention (and there are none in this caſe) ſhould give way to that intention; the proviſo on which the leſſee's power to determine the term ariſes, ſays, that if he ſhall give a certain notice, then *from and after* the expiration of the firſt three or five years, and payment of all rents and duties, and performance of the covenants on the part of the leſſee, the indenture ſhould ceaſe and be utterly void; therefore certain other things beſides giving the notice, were to be performed by the leſſee, namely, the payment of all rents and duties, and performance of all covenants; but the tenant here contents himſelf with ſaying, that he gave due notice, and does not pretend to ſay, that the rents and duties were diſcharged, and the other covenants performed: there is no doubt, however, from the words of the proviſo, but that

from and after create a condition precedent; and there is as little doubt reſpecting the intention of the parties: the landlord did not mean, that the leſſee ſhould have it in his power, to put an end to the leaſe, leaving him, the leſſor, to pay all the duties, and to put the eſtate in repair; the meaning evidently was, that the leſſee ſhould not have the benefit of the proviſo, without doing the whole of what he had undertaken to do, and not merely a part: then it is objected, that the landlord ſhould have ſhewn in his replication, what duties were not performed; but the proviſo was introduced for the benefit of the tenant, and before he can take advantage of it, he muſt ſhew that he has done every thing that was required of him. Judgment affirmed.

Hotham & *al.* *v.* Ea. Ind. Co. Hil. 27 Geo 3. B.R. 1 *Ter. Rep.* 638.

And if the performance of a precedent condition, be prevented by the neglect or default of the other party, it is equal to a performance. In covenant on a charter-party of affreightment; the declaration, after ſtating ſeveral parts of it (by which it appeared, that notwithſtanding the plaintiff had let the ſhip to freight only 903 tons, the company were to lade on board as many more goods as the ſhip could in ſafety carry), contained a covenant, that no allowance ſhould be made for ſhort tonnage, *unleſs the ſame ſhould be certified by the defendant's preſidents, agents, or chiefs and councils, or ſupercargoes, from whence ſhe ſhould receive her laſt diſpatch*; and alſo unleſs ſuch ſhort tonnage be found and made to appear, on her arrival in the river Thames, upon a ſurvey to be taken by four ſhip-wrights or others, to be indifferently named and choſen by the defendants and the plaintiffs; the declaration then ſtated, that although the defendants loaded and put on board goods to the amount of 903 tons, and although the ſhip could have ſafely brought 100 tons more, the defendants, their factors and aſſigns, wholly refuſed to put any more goods on board: the defendants pleaded, 1ſt, That the ſhip was not capable of taking in more than 903 tons, on which iſſue was taken; and, 2dly, That the allowance claimed for that tonnage, was not certified by the company's preſident, &c. Replication, that the plaintiffs requeſted the company's agents, &c. to certify the deficiency, and that they wholly refuſed. Rejoinder, taking iſſue on that fact: on the trial, the jury found a verdict for the plaintiffs on both iſſues, and it was afterwards moved in arreſt of judgment; and the objections were, "that the certificate previous to the ſhip's ſailing from the Eaſt Indies, and the ſurvey after her arrival in the Thames, *were conditions precedent* to the plaintiffs right to recover for ſhort tonnage, and being ſuch, and performance not being averred, it was a radical defect in the plaintiff's title, not cured by verdict, but objectionable in arreſt of judgment.—By the Court, There are no preciſe

technical words required in a deed, to make a ſtipulation condition *precedent* or *ſubſequent*; neither doth it depend on the circumſtance, whether the clauſe is placed prior or poſterior in the deed, ſo that it operates as a proviſo or covenant; for the ſame words have been conſtrued to operate as either the one or the other, according to the nature of the tranſaction; the merits, therefore, of the preſent queſtion muſt depend on the nature of the contract, and the acts to be performed by the contracting parties, and the ſubſequent facts diſcloſed on the record, which have happened in conſequence of this contract; it is unneceſſary to ſay, whether the clauſe relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiff having taken all proper ſteps to obtain the certificate, and it being rendered impoſſible to be performed by *the neglect and default* of the company's agents, it is equal to performance; this is evident from common ſenſe, and it was ſo held in Roll's Abr. 445, and many other books. If ſo, there was a right of action once fairly veſted in the plaintiffs, from the defendants not having fully laden the ſhip before ſhe left India, which they were by their covenant bound to do: for all that is neceſſary *prima facie* to found an action of covenant upon is, that the covenant ſhould be broken; and this right of action, once veſted, was only capable of being diveſted by a ſubſequent *nonfeaſance*; namely, by not taking the proper ſteps to procure a ſurvey after the arrival of the ſhip in the river Thames; this, therefore, being a circumſtance, the omiſſion of which was to defeat the plaintiff's right of action, once veſted, whether called by the name of a proviſo, by way of defeaſance, or a condition ſubſequent, it muſt in its nature be a matter of defence, and ought to be ſhewn by the defendants; and as they have not inſiſted on it, though they have inſiſted on the want of a certificate, we muſt after verdict take it, that the fact did not exiſt, and it will follow as a conſequence, that *there is no ground for arreſting the judgment.*

Phillips *v.* Fielding, M. 33 Geo. 3. C.B. 2 *Hen. Black.* 123.

In an action of aſſumpſit, for the non-performance of a ſpecial agreement, the declaration (which was very long) contained nine counts; the firſt of which ſtated, "that the plaintiff was about to expoſe to ſale, and to ſell by way of public auction, a certain copyhold eſtate, under the following conditions: 1ſt, that the higheſt bidder ſhould be the purchaſer: 2dly, That no perſon ſhould advance leſs than 2l. at each bidding: 3dly, That the purchaſer ſhould pay down immediately a depoſit of 20l. *per cent.* and ſign an agreement for payment of the remainder on or before Chriſtmas-day next, *on having a good title:* 4thly, That *the purchaſer ſhould have a proper ſurrender of the eſtate at his own expence, on payment of the remainder of the purchaſe money,* according

according to the third condition, *at which time the purchaſer would be entitled to the rents and profits:* it then ſtated the 5th, 6th, and 7th conditions of ſale: that the ſale took place, and the defendant was the higheſt bidder for the eſtate, and bought the ſame at 170l. and then and there ſigned a certain agreement in writing, whereby he agreed to become the purchaſer of the ſaid premiſes, at the price of 170l. whereby he became liable to pay, &c. the breach was then aſſigned, that although the plaintiff had well and truly performed the conditions of ſale on his part, yet *the defendant did not pay down immediately the depoſit, nor did he on or before the 25th day of December*, 1791, *or at any other time pay the 170l. purchaſe money*, although ſo to do he had been requeſted, and although the time limited by the conditions of ſale had elapſed, and although *the ſaid plaintiff had always been ready and willing, and had frequently offered to make out a good title to the ſaid eſtate, and to make a proper ſurrender of the ſaid eſtate, to the ſaid defendant, on payment of the ſaid purchaſe money*, &c. In the 2d, 3d, 4th, and 5th counts, the reſpective eſtates which the plaintiff was about to ſell, were deſcribed as being *really* different from each other (1); but in all other reſpects thoſe counts were ſimilar to the firſt, reciting the ſame conditions, and containing the ſame allegations; the remaining four were the common money counts: to the five firſt counts, there was a general demurrer, and to the four laſt non aſſumpſit was pleaded. In ſupport of the demurrer, it was objected, 1ſt, That the plaintiff had not ſhewn a ſufficient performance of the agreement on his part, by ſtating an actual ſurrender to the defendant, or a tender and refuſal, which is equivalent; 2dly, Though he ſtated he was ready and willing, and offered to make a good title to the eſtate, and proper ſurrender, yet he did not ſhew *what title*. The caſe was argued at conſiderable length; AND THE COURT, after cenſuring in very ſtrong terms, the length of the declaration (which *Gould*, J. ſaid might have referred generally to the conditions of ſale, ſet forth in the firſt count, without repeating them over again in the ſubſequent counts) held, that it was clearly bad on both the grounds inſiſted on in the argument; firſt, becauſe the plaintiff had not diſtinctly averred a ſufficient performance of his part of the agreement, by ſtating an actual ſurrender to the defendant, or a tender and refuſal; and, ſecondly, becauſe he had not ſhewn what title he had to the eſtate, for whatever his intereſt was, it ought to have been ſpecially ſet forth. Judgment for the defendant.

(1) The fact was, there were five different eſtates, ſold in five ſeparate lots, for the purchaſe of which, the defendant ſigned five ſeparate agreements.

Jones *v.* Barkley, Tr. 21 Geo. 3. BR. 2 *Doug.* 684.

Mutual conditions to be performed at the ſame time.] The plaintiffs declared, on an agreement by the defendant, to pay 600l. *on the plaintiffs aſſigning an equity of redemption of* a certain quantity of ſtock to one *Lane*, and executing to him general releaſes of all demands of the plaintiffs againſt him, and then averred that *they had offered to aſſign to Lane* the equity of redemption of ſuch ſtock as aforeſaid, *and had tendered* to him a draught of ſuch aſſignment and releaſe, and then offered to execute the ſame; and would have then executed the ſame, but that *the defendant then and there abſolutely diſcharged the plaintiffs* from executing the ſame, or any aſſignment or releaſe whatſoever; *and yet* the defendant had not paid the 600l. or any part of it: the defendant pleaded, 1ſt, The general iſſue; 2dly, That the plaintiffs did never execute an aſſignment of the ſaid equity of redemption to the ſaid *Lane*, or any perſon he appointed, nor any general releaſe, nor deliver or tender ſuch aſſignment and general releaſe ſo executed: to this there was a ſpecial demurrer. By the Court, The defence ariſes upon an objection to the declaration; and, therefore, the defendant ſhould have demurred to it, and not have lengthened the record unneceſſarily by ſpecial pleas: the queſtions on tenders are very different from this, they have ariſen, not upon what ſhall excuſe, but on what is a tender: if the party pleads a tender, he muſt prove one. But the deciſion would have been very different in the caſes of that ſort, if there had been any act of the one party ſtated on the record, which had prevented the other from making a complete tender. In *Kingſton* v. *Preſton*, the principle is clearly laid down, that, *when ſomething is to be performed by each party at the ſame time, he who was ready, and offered to do his part, may ſue the other for not performing his:* the party muſt ſhew he was ready; but if the other ſtops him on the ground of an intention not to perform his part, it is not neceſſary for the firſt to go farther, and do a nugatory act. Here the draught was ſhewn to the defendant for his approbation of the form, but he would not read it; and upon a different ground, namely, that he means not to pay the money, diſcharges the plaintiffs from executing it. Judgment for the plaintiffs.

Stevens *v.* Carrington, M. 19 Geo. 3. B.R. 1 *Doug.* 27.

Breach of covenant.] On a diſſolution of partnerſhip between the plaintiff and defendant, who were wharfingers, there was a covenant, "that the plaintiff ſhould have a moiety of the goods; and that each ſhould bear an equal ſhare of the expence of weighing and dividing; but that the plaintiff ſhould ſolely bear the charges and expence of conveying his moiety of the goods to a warehouſe he had taken." In an action of covenant on this agreement, the breach aſſigned was, "that the defendant *had not delivered* the moiety of the goods; and on a general demurrer, the defendant

defendant had judgment. *Per Cur.* the defendant, by this covenant is not bound to deliver; though if he had obſtructed the plaintiff in removing the goods, it would have been a breach of the covenant.

In covenant, the plaintiff declared as aſſignee of one *Clarke*, for that the defendant, under an indenture of leaſe from the ſaid *Clarke*, had covenanted that he the ſaid defendant would permit and ſuffer the ſaid *Clarke* (the leſſor), his heirs, nominees, and aſſigns, or his or their next tenant or tenants, to enter in the laſt year of the demiſe, and ſow along with the barley and oats of the defendant, ſo much clover and graſs ſeeds as the ſaid *Clarke*, his heirs, &c. ſhould think fit: and the plaintiff aſſigned a breach, that the defendant had ſowed the barley *without giving him notice*; the defendant pleaded, that *he had not prevented* the plaintiff. On demurrer, the plea was held good. *Per Cur.* the covenant makes no mention at all about any notice to be given; and as the plaintiff was the party for whoſe benefit the covenant was intended, he ought to have uſed due diligence: if the defendant had refuſed to give notice, or had given a wrong notice, it might have been a breach; but here it appears that he has done nothing to prevent him, or the contrary; therefore there can be no breach. Hughes *v.* Richman, Tr. 14 Geo. 3. B.R. *Coxup.* 125.

In an action of covenant brought by the plaintiff, as leſſee under the defendant, who was tenant for life, with remainder to her ſon in tail: it appeared that the defendant reſerved the timber growing on the eſtate, with liberty to enter and cut down the ſame, *making reaſonable ſatisfaction to the plaintiff for the damage he ſhould thereby ſuſtain*; the defendant's ſon, who was upon bad terms with her, conceiving, that as tenant in tail in remainder, he had a right to fell the timber on the eſtate, entered at an improper ſeaſon, and cut the ſame down: in conſequence of this, the plaintiff applied to the defendant for ſatisfaction, and ſhe promiſed, that if her ſon would not pay, ſhe would: this, it was contended on the behalf of the plaintiff, was a recognition of the defendant's ſon having acted with her privity and concurrence, and ſo an adoption of his acts. And the judge being of this opinion, there was a verdict for the plaintiff: this being afterwards moved to be ſet aſide, *The Court* ſaid, That the defendant was not liable on her covenant, for the act of a wrong doer; and that if this were not a breach of covenant by the defendant at the time when the timber was cut and carried away, no ſubſequent promiſe to make a ſatisfaction in damages could make it ſuch; and that therefore the plaintiff was not entitled to recover. But as liberty was not reſerved at the trial for the defendant to enter a nonſuit, if the Court ſhould be of opinion that the verdict could not be ſuſtained, Griffiths *v.* Brome, widow, M. 35 Geo. 3. B.R. 6 *Ter. Rep.* 66.

ed, the court only made the rule abſolute to ſet aſide the verdict, and to grant a new trial.

Clifton *v.* Walmeſley and another, Ea. 34 Geo. 3. B R. 5 *Ter. Rep.* 564.

In an action of covenant, the declaration ſtated an indenture, whereby the plaintiff's anceſtor demiſed to the defendants certain quarries of cannel for twenty-one years, at the yearly rent of 150l. and certain other ſums; "and alſo one "half part or ſhare of all ſuch ſum and ſums of money, as "all or any of the cannel to be gotten by virtue of the ſaid "indenture, *ſhould ſell for, at the pit's mouth*, over and above "4d. the baſket, or top and bottom:" Several breaches of covenant were aſſigned; and amongſt others, the following one; that divers baſkets of cannel were and had been *ſold for, at the pit mouth*, more than 4d. the baſket, &c. whereby the defendants were liable to pay, &c. the defendants pleaded they did not break the covenants; on which iſſue was joined: upon the trial, the evidence was, that the defendants had aſſigned to Meſſrs. *Blundell's* (whom the plaintiff had refuſed to accept as tenants), and that Meſſrs. *Blundell's raiſed divers quantities of cannel at the pit's mouth, upon the premiſes, which they led away and ſold elſewhere at different prices*, beyond 4d. per baſket, when the ſelling prices of the pit's mouth at the ſame time were above 4d. the baſket. The plaintiff offered evidence to ſhew, that from the date of the leaſe till the aſſignment, the defendants paid to the plaintiff a moiety of the ſelling price at the pit's mouth when the coal was above 4d. per baſket, although they led away the coal and ſold it elſewhere. This evidence was rejected by the judge, and a verdict was found for the plaintiff, ſubject to be reduced or increaſed by the award of J. W. if this Court ſhould be of opinion, that upon the points reſerved, the plaintiff was entitled to a verdict, if not, a nonſuit to be entered. The points ſubmitted to the Court were, 1ſt, Whether, upon the true conſtruction of the leaſe, unexplained by extrinſic evidence, the half of ſuch ſums of money as the cannel got, and ſold elſewhere than at the pit's mouth, would have produced if ſold at the pit's mouth, was due to the plaintiff when the ſelling price at the pit's mouth was above 4d. per baſket? and if the Court ſhould be of opinion with the defendants upon this point, then, 2dly, Whether the evidence above-mentioned to have been rejected, ought to have been received? By the Court, The conduct of the defendants may poſſibly be a fraud upon the covenant; and perhaps a court of equity would give the plaintiff ſome relief; but this Court cannot get rid of the covenant; it is drawn in clear and explicit terms. We cannot declare that the coal was ſold at the pit's mouth, when it is expreſsly ſtated to be ſold elſewhere: whatever the meaning of the parties might have been, we can only look for it in the covenant;

and

and in that they have expreſſed themſelves preciſely and unambiguouſly; and therefore we cannot receive extraneous evidence in explanation of it. *Poſtea* to the defendants.

In covenant brought by the plaintiff upon a leaſe for years, as heir in reverſion in fee to his father, and breach aſſigned for want of repairs. The defendant pleaded, that the father, when he made the leaſe to him, was only tenant for life, traverſing that the reverſion belonged to the father and his heirs. To this there was a demurrer, and joinder in demurrer. It was argued on the part of the defendant, that by the death of the tenant for life the leaſe was at an end, and this action could not be maintained; for that a leaſe for years by tenant for life is ſo abſolutely determined by his death, that no acceptance of rent by the ſucceſſor to the land can make it good: that though during the life of the tenant for life, and the continuance of the leaſe, the defendant would have been eſtopped, to ſay he had not the reverſion in him; yet he being dead, and the leaſe thereby at an end, he is not eſtopped to plead the truth, which he had done by this plea in confeſſing the leaſe and avoiding it: and of that opinion was the whole Court: they alſo held, that the traverſe was well taken, and judgment was given for the defendant *per tot. cur.* and *Clive*, J. ſaid, the defendant might either traverſe that the father was not ſeized of the reverſion in fee, or that it did not deſcend to the plaintiff *quod fuit conceſſum.* Brudnell *v.* Roberts, Tr. 2 Geo. 3. C.B. 2 *Wil.* 143.

A covenant on the part of the leſſee, his executors and adminiſtrators, is binding on *the aſſignee of the leſſee*, though he be not named. In an action of covenant brought by the leſſor of a farm againſt the aſſignee of the leſſee for a breach of covenant: the declaration ſet forth a covenant, whereby the leſſee, for himſelf, his executors, and adminiſtrators, covenanted, that he, the ſaid leſſee, *his heirs and adminiſtrators*, ſhould with his and their family and ſervants, conſtantly reſide upon the demiſed premiſes during the demiſe, under a penalty of 5l. per month. The breach aſſigned was, that the defendant *(the aſſignee)* after the ſaid aſſignment of the ſaid demiſed premiſes, had not, with himſelf, his family, and ſervants, reſided *in and upon the ſaid demiſed premiſes*, but on the contrary, had totally abſented himſelf, &c. To this there was a general demurrer, and joinder in demurrer. The Court, after argument, ſaid, Though the deed was very ill drawn, they were clearly of opinion, that the covenant in queſtion was *quodam modo*, annexed and appurtenant to the thing demiſed, according to the firſt and ſixth reſolutions in *Spencer*'s caſe, 5 *Co.* 16. *a* (1), which were Tatem *v.* Chaplin, Ea. 33 Geo. 3. C.B. 2 *Hen. Black.* 133.

(1) The firſt of theſe reſolutions was:—When the covenant extends to a thing *in eſſe*, parcel of the demiſe, the thing to be done by force of

were directly in point; and therefore, that *the assignee was bound, though he was not named.* Judgment for the plaintiff.

Churchwardens of St. Saviour's v. Smith, Hil. 2 Geo. 3. B.R. 3 *Burr.* 1271. 1 *Black.* 351.

Breach by assignees.] An action of covenant will not lie against an assignee of a term, for a breach before the assignment. In this case, the lessee had covenanted to pull down certain old houses, and rebuild others within seven years; the lessee did not perform his covenant; and this action being brought, the breach was assigned in *not pulling down* the old houses, *and building new ones*, viz. "that *J. R.* the original lessee did not do it before the assignment; nor has the defendant, the assignee, since the assignment: the plea was, that the estate did not come to the defendant by assignment till after the expiration of the seven years. To this there was a demurrer and joinder in demurrer. *By the Court*, The single question is, whether the assignee be answerable for the breach incurred before the assignment? And it is certain *that he is not.* This breach was committed before his time; and this covenant does not run with the land. It was so settled in *Gresoott* v. *Green*, 1 *Salk*, 199. Judgment for the defendant.

Holford v. Hatch, Ea. 19 Geo. 3. B.R. 1 *Doug.* 182.

Neither will covenant lie at the suit of the lessor against an under-lessee. This was covenant for rent in arrear, brought against the defendant, *as assignee* of one *Saunders*: the declaration stated (in the common form) that the plaintiff demised to *Saunders* for seven years, by virtue whereof he entered, and was possessed, and that afterwards *all the estate, right, title, and interest of* Saunders *in the premises came to the defendant, by assignment thereof*—by virtue whereof he entered and was possessed; and that after the assignment, rent had become due which the defendant had not paid. The defendant pleaded, that *all the estate*, right, title, and interest of *Saunders* did not come to him. On the trial, it appeared that the defendant was in possession of the premises during the time when the rent in arrear became due; but that by the deed under which he held, they were let to him by *Saunders, for*

---

of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words.

And the sixth resolution was:—If lessee for years covenants to repair the houses during the term, it shall bind all others, as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act of law, as by the act of the party, for all is one having regard to the lessor: and if the law should not be such, great prejudice might accrue to him; and reason requires, that they who shall take the benefit of such covenant, when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessee makes it with the lessor.

a day,

a day, or ſome days leſs than the original term, and that he had actually ſurrendered them before the action brought. Upon this evidence, it was contended, 1ſt, That in point of law, a perſon holding of the firſt leſſee, by an under-leaſe, like the preſent, is not liable to be ſued by the original leſſor, on the covenant for rent contained in the original leaſe; 2dly, That the fact put in iſſue on the record, viz. that *all the eſtate,* &c. of *Saunders* came to the defendant was not proved. However, a verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonſuit: a motion for this purpoſe was afterwards made, and the caſe was fully argued. By the Court, This is an action of covenant by a leſſor againſt an under-leſſee; and the ſingle queſtion is, whether the action can be maintained againſt him, as being *ſubſtantially* an *aſſignee*: for ſome time we had great doubts. We have beſtowed a great deal of conſideration on the ſubject, and looked fully into the books; and it is clearly ſettled (and it is agreeable to the text of *Littleton, C. Lit.* 281, a, b.) that the action cannot be maintained, unleſs againſt an aſſignee of the whole term. Nonſuit to be entered.

But if the whole of a term is made over by the leſſee, although in the deed he reſerves the rent and a power of entry for non-payment to himſelf, and not to the original leſſor, and although he introduce new covenants, the perſon to whom it is made over may ſue the original leſſor or his aſſignee of the reverſion, or be ſued by them, as aſſignee of the term, on the reſpective covenants in the original leaſe. This was covenant by the plaintiff as aſſignee of a term againſt the defendant as aſſignee of the leſſor, for not finding, providing, aſſigning, and allowing proper wood and timber for repairing the demiſed premiſes. The declaration ſtated a demiſe of certain premiſes, in which were contained among other covenants, one from the leſſee to repair, and another on the part of the leſſor to find timber for ſuch repairs: it then ſtated, that the leſſee entered and afterwards aſſigned to one *Warner*, and then a title was derived by many meſne aſſignments from *Warner* to the plaintiff; and it was ſhewn, that the leſſor's reverſionary intereſt came by aſſignment to the defendants; and then a breach of the covenant for finding and allowing timber ſince the reſpective titles of the plaintiff and defendants had accrued, was aſſigned. The defendants pleaded, that the original leſſee did not aſſign, transfer, and ſet over to *Warner* in manner and form, &c. alſo three other pleas, on which no queſtion aroſe: 5thly, Performance. On the trial, the original leaſe was produced, alſo the indenture between the original leſſee and *Warner*, which, after reciting the leaſe, witneſſed that the leſſee aſſigned all and ſingular, &c. to *Warner*, his executors, adminiſtrators, and aſſigns (ſubject to the exceptions, reſervations,

Palmer *v.* Edwards, Ea. 23 Geo. 3. B R. *Doug.* 187, n. [† 59.]

reſervations, and agreements aforeſaid) *at the yearly rent of* 26*l.* 2*s. payable to the ſaid leſſee*, then there was a covenant by *Warner* to repair at his own proper coſts and charges (wood and timber excepted). *and a power to the original leſſee to re-enter on non-payment of the rent.* A verdict having been found for the plaintiff, a new trial was moved for on the ground that this was not an aſſignment, becauſe the rent was not reſerved to the firſt leſſor, but to his leſſee. The Court held, That wherever the whole intereſt is conveyed, it is an aſſignment; and that in ſuch caſe, the aſſignee ſtands exactly in the place of the leſſee, and is entitled to the benefits of all the covenants on the part of the leſſor: and per *Buller*, J. this certainly was an aſſignment, there was no reverſion left. There is no doubt but there is ſufficient privity for the defendants as aſſignees of the reverſion to maintain an action on the covenants in the original leaſe againſt the plaintiff, and that the remedy is mutual, ſo as to entitle the plaintiff to the advantage of the original covenants on the part of the leſſor.

Eaton *v.* Jaques, M. 21 Geo. 3. B.R. *Doug.* 454.

Neither will covenant lie againſt the mortgagee of a term as aſſignee, unleſs he has taken actual poſſeſſion.—This was an action of debt, for rent againſt the defendant, as aſſignee of the original leſſee; the declaration ſtated the original leaſe, that by virtue thereof, the original leſſee entered and was poſſeſſed; and that being ſo poſſeſſed afterwards on ſuch a day, all the eſtate, &c. of the leſſee by aſſignment thereof, then duly made, came to, and veſted in the defendant, by reaſon whereof the defendant became poſſeſſed, and that ſince he was and became aſſignee as aforeſaid, a year's rent had become due: the defendant *pleaded*, that *all* the eſtate, right, title, &c. did not come to, and veſt in the defendant by aſſignment thereof, and that he was not poſſeſſed, &c. *Iſſue* being joined thereon, the cauſe came on to be tried, and a verdict was found for the plaintiff, ſubject to the opinion of the court, upon a caſe which ſet forth the original demiſe, as ſtated in the declaration; and that by an indenture of mortgage of ſuch a date, the original leſſee aſſigned *all* his eſtate, right, title, &c. of and in the premiſes, by virtue of the ſaid leaſe, to hold unto the defendant for *all* the reſidue of the term, *ſubject nevertheleſs to the rents and covenants therein contained.* In which ſaid indenture, was contained *a proviſo for making the ſame void, on payment of* 114*l. and intereſt*, at the days and times therein mentioned; and there was *another proviſo, that until default ſhould be made in payment of the principal and intereſt, it ſhould be lawful for the original leſſee to hold and enjoy the premiſes without interruption from the defendant*; the intereſt on the mortgage was regularly paid up, and the day for payment of the principal was not arrived, and the defendant never had poſſeſ-

ſion of the houſe under the mortgage: the queſtion was, Whether *the plaintiff was entitled to recover the rent from the defendant?* and the caſe was fully argued. By the court, In leaſes, the leſſee being a party to the original contract, continues always liable, notwithſtanding any aſſignment, the aſſignee is only liable, in reſpect of his poſſeſſion of the thing; he bears the burthen while he enjoys the benefit, and no longer; and if the whole is not poſſeſſed, if a day only is reſerved, he is not liable: now the preſent queſtion ariſes from a mere ſlip in the attorney, in making the conveyance; for if he had made it an under-leaſe, by leaving a reverſion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee. To do juſtice between men, it is neceſſary to underſtand things as they really are, and conſtrue inſtruments according to the intent of the parties: what is the effect of this inſtrument between the parties? the leſſor is a ſtranger to it; he ſhall not be injured, but he is not entitled to any benefit under it; can we ſhut our eyes, and ſay it was an abſolute conveyance? It was a mere ſecurity; and it was not, nor even meant, that poſſeſſion ſhould be taken till default of payment, and the money has been demanded: the legal forfeiture has only accrued ſix months, and if the mortgagee had wanted poſſeſſion, he could not have entered *viâ facti*, he muſt have brought an ejectment; this was the underſtanding of the parties, and is not contrary to any rule of law; it was not an aſſignment *of all* the mortgagor's eſtate, right, title, &c. The queſtion is, Whether mere nominal aſſignees, with the naked right, or only ſubſtantial aſſignees, in the actual enjoyment of the eſtate, ſhall be liable to this action? and we are clearly of opinion, that only thoſe of the laſt deſcription are liable.

An aſſignee of a term declared againſt as ſuch, is not liable after he has aſſigned over.—In covenant for rent reſerved upon a leaſe, by an aſſignee of the reverſion, againſt an aſſignee of the original leſſee: the defendant pleaded two different pleas, the firſt was demurred to; in the ſecond, he ſtated, that before the rent in queſtion became due, he aſſigned all his eſtate in the premiſes, to one *Riggs*, by virtue of which aſſignment, *Riggs* entered and was and ſtill is poſſeſſed, &c. To this plea, the plaintiff *replied*, that at and after the time, when the rent became due, the defendant remained and continued in poſſeſſion of the premiſes, traverſing that *Riggs* entered and was poſſeſſed: the defendant *demurred* to this replication, and ſhowed for cauſe, that the plaintiff had therein traverſed, and attempted to put in iſſue matter of law only, and not any matter traverſable or iſſuable. The court did not enter into the merits of the firſt plea, being unanimous in thinking, that the replication to the

Walker v. Reeves, M. 22 Geo. 3. B. R. 2 *Doug.* 461. n. [1].

the ſecond was not good, unleſs it had gone farther, and charged the ſecond aſſignment to have been fraudulent. By the aſſignment, the title and poſſeſſory right paſſed, and the aſſignee became poſſeſſed in law. As to actual poſſeſſion, that muſt depend on the nature of the property, whether it can take place; it might be a waſte or unprofitable ground, as ſeemed to have been the caſe here (from the firſt plea, it appeared to be ground meant to be built upon). This caſe was by no means like *Eaton* v. *Jaques*, for the aſſignment there, being a mortgage from the nature of the tranſaction, it was not an aſſignment to this purpoſe, it was mere ſecurity, till the mortgagee called for his money, the mortgagor was to be left in poſſeſſion, and to pay the intereſt; and it was not underſtood by either of the parties, that the mortgagee ſhould be liable for the rent (1).

Chancellor v. Poole, Tr. 21 Geo. 3. B.R. 2 *Doug.* 764.

In action of covenant for rent arrear; the declaration ſtated a demiſe by indenture, from the plaintiff, to one *Burrough*, for 21 years, determinable by either party at the end of the firſt 7, or firſt 11 years: the declaration then ſtated, that afterwards by deed-poll between *Burrough* the leſſee, the plaintiff and the defendant; he, *Burrough*, the leſſee, *with the conſent of the plaintiff*, aſſigned to the defendant to hold for all the unexpired reſidue, he, the defendant, *paying* the rent and *performing* the covenants, and indemnifying him (the original leſſee *Burrough*) againſt the ſame; and it was therein agreed between the plaintiff and defendant, that the term of 21 years ſhould be, and continue, an abſolute leaſe to the end of that term, and therefore they did releaſe each other from the covenant for determining it ſooner; that the defendant entered and was poſſeſſed, &c. and the breach of covenant aſſigned was, in the non-payment of half a year's rent. *The plea* was, that the defendant before the rent became due, aſſigned to one *Bucholl*, who entered and was poſſeſſed; to this there was a general demurrer. The queſtion on this record was, Whether the defendant was to be conſidered as having become an immediate leſſee under the plaintiff, by the operation of the deed-poll? or, at leaſt, as having thereby covenanted perſonally with the plaintiff, for the payment of the rent? or, whether he was only an aſſignee, with a mere derivative title from *Burrough*, the firſt

(1) In point of fact, the laſt aſſignment in this caſe of *Walker* v. *Reeves*, was only as a mortgage ſecurity; therefore, adds the learned reporter, if the plaintiff, inſtead of replying that *Riggs* did not take poſſeſſion, had traverſed by his replication the allegation of the plea, that the defendant had aſſigned *all the eſtate*, title, intereſt, &c. and upon iſſue being joined, it had appeared on the trial, that the aſſignment contained a proviſo of redemption, it ſhould ſeem that he would have been entitled to a verdict, on the authority of *Eaton* v. *Jaques*.

leſſee,

leſſee. If the defendant was a leſſee, or had covenanted perſonally with the plaintiff, he was liable for breaches of covenant happening after the aſſignment of his intereſt; becauſe though the privity of eſtate was gone, the privity of contract ſtill remained between him and the leſſor: if he was only an aſſignee, there never was any privity of contract between them, and, therefore, he ceaſed to be liable, as ſoon as his aſſignment to *Bucholl* put an end to their privity of eſtate. By the court, The queſtion is, Whether the plaintiff is a contracting or merely an aſſenting party, in the deed poll? and he ſeems to have decided againſt himſelf, for he has ſtated this as an aſſignment; if he had meant to avail himſelf of it, as a contract between the defendant and himſelf, as a new leaſe, and the defendant as his immediate leſſee, he ſhould have ſtated it according to the legal operation, and as a demiſe from the plaintiff to the defendant; by ſtating the firſt leaſe in the declaration, which he had no occaſion to do, he has concluded himſelf; beſides the covenant in the deed-poll, for paying the rent, is with the original leſſee, not with the plaintiff the leſſor. Judgment for the defendant.

And though the aſſignment be to a feme covert, it is a good diſcharge to the aſſignee. The plaintiffs, as executors of an aſſignee of the leſſor of certain premiſes, brought this action of covenant againſt the defendants as aſſignees of the original leſſee: the plea was, that before the rent became due, the intereſt in the premiſes was aſſigned to one *Catharine Kingſton*. The replication was, that at the time of the aſſignment to her, ſhe was covert of one *T. K.* her huſband, who was ſtill living: general demurrer. The Court gave judgment for the defendants on the authority of *Co. Lit.* 3. a. alſo 356. b. where it is laid down, that a feme covert is of capacity to purchaſe of others without the conſent of her huſband; and that though he may diſagree, and diveſt the eſtate, yet if he neither agree nor diſagree, the purchaſe is good: but the plaintiff had leave to reply *de novo*.

Barnfather, and others v. Jordan, & *al.* M. 21 Geo. 3. B.R. 2 *Doug.* 451.

And in covenant which runs with the land, evidence that the defendant is in as heir at law, will ſupport a declaration charging him as aſſignee. This was an action on a covenant in a leaſe for quiet enjoyment; and the declaration, after ſtating that the defendant's anceſtors granted the leaſe in queſtion, alleged that *the reverſion came to and veſted in the defendant by aſſignment thereof.* The defendant pleaded by his guardian that the reverſion did not come to and veſt in him *modo et formâ*, as ſtated in the declaration. On the trial, it appeared that the eſtate *deſcended* to the defendant, an infant, *as heir at law* to the leſſors, his father and grandfather and that the rent had been received by the mother and another

Deriſley & *al.* v. Cuſtance, M. 31 Geo. 3. B.R. 4 *Ter. Rep.* 75.

other perſon who gave receipts for the ſame, mentioning it to be *for her ſon's uſe*. On this evidence, it was objected, 1ſt, That the receipt of rent was the act of the defendant's mother, and could not prove a poſſeſſion in the infant to ſubject him to an action of covenant: 2dly, That the evidence ſhowed that the reverſion veſted in him by deſcent, and not by aſſignment; and had the declaration charged defendant as heir, the parole would have demurred. The judge who tried the cauſe, being of opinion with the defendant on both objections, nonſuited the plaintiffs: it was afterwards moved to ſet the nonſuit aſide. By the Court, As the plaintiffs cannot be ſuppoſed to be cognizant of the defendant's title, it was ſufficient for them to allege in their declaration, that he was *the aſſignee*, without ſhowing *quo jure* he was ſuch: it is the common mode of pleading: then the queſtion is, Whether the circumſtance of the defendant's being an infant will vary the caſe in this ſtage of the cauſe? and it certainly does not: this being an action of covenant, it was not competent to the defendant to plead his infancy *in bar* to the action; for it is clear, that the defendant's infancy in this caſe is not a matter of bar to the action, it is a dilatory plea, and does not go to the merits; it only ſuſpends the pleadings. If he had wiſhed to avail himſelf of his infancy, he ſhould have pleaded that the eſtate did not come to him by aſſignment, but as heir at law, and have prayed the parole to demur: but he has waved that advantage, the infancy was not pleaded; and there is no caſe to ſhow that parole demurrer can ariſe at *niſi prius*. If the defendant had pleaded that the eſtate came to him as heir at law, and that he was an infant, traverſing that it came to him by aſſignment; that would indeed be tendering an iſſue, in the words of the declaration on the inducement, but which might be material on a different ground. If, therefore, the plaintiff, with that inducement, would have joined iſſue, on that fact it would have become material to enquire, whether or not the defendant were an infant? but as the record now ſtands, it is perfectly indifferent, whether the defendant be an infant or an adult; then the queſtion is, Whether, as between adults there be any objection ariſing from the evidence to this declaration againſt the defendant, charging him *as aſſignee*, when in fact he *was heir*, it is ſufficient to prove *the ſubſtance of the iſſue*, which is in this caſe that the defendant is clothed with ſuch a character as will make him liable on the covenant; and that was ſufficiently proved, by ſhowing that the eſtate was veſted in him: for whether he were in poſſeſſion as aſſignee, or heir at law, he was equally liable on this covenant; and liable on the general allegation of his being aſſignee.

Pleadings.]

Pleadings.] In declaring in an action of covenant, the party muſt not ſet out the deed at length, or the ſuperfluous parts of it: therefore, in covenant on a mortgage-deed, it is ſufficient for the plaintiff to ſet out in his declaration, that the defendant by indenture had demiſed certain premiſes therein mentioned, without ſtating them particularly; ſubject amongſt other things to ſuch a proviſo, ſetting out the ſubſtance of the covenant and the breach. Dundaſs *v.* Ld. Weymouth, M. 18 Geo. 3. B.R. *Cowp.* 665.

And, accordingly, in this caſe, which was an action againſt the executors of Sir *John Aſtley*, for breach of covenant for quiet enjoyment under a leaſe. The declaration ſet out the whole leaſe *verbatim*; and the Court, on motion, referred it to the maſter to ſtrike out the ſuperfluous matter in the declaration, with coſts. Price *v.* Fletcher *& al.* Hil. 18 Geo. 3. *Cowp.* 727.

In aſſigning a breach of covenant for quiet enjoyment, it is ſufficient to allege, that at the time of the demiſe to the plaintiff, *A.* had lawful right and title to the premiſes; and having ſuch lawful right and title, entered, &c. and evicted him, &c. without ſhowing what title *A.* had; or that he evicted the plaintiff by legal proceſs, &c. This was an action of covenant. The declaration ſtated a leaſe from the defendant, wherein he covenanted for quiet enjoyment, "without the let, ſuit, trouble, moleſtation, or interruption of him the defendant, his heirs and aſſigns, or of any other perſon or perſons whomſoever;" it then ſet forth the breach, "that the defendant, at the time of making of the ſaid laſt-mentioned indenture and demiſe, or at any time before or afterwards hitherto, had not any right or title whatſoever to make the ſaid demiſe, nor could the ſaid plaintiff, by virtue of the ſaid demiſe peaceably and quietly enjoy, &c. for that one *J. B. P.* the younger, at the time of making the ſaid indenture, *had lawful right and title* to the ſaid premiſes; and having ſuch lawful right and title, to wit, on ſuch a day *entered* into and upon the premiſes, and ejected, expelled, put out, and amoved the plaintiff, whereby, &c." To this declaration, the defendant demurred on the ground that it did not appear by the declaration, that *J. B. P.* had eſtabliſhed or ſhewn his right, claim, or title to the premiſes, or that he entered under any legal or juſt proceſs of law. By the Court, In aſſigning a breach of covenant, it is ſufficient if it be certain to a general intent: and this is ſufficiently certain; for when it is ſaid, that "the party having a lawful right and title entered," it is the ſame as ſaying, "he entered by lawful right and title." And at the trial, the plaintiff would have failed in proving this allegation, unleſs he had ſhewn a right of entry in *J. B. P.* In ſeveral caſes, the breach has been aſſigned in the manner that this is: in 1 *Mod.* 294. *Twiſden*, J. ſaid, it is ſufficient to ſay that the party had *prior title*, not a prior title *to enter*; and in 1 *Mod.* 101, Lord *Hale* Foſter *v.* Pierſon, Ea. 32 Geo. 3. B.R. 4 *Ter. Rep.* 617.

Hale ſaid, "having title at the time is ſufficient." Judgment for the plaintiff.

Polyblank *v.* Hawkins, Hil. 20 Geo. 3. B.R. 1 *Doug.* 328.

In an action of covenant, if the plaintiff ſtate, that "he is ſeized in his demeſne *as of freehold*," it will be bad on a ſpecial demurrer. This was an action of covenant againſt the aſſignee of a leaſe by the huſband of the heir at law of the original leſſor; and the plaintiff declared that he was ſeized "of the ſaid reverſion in his demeſne *as of freehold*, in right of the ſaid *Johanna* his wife." To this declaration the defendant demurred, and aſſigned for cauſe, "that the plaintiff ſtated, that he was ſeized in his demeſne *as of freehold*, &c. whereas it ought to have been alleged, that the plaintiff, and *Johanna* his wife, in right of the ſaid *Johanna*, were ſeized in their demeſne *as of fee* of, and in the ſaid demiſed premiſes." In ſupport of the demurrer, it was contended, that the declaration muſt ſet forth ſome certain determinate eſtate, which was not done in this caſe, as *freehold* would apply either to an eſtate in fee, in tail, or for life, and it would be impoſſible here to traverſe the plaintiff's title. By the Court, This is a good objection in point of form, upon a ſpecial demurrer; but the plaintiff had leave to amend on payment of coſts.

Friend *v.* Eaſtabrook, Ea. 1 Geo. 3. C. B. 2 *Black.* 1152.

Where the defendant pleads *non eſt factum*, he cannot controvert the plaintiff's title; for in that caſe, the iſſue only is, that there is no ſuch deed as ſtated in the declaration; and if in fact, ſuch a deed appears, the defendant who is in poſſeſſion under it ſhall not queſtion the title of the plaintiff to make ſuch demiſe, and thereby evade the performance of what he himſelf has ſtipulated.

Rogers *v.* Payne, Ea. 8 Geo. 3. C.B. 2 *Wilſ.* 376.

In covenant and breach aſſigned for non-payment of a ſum of money; the defendant pleaded a diſcharge (in the nature of a releaſe) without deed in ſatisfaction of all demands: upon demurrer, it was objected for the plaintiff, that the plea was ill, for that a covenant to pay money, which is by deed, cannot be diſcharged without deed (6 *Co. Rep.* 44. a, *Blake's* caſe) and of that opinion was the court.

Littler & *al. v.* Holland, Ea. 30 Geo. 3. B.R. 3 *Ter. Rep.* 590.

Evidence.] In an action of covenant, the plaintiffs declared on certain articles, by which the plaintiffs undertook to build two houſes for the defendant, by a certain day (the 1ſt of April) in conſideration of which, the defendant undertook to pay the plaintiff 500l. the declaration then ſtated, that the houſes were built and finiſhed by the firſt of April, but that the defendant had not paid: the defendant pleaded *(inter alia)* that the plaintiffs did not finiſh and complete the houſes, by the 1ſt of April, 1788, on which iſſue was joined: it appeared, that the parties had, by a ſubſequent parol agreement, enlarged the time, and that the work was finiſhed within the time ſo enlarged: an objection was taken, that this did not ſupport the allegation in the declaration; and the

the judge who tried the cauſe being of that opinion, nonſuited the plaintiff. Afterwards, on a motion being made for a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide? the court refuſed to grant a rule to ſhew cauſe. *Per Cur.* The declaration charges, that the parties had ſtipulated by deed to perform a ſpecific thing, on a certain day: then if the plaintiff who ſues on that contract, be not bound to prove it as laid, the defendant has no notice of that which he is called upon to anſwer. It has been held by this Court, in an action by Mr. *Garrick* againſt *Barry*, for not performing his contract, where the defendant had a *parol* licence to be abſent, and the articles required that ſuch licence ſhould be in *writing*, that this could not be diſpenſed with, and that the *parol* licence was no anſwer to the plaintiff's action, though perhaps, the defendant had another remedy in a court of equity.

In an action of covenant, the breach aſſigned was, "that the defendant had not, ſince the 25th of March, uſed the demiſed premiſes in a good and huſbandlike manner, *but on the contrary* thereof, had committed, permitted, and ſuffered to be made, done, and committed, in and upon the ſaid premiſes, great waſte, ſpoil, and deſtruction. The defendant pleaded, that he had not committed waſte upon the premiſes, but uſed the ſame in a good and huſbandlike manner. On the trial, the plaintiff offered to ſhew in evidence, that the defendant had not uſed the ſame in a huſbandlike manner, inaſmuch as he had not ſown any clover or turnips on a certain proportion of the farm, according to the uſual courſe of huſbandry in that county; but the judge who tried the cauſe, being of opinion that as the leaſe was not expired, this was not waſte, nonſuited the plaintiff. A new trial was afterwards moved for; but the court, without hearing any argument, ſaid, that although, in the former words of the breach, the evidence would have been admiſſible, yet as the plaintiff had in the ſubſequent part of it, narrowed it to *waſte, ſpoil, and deſtruction*, it was not competent to him to give evidence of any other particulars, which did not come within the meaning of thoſe words. Harris *v.* Mantle, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 307.

In covenant for rent, on an indenture of demiſe of the leaſe, from the plaintiff to the defendant, from 5th April, 1788, for one year, the plea was, that *W. Moore*, was ſeiſed in fee of an undivided moiety of the cloſe; and before the demiſe to the defendant, he demiſed that moiety to *Robinſon*, from 5th April, 1788, for a year; the like as to the other moiety by *Francis Lundy:* by virtue of which demiſes, *Robinſon*, before the demiſe to the defendant, entered and has ſince kept poſſeſſion. The replication admitted the ſeiſin in fee, but ſtated, that before thoſe demiſes, *W. Moore*, and *F. Lundy*, demiſed their reſpective moieties to the plaintiff, both Bell *v.* Harwood, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 308.

both which demiſes were continuing when the rent accrued. On the trial, ſtrong evidence was given by the plaintiff, to ſhew that the prior demiſe was to him: to diſprove which the defendant propoſed to call *Lundy*; but on an objection taken to his competency, on the ground of intereſt, he was rejected, and the plaintiff obtained a verdict. A new trial was afterwards moved for; and, by the Court, We are bound by law to grant a new trial; the witneſs evidently wiſhed to prefer one tenant to another, which inclination goes ſtrongly to his *credit*, but it does not to his *competency*; becauſe this verdict could not be given in evidence, in any future action, to be brought either by or againſt this witneſs, becauſe it would be a record between other parties: if two perſons are contending for the poſſeſſion who are to pay rent in different rights, there the landlord cannot be admitted a witneſs in the ejectment: here, therefore, if an ejectment had been brought by *Robinſon*, againſt the preſent plaintiff, it is clear, that *Lundy* could not have been examined as a witneſs, to prove the demiſe; but in this action he was a competent witneſs, and ought to have been received.

Fulwell *v.* Hall, Tr. 12 Geo. 3. C.B. 2 *Black.* 837.

In covenant, money cannot be paid into court, generally; for the action is for damages, which are uncertain: but on a ſpecial count for a liquidated ſum, as for non-payment of rent, or for not paying 5l. per acre, for ploughing up meadow-land, the court will allow it to be paid in.

Winter *v.* Trimmer, M. 3 Geo. 3. B R. 1 *Black.* 395.

It was argued, that where there is a ſpecial penalty in a covenant, as in a charter-party, you cannot recover more than that penalty, in an action on the caſe for breach of the contract: but Lord *Mansfield* held, that you may either receive the penalty, and reſcind the contract, or bring an action on the covenant to recover damages, and let the contract ſtand.

Actions on Penal Statutes.

Lookup *qui tam v.* Sir T. Frederick, M. 6 Geo. 3. C B. *Bull.* N.P. 195.

ACTIONS on penal ſtatutes are to be commenced within one year.—On a caſe reſerved, it appeared that an action of debt was brought on 9 *Ann.* c. 14, by a common informer againſt Sir *T. F.* for winning 525l. of *G. L.* at cards; the money was loſt and paid, 11th March, 1757; and the original not ſued out till Michaelmas, 1762; the court of common pleas held it a caſe within 31 *Eliz.* c. 5 (1), though the

(1) By 31 *Eliz.* c. 5, all actions on penal ſtatutes, where the forfeiture is limited to the king, are to be brought within two years; and all actions upon any penal ſtatute, the benefit whereof is limited to the king and to the proſecutor, ſhall be brought within one year; and in default of ſuch purſuit, then the ſame to be brought for the king, at any

the action be given in the first instance to the party grieved, and afterwards to the common informer, for himself and the poor of the parish; for such action would have been within the stat. 7 *Hen.* 8, c. 3 (1), and the 31 *Eliz.* c. 5, was made to narrow the time given by that statute, and therefore could never mean to leave any actions unrestrained in time; the latter part of the clause must therefore be construed to extend to them.

And if the writ be not sued out till after the year, though by relation it would be within the time, the plaintiff ought to be nonsuited; and the writ may be produced in evidence, to shew the day on which it was actually sued out. Morris *v.* Pugh & Harwood, M. 2 Geo. 3. *Bull.* N.P 195. 3 *Burr.* 1241. 1 *Black.* 312, 320.

But the court will not on motion stay the proceedings, in an action on a penal statute, though no affidavit has been filed, that the offence was committed in the county where the action is brought, and within a year before the bringing of it, according to the stat. 21 *Jac.* 1, c. 4 (2); for that statute only restrains the proceedings on penal statutes, in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior courts. On shewing cause against a rule to stay the proceedings in an White *qui tam v.* Boot, Hil. 28 Geo. 3. B.R. 2 *Ter. Rep.* 274.

---

any time within two years after that year ended: and if any suit, upon any penal statute made, or to be made, except the statute of tillage, shall be brought after the time in that behalf before limited, the same shall be void and of none effect.

(1) An act for limiting the commencement of penal actions, repealed by the stat. 31 *Eliz.* c. 5.

(2) By 21 *Jac.* 1, c. 4, all offences against any penal statute, for which any common informer may ground any popular action, bill, plaint, suit, or information, before *the justices of assize, or nisi prius, or of general gaol delivery, or of oyer and terminer, or justices of peace, in their general or quarter sessions* (except offences against the statutes concerning recusancy, maintenance, champarty, or buying of titles, the king's customs, or transporting gold or silver, or munition, or wool, or leather, § 5) shall be prosecuted before the justices of assize, or nisi prius, or of general gaol-delivery, or of oyer and terminer, or before the justices of peace of every county, city, borough, or town corporate, having power to hear and determine the same, and not elsewhere; and the like process shall be had as in an action of trespass *vi et armis*, at common law, § 1.

And in all suits on penal statutes, the offence shall be laid in the proper county; and if on the general issue the offence be not proved in the same county in which it was laid, the defendant shall be found not guilty, § 2.

And no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, until the informer hath first made oath, before some of the judges of the court, that the offence laid in such information, &c. was not committed in any other county than where, by the said information, &c. the same is supposed to have been committed, and that he believeth in his conscience, the offence was committed within a year before the information or suit; the oath to be there entered of record, § 3.

action on a penal ſtatute, becauſe the plaintiff had not filed any affidavit, that the offence was committed within the county where, or within a year before the action was brought, according to the ſtat. 21 *Jac.* 1, c. 4, it was urged, that the directions of this ancient ſtatute, had never been followed in practice; and even if an affidavit were neceſſary, the want of it was not a ſufficient ground to ſtay the proceedings, for the ſtatute is merely directory to the officer, to receive ſuch an affidavit; and if it were true that the offence was not laid in the proper county, or that the action was not commenced within a year after the offence committed, the defendant might avail himſelf of it at the trial, and the plaintiff would not be entitled to recover. *Per Cur.* An act of parliament cannot be repealed by non-uſer, notwithſtanding any practice that may have obtained to the contrary: as long as the ſtatute of *James* the Firſt remains unrepealed, it muſt be carried into execution; and as the plaintiff has not complied with the directions of the ſtatute, the proceedings muſt be ſtayed This ſeems to be the proper mode of taking advantage of this objection.

Leigh *qui tam* v. Kent, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 362.

But the above caſe has been ſince overruled This was an action on a penal ſtatute, in which the plaintiff having recovered nine penalties, it was moved to ſtay the proceedings, with liberty afterwards to move in arreſt of judgment. On ſhewing cauſe, four objections were taken, the firſt of which (the only one neceſſary to be noticed in this place) was, that no affidavit had been filed, that the offence was committed in the county where, or within a year before the action was brought, according to 21 *Jac.* 1, c. 4; and the caſe of *White q. t.* v. *Boot*, was cited and relied on. *By the Court*, The caſe of *White* v. *Boot* was not conſidered very much at large: and it does not appear to be law. No ſuch affidavit was neceſſary; it never has been uſual to take that ſtep: and though, where the words of an act of parliament are plain, it cannot be repealed by *non uſer*, yet where there has been a ſeries of practice, without any exception, it goes a great way to explain them, where there is any ambiguity. And after a long courſe of years, during which time it has not been the practice to file affidavits in ſuch caſes as the preſent, the Court will endeavour to get rid of the objection. *The ſtatute of* 21 Jac. 1. *does not control any of thoſe ſtatutes on which penal actions are to be brought in the ſuperior courts*; for the firſt ſection enacts, "that all offences to be committed againſt any penal ſtatute, for which any common informer may lawfully ground any popular action, &c. *before juſtices of aſſize, juſtices of niſi prius or goal-delivery, juſtices of oyer and terminer, or juſtices of peace in their ſeſſions*, ſhall be commenced, &c. in the county where committed." Now

this

this action could not (1) have been brought before the juſtices of aſſize or juſtices of peace, &c.; and by the very words of the ſtatute, it only applies to caſes where the legiſlature had given liberty to common informers, to bring actions, &c. before juſtices of aſſize, &c. therefore the caſe of *White* v. *Boot*, cannot be law. It was an action brought on the ſtat. 25 *Ed.* 3, and it does not appear that it was conſidered whether that action could have been brought *before juſtices of aſſize*, &c. and if it could not, then the ſtatute 21 *Jac.* 1, does not apply to it.

So, where a declaration had been delivered in this action, which was debt on the ſtat. 21 *Hen.* 8, c. 13, for non-reſidence, a rule was obtained to ſhew cauſe why the proceedings ſhould not be ſet aſide, on the ground, that upon ſearching in the office, no affidavit appeared to be filed, that the offence was committed in the county where, and within a year before the action was brought, agreeable to the ſtat. 21 *Jac.* 1, c. 4. On ſhewing cauſe, the above caſe of *Leigh q. t.* v. *Kent*, was mentioned to ſhew, that the ſtat. of *Jac.* 1, was not applicable to thoſe ſtatutes on which penal actions are to be brought in the ſuperior courts. THE COURT were clearly of this opinion, and diſcharged the rule. Balls *qui tam* v. Atwood, H. 31 Geo. 3. C.B. 1 *Hen. Black.* 546.

So, in an action of debt, on 1 *Jac.* 1, c. 22, § 14, for ſelling leather which had not been ſearched and ſealed, it was objected on the trial, that as under the 50th ſection of this ſtatute, the plaintiff might have proceeded in a different form againſt the defendant, *before the juſtices of aſſize, or juſtices of the peace, at their ſeſſion, &c.* for this offence, the juriſdiction of the ſuperior courts was taken away by the 1ſt ſection of the ſtat. 21 *Jac.* 1, c. 4, § 1; but the objection was overruled, and a verdict taken for the plaintiff, with liberty to move the court to enter a nonſuit. A motion was now made, to ſhew cauſe either why a nonſuit ſhould not be entered on the conſtruction of the 4th clauſe of the 21 *Jac.* 1, which enables defendants ſued on penal ſtatutes, to plead the general iſſue, and give ſuch ſpecial matter in evidence, as if pleaded would have been a good bar to the action? or why the judgment ſhould not be arreſted on the firſt clauſe of the ſame ſtatute? Cauſe was ſhewn againſt this rule, and the caſe underwent an accurate diſcuſſion. BY THE COURT, This action is brought on the 1 *Jac.* 1, c. 22, Shipman *qui tam* v. Henbeſt, M. 31 Geo. 3. B.R. 4 *Ter. Rep.* 109.

(1) It was an action on the ſtat. 21 *Hen.* 8, c. 13, § 26, for non-reſidence; and it has been ſettled by the caſe of *Garland, q. t.* v. *Burton*, 2 *Stra.* 1103. But an information for non-reſidence does not lie before juſtice of aſſize and oyer and terminer, that ſtatute having only given actions in the king's courts, where there may be an eſſoign of law or protection.

which impoſes certain penalties, and enacts by the 46th ſection, that the penalties ſhall be recovered by action of debt, bill, plaint, information, or otherwiſe, in any of his Majeſty's courts of record, in which ſuit no wager of law or eſſoign ſhall be admitted; therefore this action may be ſupported, unleſs the juriſdiction of this court be taken away by the ſubſequent ſtatute of 21 *Jac.* 1, c. 4. And it is a known principle of law, that the juriſdiction of the ſuperior courts can only be taken from them by the expreſs words of an act of parliament, or by neceſſary implication. It has been argued that the 21 *Jac.* 1, does not extend to acts paſſed ſubſequent to it, and that this may be conſidered as an action brought on a ſubſequent ſtatute, the 1 *Jac.* 1, c. 22, having expired before the 21 *Jac.* 1, and having been only re-enacted ſince that time; but we are all moſt clearly of opinion, that this muſt be conſidered as an action on 1 *Jac.* 1, c. 22, and that the ſubſequent laws, which have continued it from time to time, will give effect to it as an act made in the reign of the 1 *Jac.* 1; therefore, all the caſes which decide that this ſtatute of the 21 *Jac.* 1, prohibits this mode of proceeding, will apply to this caſe, as far as reſpects the date of the act of parliament, provided it applies to it in other reſpects. Another objection made at the bar was, that the 9 *Ann.* c. 11, has inflicted other penalties for this offence; and that, becauſe a ſummary mode of proceeding is given by the 36th and 37th ſec. of that act, before two juſtices, with a power of mitigating the penalties, the juriſdiction of the court is taken away: but that argument is totally unfounded; the penalties in the latter ſtatute are accumulative, and impoſed with a different view; and this ſtatute does not affect to repeal the proviſions of the 1 *Jac.* 1, c. 22. Then *as to the principal queſtion in the caſe*, an attentive conſideration of the words of 21 *Jac.* 1, c. 4, § 1, will remove all doubts concerning it: it enacts, "that all offences againſt any penal ſtatute, for which any common informer may lawfully ground any popular action, bill, plaint, ſuit, or information, *before juſtices of aſſize, juſtices of niſi prius or gaol-delivery, juſtices of oyer and terminer, or juſtices of peace in their ſeſſions*, ſhall be commenced," &c. Then this act of parliament does not extend to *all proceedings* on penal ſtatutes, it only prohibits the proceedings in the courts of Weſtminſter, in all thoſe caſes where popular actions, bills, plaints, ſuits, or informations might have been brought in the inferior courts: but neither of thoſe modes of proceeding to recover the penalty inflicted by the 1 *Jac.* 1, c. 22, is given by the 50th ſection of that act; and that clauſe only enables juſtices of aſſize, juſtices of peace, &c. within their ſeveral juriſdictions, *to enquire* of all the premiſſes in their ſeſſions, leet, or law days, *and to hear and determine the ſame.*

Now

Now when a power is given to a juriſdiction, which does not ordinarily entertain actions, bills, or plaints, and that power is only generally *to enquire of, hear, and determine* the offence, it muſt be underſtood to mean by the common law mode of proceeding, namely, by indictment or preſentment. There is no pretence to ſay, that an action, bill, or plaint, can, by the common law, be brought at the aſſizes, the ſeſſions, or at courts leet; therefore it appears moſt clearly, that the ſtat. 21 *Jac.* 1, c. 4, has only extended the juriſdiction of the ſuperior courts in certain enumerated caſes: and as this is not one of thoſe caſes, the ſtat. 21 *Jac.* 1, does not apply to it. It was argued, "that the 21 *Jac.* 1, c. 4, is a beneficial law, and ought to be extended as far as poſſible; but if the legiſlature had thought ſo, they would have extended the benefit of it to the penal ſtatutes paſſed ſubſequent to it, which are infinitely more numerous than thoſe made before that time: and it is more beneficial to the ſubject, that his cauſe ſhould be heard and determined by the ſuperior courts of record. On the whole, therefore, it appears to be the true meaning of the ſtatute 21 *Jac.* 1, that wherever, by any act then in force, the informer might have ſued by action, bill, plaint, ſuit, or information, in the ſuperior courts, as well as in the courts at Weſtminſter, he is confined to ſue in the former: but as that ſtatute gives no new juriſdiction to the inferior courts, the party may ſtill ſue in the courts at Weſtminſter for all thoſe penalties which could not, before the paſſing of that ſtatute, have been recovered in the inferior ones.

If a ſtatute having created penalties of 50l. and of 10l. enacts, that all penalties amounting to 50l. ſhall be ſued for in any of the courts at Weſtminſter, but in a ſubſequent clauſe, provides that it ſhall be lawful for any juſtice to hear and determine any offence againſt that act, which ſubjects the offender to any pecuniary penalty, not amounting to 50l. with a power to him to mitigate the penalties (as is the caſe under 25 Geo. 3, c. 51, § 57, 59, reſpecting poſt-horſes) ſuch proviſo ouſts the juriſdiction of the ſuperior courts as to the inferior penalties, and they can only be recovered before a magiſtrate; for it is clear that the intention of the legiſlature is, that the greater penalties ſhall be ſued for in the ſuperior courts, and that the ſmaller offences may be enquired into by a juſtice of the peace. And this diſtinction is reaſonable; for the juſtice having the power to mitigate the penalties, and the ſuperior courts not, it would be abſurd to ſay that the juriſdiction was concurrent; for if it were, the proſecutor might ſue where he pleaſed, and he would of courſe inſtitute his ſuit before that juriſdiction by whom the penalties could not be mitigated, which would fruſtrate

Cates *qui tam* *v.* Knight. *et idem* *v.* Melliſh, M. 30 Geo. 3. B R. 3 *Ter. Rep.* 443.

the intention of the legiſlature, who inſerted the proviſo, to prevent the party being ſaddled with the unmerciful coſts of a mercileſs proſecutor.

3 *Ter. Rep.* 444. n. (a)

And as this is an objection appearing on the record, the defendant may take advantage of it either by demurrer, or by moving in arreſt of judgment.

Frederic v. Lookup *qui tam*, Hil 7 Geo. 3. B R. 4 *Burr.* 2018.

Where the ſtatute gives half the penalty to the informer, and half to the poor of the pariſh, the declaration may be either to render to the informer, or to the informer and the poor; but a common informer cannot have damages for the detention of the debt, nor conſequently coſts of increaſe founded upon ſuch damage. This was error from the court of common pleas, and the record was as follows: "Sir *Thomas Frederick*, late of Weſtminſter, in the county of Middleſex, bart. was ſummoned to anſwer to *Andrew Lookup*, who ſues as well for himſelf as for the poor of the pariſh of St. Paul, Covent Garden, in the county of Middleſex aforeſaid, in a plea that he render to the poor of the pariſh aforeſaid, and to the ſaid *Andrew*," &c. The declaration charged the offence to have been committed *at Weſtminſter aforeſaid*; the jury find parcel of the debt to be owing to the poor of the ſaid pariſh, and to the ſaid *Andrew*, and aſſeſs his *damages by reaſon of its being detained*, &c. the judgment runs thus: "*It is conſidered*, that the ſaid *Andrew*, who as well, &c. and "the ſaid poor of the pariſh aforeſaid, do recover, &c. *It* "*is alſo conſidered*, that the ſaid *Andrew*, who as well, &c. "do recover againſt the ſaid Sir *Thomas*, his damages afore"ſaid, to, &c. and alſo 55l. 19s. to the ſaid *Andrew*, who "as well, &c. at his requeſt, for his coſts and charges afore"ſaid, by the court here, for the increaſe adjudged." On a writ of error brought in this court, upon the above judgment of the court of common pleas, the firſt objection was, "that the pariſh of St. Paul, Covent Garden, did not appear to have any concern in this matter; as it was neither ſhewn nor alleged, that the offence was committed in that pariſh, it being ſaid to be *at Weſtminſter aforeſaid*, without ſpecifying any pariſh at all:" to this it was anſwered, that it muſt have been proved at the trial, for the jury have found, that Sir *Thomas doth owe* to the poor of that pariſh; that it was a rule (1), that whereſoever it may be preſumed that any thing muſt of neceſſity be given in evidence, the want of mentioning it on the record will not vitiate it after verdict; that this rule extends to actions upon penal ſtatutes; that the court will intend it; it is only a title

(1) Laid down in Sir *Tho. Raym.* 487.

defectively

defectively ſet forth; that there was nothing upon the record contrary to it; that the *venire* was laid *in Weſtminſter aforeſaid*, which by reference appears to be in the county of Middleſex, and St. Paul, Covent Garden, is known to be in Weſtminſter, in the county of Middleſex; and beſides, if it were wrong, it would be cured by the ſtatute of *Jeofales*; OF THIS OPINION WERE THE COURT. "The ſecond objection was," that it was a wrong *venire*, and ſo fatal in a penal action. To this it was anſwered, that by 24 *Geo.* 2, c. 18, § 3, every *venire facias*, for the trial of any iſſue in any action or information, upon any penal ſtatute, in any court of record at Weſtminſter, &c. ſhall be awarded of the body of the county where ſuch iſſue is triable, and the action is clearly brought in the proper county; the ſheriff can return no other than the general pannel; OF THIS OPINION WERE THE COURT. "The third objection was," that the poor have judgment to recover ("the ſaid *Andrew*, and the ſaid poor"), whereas the act directs that the informer ſhall recover: to this it was anſwered, that it may be either way; that the declaration may be laid either to render "to the informer only," or "to render to the informer and the poor," and conſequently ſo may the judgment be likewiſe; OF THIS OPINION WERE THE COURT. The ſecond objection was, "that the judgment was for *damages* to the common informer, and alſo *increaſed coſts*; whereas a common informer cannot have damages for *the detention* of the debt (1), and the coſts *de incremento* are connected with theſe damages, and this is an entire judgment, and muſt be either affirmed *in toto*, or reverſed *in toto*. It was acknowledged, that a common informer cannot have judgment for *damages, for the detention of the debt*, becauſe the debt itſelf does not ariſe till the judgment, and the increaſed coſts will follow the damages; but it was denied, that this was an *entire* judgment, and muſt be reverſed *in toto*, if at all: for that on the contrary, they were diſtinct judgments *(it is conſidered, &c. it is "alſo" conſidered, &c.)* ſo that part might be affirmed, and the other part which is affected by this objection may be reverſed (2); THE COURT WERE OF THIS OPINION, and ordered that ſo much of the judgment as related to *the recovery of the debt*, in this action ſhould be affirmed; and that ſo much of the ſaid judgment, as related to *the damages and coſts*, ſhould be reverſed.

To an action of debt on a penal ſtatute, the defendant pleaded *not guilty*, and the plaintiff ſigned judgment as for want of a plea. By the Court (on a motion to ſet aſide this judgment), This plea was certainly not a nullity: and

Coppin *qui tam* v. Carter, M. 27 Geo. 3. B.R. 1 *Ter. Rep.* 462.

(1) 1 *Roll.* abr. P. pl. 1. 4. (2) 1 *Stra.* 188. 2 *Stra.* 807.

indeed

indeed it ſhould rather ſeem that this is a good plea; for as this is an action for an offence under a penal ſtatute, the defendant by ſuch a plea ſays that he is not guilty of the offence. Upon a devaſtavit againſt executors, not guilty may be pleaded, as well as *nil debet*; at any rate, however, this plea is not a nullity; therefore the judgment muſt be ſet aſide, with coſts.

Combe *qui tam* v. Pitt, Tr. 3 Geo. 3. B.R. 3 *Burr.* 1423. 1 *Black.* 437.

A plea in abatement, to an action brought on a penal ſtatute, ſhewing, that another action was brought againſt the defendant in the ſame term, by another perſon, for the ſame offence, is not ſufficient; it muſt ſhew that *the right of action*, was attached in ſome other perſon, before the plaintiff's action was commenced. This was an action of debt for 1500l. brought by the plaintiff, one of the candidates for member of parliament at the laſt election for *Ilcheſter*, againſt the defendant, for unlawfully corrupting three ſeveral voters to give their votes to two other candidates: the defendant pleads in abatement, that another action of the ſame ſort was brought in the ſame term by one *Lake*, which is ſtill depending; and avers, that the facts alleged in both the bills are the ſame. The plaintiff replies, that on the 30th June, 1762, he ſued out a *latitat*, which was ſerved on the defendant the 29th of July; and that his bill was filed on the firſt return in Michaelmas term. The defendant rejoins, that on the ſame 30th of June *Lake* ſued out his writ of *latitat*, which was ſerved on the defendant the 7th of July, and his bill was alſo filed on the ſame firſt return day in Michaelmas term. The plaintiff ſurrejoins, that in fact and truth, his own writ was ſued out on the 1ſt of July, and *Lake's* on the third; though both were, according to the uſage and practice of the Court, being ſued out in vacation, teſted on 30th June, being the laſt day of the preceding term. To this the defendant demurs generally, and alſo ſpecially, for that the ſurrejoinder, which avers the ſuing out of the writ to be on the 1ſt of July, is a departure from the replication, which avers it to have been ſued out on the 30th of June. The plaintiff joined in demurrer. By the Court, It is unneceſſary to go into any of the pleadings ſubſequent to the plea, if the plea itſelf is bad; and we are all of opinion that *this plea is a bad one*. It is a plea in abatement, ſhewing, "that another action was brought againſt the defendant, in the ſame term by another perſon for the ſame offence;" and this is all without any thing more: whereas he ought to have ſhewn, "that the right of action was attached in ſome other perſon before the preſent plaintiff's action was commenced;" for notwithſtanding the general fiction, "of the whole term's being but one day," yet when the priority of action becomes eſſential and neceſſary to be aſcertained, the particular day muſt be ſhewn; a diſtinction has

has been taken between pleas in *bar*, and pleas in *abatement*, viz. that *pleas in bar* muſt ſhew the priority, becauſe the right of action attaches by the priority; but that where both actions are brought at the ſame time, it ought to be as it is here, pleaded in abatement; and that ſuch a plea in abatement is good. But there can be no reaſon or foundation for ſuch a diſtinction; for in both caſes, it is equally neceſſary to ſet out the particular day. If the particular day be not ſpecified, the whole term will be conſidered but as one day. A caſe was cited from *Moore*, 864, and *Hobart*, 128, *Pye* v. *Cook*, to prove that where two informations are exhibited on *the very ſame day*, the defendant needs not to anſwer either; and that one may be pleaded to the other: but though the law does not in general allow of the fraction of a day, yet it admits it in caſes where it is neceſſary to diſtinguiſh: and we do not ſee why the very hour may not be ſo too, where it is neceſſary and can be done (as for inſtance in the regiſter's office, where they always mark the hour) for it is not like a mathematical point, which cannot be divided: however, this is not neceſſary to be determined in the preſent caſe. Upon the whole, the plea is bad (1), and therefore there is no need to go into any of the ſubſequent pleadings; our judgment is, that the defendant *reſpondeat ouſter*.

A defendant cannot plead double in a penal action. In an action of debt on a penal ſtatute (25 *Geo.* 3, c. 50, § 5) the defendant, under the common rule for pleading, double pleaded, 1ſt, The general iſſue; and, 2dly, A proſecution and acquittal for the ſame offence before a juſtice of the peace: a rule was obtained, calling upon the defendant to ſhew cauſe why the rule for pleading double ſhould not be diſcharged? or why the defendant ſhould not elect on which of the pleas he meant to rely, and to ſet aſide the other? This motion was grounded on the poſitive words of ſect. 7 of the ſtat. 4 *Ann.* c. 16, which allows double pleading, wherein it is provided that nothing in that act ſhall extend to any writ, bill, action, or information upon any penal ſtatute; and the Court, after cauſe ſhewn, were of opinion that as the words of the proviſo were peremptory that that act ſhould not extend to actions upon any penal ſtatute, they could not be diſpenſed with.

Heyrick v. Foſter, Tr. 32 Geo. 3. B.R. 4 *Ter. Rep.* 701.

There is no difference between *civil* and *penal* actions in reſpect to amendments at common law. In a *qui tam* action for uſury, a rule having been obtained for *amending the declaration*, in altering the date of the note, all being in paper, it was afterwards moved to diſcharge that rule: But BY THE COURT, The rule is, "That whilſt all is

Benfield *qui tam* v. Milner, M. 1 Geo. 3. B.R. 2 *Burr.* 1098.

(1) See 2 *Lev.* 141, and 2 *Stra.* 1169.

in

in paper you may amend." Here the plaintiff has only miſtaken the date. In the exchequer, they amend penal informations: the ſtatutes of amendment do not extend to penal actions; but this is an amendment at common law, and there is no difference between *civil* and *penal* actions, where they apply as for an amendment at common law, and all is in paper.

Mace *qui tam* v. Lovett, Hil. 12 Geo. 3. B.R. 5 *Burr.* 2833.

And the declaration may be amended in an action on a penal ſtatute after record made up, carried down to trial, and withdrawn by plaintiff. This was a *qui tam* action on the ſtatute of uſury. The record had been made up ready for trial; but it was withdrawn by the plaintiff's attorney, upon his diſcovering a miſtake in the declaration, reſpecting the ſum lent. It was now moved for leave to amend the declaration, by altering the ſum lent from 100l. to 88l. and it was urged, that all was in paper, as it had never been tried; and till a verdict, it is not conſidered as being upon record. THE COURT were ſatisfied, that in this caſe, the amendment might be made. *Per Cur.* The court have gone a great way in allowing amendments towards the attainment of juſtice: there is no diſtinction between *qui tam* actions, and *civil* actions, where an amendment at common law is applied for: the Court will not alter the charge, indeed; but the amendment here prayed will not do that, it is to leſſen the ſum, not to increaſe it: it is a mere ſlip. *Benfield, q. t.* v. *Milner*, is like this caſe: however the amendment muſt be upon the payment of coſts.

Richards *qui tam* v. Brown, Ea. 19 Geo. 3. B.R. *Doug.* 113.

So, where the plaintiff ſued the defendant in an action for uſury, and obtained a verdict and judgment in this court, and the defendant brought a writ of error in the houſe of lords, and aſſigned for error, that the attorney who had appeared on record for the plaintiff had no warrant from him, it was moved on the behalf of the plaintiff, pending the writ of error, that the judgment-roll might be amended, by ſtriking out the name of *Robert Mayes* in the plaintiff's warrant, and inſerting that of *John Stapleford*, *John Stapleford* being *the name in the memorandum* of the declaration: and the Court, after cauſe ſhewn, gave the plaintiff leave to amend accordingly.

Goff *qui tam* v. Popplewell, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 707.

But where a motion was made to amend a declaration in a penal action (for uſury) in the dates and ſums, and it appeared that the action was commenced four years before, *The Court* ſaid, That though there was no difference between civil and penal actions, as to amendments at common law, whilſt all was in paper, yet as this action had been hanging over the defendant's head for four years, they would not in their diſcretion permit the propoſed amendments to be made, which would in effect amount to a permiſſion

miſſion to bring another action, to which otherwiſe the defendants might plead the ſtatute of limitations.

So, upon an application for leave to amend the declaration in this action (which was for uſury) as to the ſums ſtated to have been received by the defendant, it appeared that *the writ iſſued on 12th December*, 1792, and the declaration, *which was not delivered till Eaſter term*, 1794, ſtated the uſury to have been committed on 16th December, 1791. The iſſue was made up, and notice of trial given for the ſittings after Michaelmas term, 1794; but ſome miſtakes having been diſcovered in the amount of the ſums ſtated to be lent, and the intereſt received thereon, the plaintiff withdrew his record, and made the preſent application, which was oppoſed on the ground that the effect of the amendment in this caſe would be enabling the plaintiff to bring a new action after the time limited by the ſtatute was expired; and *Goff* v. *Popplewell* was relied on. By the Court, The Court has the power to amend as long as the proceedings are in paper, in criminal as well as civil proceedings. But the queſtion here is, Whether the Court ſhould, in their diſcretion permit this amendment to be made? It appears that there has been an extraordinary delay throughout the whole of this proceeding. Now it has been at all times conſidered againſt the policy of the land that penal actions ſhould be kept ſuſpended over the heads of defendants; and the ſtat. 31 *Eliz.* c. 5, was paſſed, in order that they ſhould be proceeded upon with all expedition. Therefore, on the authority of *Goff* v. *Popplewell*, the rule muſt be diſcharged: and indeed without ſuch an authority we ſhould have felt no difficulty in refuſing the amendment.

Steel *qui tam* v. Sowerby, H 35 Geo. 3. B R. 6 *Ter. Rep.* 171.

But if there has been no unneceſſary delay in the proceedings, the Court will give the party leave to amend, though the time limited for bringing another action is elapſed. This was an action on the ſtat. 25 *Geo* 3, c. 80, § 7, for acting as an attorney without a certificate. It was commenced in the vacation after Hilary term: iſſue was joined in Trinity term following; and the record was carried down to the next ſummer aſſizes, where a miſtake having been diſcovered in the words of the declaration, the plaintiff was adviſed to withdraw the record, which he accordingly did, and now moved for leave to amend the declaration. This was oppoſed on the authority of the two laſt caſes, viz. *Goff* v. *Popplewell*, and *Steel* v. *Sowerby*. BY THE COURT, The caſes cited do not warrant the poſition in the latitude contended for, namely, that the Court will not permit an amendment after the time for commencing a new action has expired. In thoſe caſes, the Court proceeded on the ground of unneceſſary delay having been uſed by the party ſuing; in one the action had been depending three, in the other four years.

Croſs *qui tam* v. Kaye, Hil. 36 Geo. 3. B R. 6 *Ter. Rep.* 543.

years. The object of the ſtatute of *Elizabeth* was, to prevent an improper and vexatious uſe being made of penal actions, by keeping them ſuſpended over defendants for a length of time; but that does not appear to have been the caſe on this occaſion. The plaintiff went down to trial as ſoon as he could; he was prevented proceeding to trial, on being adviſed at the aſſizes that he had made a miſtake, and no time has been ſince loſt. Amendments in penal actions are not of novel introduction: it has always been the practice of the maſter of the rolls on application made to him, to order originals to be iſſued in penal actions, in order to ſubſtantiate the proceedings that had been had without them, unleſs it appear that there has been unneceſſary delay on the part of the plaintiff. If the amendment prayed for had gone the length of introducing a new charge againſt the defendant, we ſhould have thought it came too late on account of the ſtatute of limitations: but that is not the caſe.

Evans *qui tam* v. Stevens, Ea. 31 Geo. 3. B.R. 4 *Ter. Rep.* 224.

And the Court will not give the plaintiff leave to amend the declaration in a penal action after a demurrer to a replication to a plea in abatement. This was an action brought by the plaintiff, who ſued *as well for the treaſurer of the diviſion of the town and port of Seaford in Suſſex*, as for himſelf, to recover a penalty, under 22 *Geo.* 3, c. 41, for having voted at the Seaford election, being diſqualified as an exciſe-officer. The declaration was filed in Michaelmas term: and the defendant, after a general imparlance to Hilary term, *pleaded* in abatement, that the diviſion of the town and port of Seaford, is not ſuch a diviſion of the county of Suſſex, whereof or for which a treaſurer is, or can lawfully be appointed, praying that the bill may be quaſhed. The plaintiff, in his replication, after ſetting forth Seaford to be a town corporate, pleaded that Seaford did not, before the making of the ſtatute, 12 *Geo.* 2, c. 29, for collecting the county rates, contribute or pay to the county rates of Suſſex, nor at any time ſince has contributed or paid to the ſame. By the Court, The plea cannot be ſupported, inaſmuch as it is a plea in abatement, after a general imparlance (1). It is alſo bad in ſubſtance; becauſe it does not give the plaintiff a better writ, but tends to ſhew that he can maintain no action. Then if this plea be bad, the next queſtion is, whether the declaration can be ſupported. The action is brought on the ſtat. 22 *Geo.* 3, c. 41, § 1, which, after creating the forfeiture, directs that one moiety of the penalty ſhall be paid into the hands of the treaſurer of the county, riding, or diviſion, within which the offence is committed; now the word *divi-*

(1) See p. 8. ſupra.

ſion

ſun in this act ſtands with *county*, and *riding*; and therefore muſt mean ſomething analogous to them; and the word diviſion applies to the county of Lincoln, in the ſame manner that Riding does to the county of York. This interpretation of the word is further proved by the diſtribution of the penalties in Scotland, one moiety of which, the act directs, ſhall be applied to ſuch purpoſes as the juſtices at the ſeſſions for the county, ſtewarty, riding, or diviſion ſhall think fit; ſtewarty in that country being equivalent to county. And if the legiſlature had intended that the penalties ſhould be paid to the treaſurers of ſmaller diſtricts than counties, ridings, or diviſions, they would have inſerted in that part of the act the ſame words which are uſed in a preceding part: county, ſtewarty, *city*, *borough*, or *cinque* port. The counſel for the plaintiff then applied for leave to amend; but *Buller*, J. ſaid *there was no inſtance in which the court had given leave to amend as to the parties to a ſuit in a* qui tam *action after a demurrer*. And the court ſaid, that as it appeared on the record, that the plaintiff could not maintain his action, they muſt give judgment for the defendant, though his plea were bad.

Compounding.] Where the court give leave to compound a penal action, the king's half of the compoſition muſt be paid into the hands of the maſter of the crown-office, for the uſe of his Majeſty. Brown *qui tam v.* Bailey M. 7 Geo. 3. B.R. 4 *Burr.* 1929.

On an indictment on the coal act, for ſelling ſhort meaſure, the defendant was found guilty; after which it was moved for leave to compound with the proſecutor: but the motion was denied; becauſe the king's moiety of the penalty is veſted by the conviction, and then it is too late to compound. Brery *qui tam v.* Levy, M. 4 Geo. 3. B.R. 1 *Black* 443.

The jury having found a verdict in this which was an action of uſury, it was moved for leave to compound, on the ground that ſome favourable circumſtances had appeared at the trial, which would have juſtified a motion for a new trial, were it not for this application: the counſel on the other ſide conſenting, the rule was made abſolute in the firſt inſtance. Maughan *qui tam v.* Walker, Hill. 33 Geo. 3. B.R. 5 *Ter. Rep.* 98.

And if a defendant obtain a rule to ſtay the proceedings in a penal action, on payment of a ſum agreed upon between him and the plaintiff, it is an undertaking by the defendant to pay the money, and for the non-payment of it, the Court will, on motion, award an attachment. King *qui tam v.* Cliſton, Ea. 33 Geo 3. B.R. 5 *Ter. Rep.* 257

Evidence.] A Quaker's teſtimony on his affirmation, is admiſſible in an action of debt on a penal ſtatute. This was an action of debt upon the ſtat. 2 *Geo.* 2, c. 24, § 7, againſt bribery: the general iſſue was pleaded, and there was a verdict for the plaintiff. On behalf of the defendant, it was moved that there might be a new trial; becauſe a Quaker Atcheſon *v.* Everett, Hil. 16 Geo. 3. B.R. *Cowp.* 382.

Quaker had been received as a witneſs on his affirmation; and it was objected, that this being a criminal cauſe, his evidence ought not to have been received. The caſe was argued at great length, and the point fully conſidered. By THE COURT, The ſtat. 7th & 8th *Will.* 3, c. 34, which was made perpetual by ſtat. 1 *Geo.* 1, ſtat. 2, c. 6, allows a Quaker to affirm in caſes where other perſons are required to take an oath; but it provides that their affirmation ſhall not be received in *criminal cauſes* (1). The queſtion is, therefore, whether the preſent *is a criminal cauſe?* if it is a criminal caſe, he muſt be ſworn, or he cannot give evidence. Now, there is no diſtinction better known than the diſtinction between *civil* and *criminal* law; or between criminal proſecutions and civil actions. Mr. Juſtice *Blackſtone*, and all modern and ancient writers upon the ſubject, diſtinguiſh between them; penal actions were never yet put under the head of criminal law or crimes. The conſtruction of the ſtatute muſt be extended by equity to make this *a criminal cauſe*; it is as much *a civil action*, as an action for *money had and received.* The legiſlature, when they excepted to the evidence of Quakers in criminal cauſes, muſt be underſtood to mean cauſes *technically criminal*; and a different conſtruction would not only be injurious to Quakers, but prejudicial to the reſt of the king's ſubjects, who may want their teſtimony. No authority whatever has been mentioned, nor any caſe cited where it has been held that a penal action is *a criminal caſe*, and perhaps the point was never before doubted: the ſingle authority mentioned againſt receiving the evidence of the Quaker in this caſe, is an appeal of murder (2). But that is only a different mode of proſecuting an offender to death: inſtead of proceeding by indictment in the uſual way, it allows the relation to carry on the proſecution for the purpoſe of attaining the ſame end which the king's proſecution would have had, if the offender had been convicted, namely, *execution:* and therefore the writers on the law of England claſs an appeal of murder in the books, under the head of criminal caſes. We are not under the leaſt embarraſſment in the preſent caſe; for there is not a

(1) This, it was obſerved by Lord *Mansfield*, who delivered the judgment of the court, in ſome inſtances bears hard upon the Quakers, and leaves them in a worſe condition than they were when their ſect firſt aroſe; for before the ſtat. 7th & 8th *W.* 3, c. 34, if a Quaker were indicted for a capital offence, he might call Quakers as witneſſes in his defence, and that without oath; for formerly the priſoner's witneſſes were not ſworn; but now, by ſtat. 1 *Ann.* ſt. 2, c. 9, § 3, all perſons examined in criminal caſes muſt be examined upon oath, both for and againſt the crown; therefore if a Quaker be indicted, he cannot have the benefit of Quaker teſtimony.

(2) 2 *Str.* 856.

ſingle authority to prove, that upon a penal action a Quaker's evidence may not be received upon his affirmation: therefore the judge did perfectly right in admitting this Quaker to be a witneſs upon his affirmation, and conſequently the rule for a new trial muſt be diſcharged.

In a penal action you may give notice to the defendant to produce a paper in his poſſeſſion; and in caſe he neglects to produce it, you may give other evidence of it: and it is not neceſſary to give ſuch notice to the defendant himſelf, notice to his agent or attorney is ſufficient. The Attorney General *v.* Le Merchant, n.(a). 2 *Ter. Rep.* 201. and Cates *qui tam. v.* Winter, Ea. 29 Geo. 3. B.R. 3 *Ter. Rep.* 306.

New trial in penal actions.] The court will grant a new trial in a penal action on account of a miſtake or miſdirection of the judge. This action was brought to recover penalties, upon the bribery-act, for bribing voters at the *Newark* election, to vote for one of the candidates. At the trial, one of the witneſſes called was an attorney, who objected to the production of certain letters on the foundation of his character of attorney, by which he conceived himſelf bound to with-hold them. The judge was of this opinion, and the plaintiff went into other evidence, upon which there was a verdict for the defendant. It was afterwards moved that there might be a new trial, on the ground of a miſtake in the judge, in conſidering, under the circumſtances of the caſe, that the attorney was bound to with-hold the letters required to be produced in evidence: but a doubt being ſtated whether there was any inſtance of a new trial having been granted, where the verdict had paſſed for the defendant in a penal action, the court deſired that that point might be looked into. By the Court (after the caſe had been fully argued on that point), Though this motion for a new trial is an application to the diſcretion of the court, it muſt be remembered, that the diſcretion to be exerciſed on ſuch an occaſion is not a wild, but a ſound diſcretion, and to be confined within thoſe limits within which an honeſt man, competent to diſcharge the duties of his office, ought to confine himſelf; and that diſcretion will be beſt exerciſed by not deviating from the rules laid down by our predeceſſors; for the practice of the court forms the law of the court. It has been ſaid, however, that if we grant a new trial in this caſe, we ſhall innovate on the practice of thoſe who have gone before us: but that was more eaſily aſſerted than proved; for *there is not a ſingle inſtance where a new trial has been refuſed, in a caſe where the verdict has proceeded on the miſtake of the judge.* Where, indeed, the jury have formed an opinion upon the whole caſe, no new trial in a penal action has been granted, though the jury have drawn a wrong concluſion: ſo too, in ordinary, where the damages are ſmall, and the queſtion too inconſiderable to be re-tried, the court has Wilſon *v.* Raſtal, Tr. 32 Geo. 3. B.R. 4 *Ter. Rep.* 753.

frequently refuſed to ſend the caſe back to another jury. But *wherever a miſtake of the judge has crept in, and ſwayed the opinion of the jury*, there is not a ſingle caſe in which the court has ever refuſed to grant a new trial. All the caſes of indictments muſt be laid out of the caſe, becauſe they are criminal caſes, and are exceptions to the general rule: but this muſt be conſidered as a civil action. The court then went into the queſtion, whether the attorney was improperly prevented from producing the letters in queſtion (1); and they decided, that under the circumſtances of the caſe, the judge had fallen into a miſtake; and therefore as the cauſe was not fully before the jury, they made the rule for a new trial abſolute.

Calcraft *v.* Gibbs, M. 33 Geo. 3. B.R. 5 *Ter. Rep.* 19.

So, in an action of debt for a penalty under the game laws, where the judge who tried the cauſe directed the jury to find for the defendant, and the jury found accordingly. It was afterwards moved that there might be a new trial, on the ground of a miſdirection by the judge in a point of law. The court were of opinion that the judge had miſdirected the jury, and the rule for a new trial was made abſolute. *Per* Lord *Kenyon*, Ch. J. If this caſe had been left properly to the jury, and they had even drawn a wrong concluſion, we ſhould not have been diſpoſed to grant a new trial in ſuch an action as the preſent: but where there is any ground of objection to the law delivered by the judge, on which the verdict has proceeded, if ſuch objection be well founded, it is immaterial what the nature of the cauſe is. The application for a new trial is a direct appeal to the juſtice and laws of the country, and cannot be tried and diſpoſed of by any other rule.

Holloway *qui tam. v.* Bennet, M. 30 Geo. 3. B.R. *Ter. Rep.* 448.

Verdict.] In an action to recover ſome penalties of 5*l.* on 13 *Geo.* 3, c. 68, § 5, there was a verdict for the plaintiff, with one penalty; and the plaintiff's counſel applied it to a count, which it was admitted could not be ſupported in point of law; and the aſſociate accordingly indorſed on the *poſtea*, that the jury had found the defendant guilty of the offence charged by that count. On a motion in arreſt of judgment, the queſtion agitated was, whether the finding of the jury could not be applied to any other count which was good, and which was proved by the evidence. By the Court (after conſideration), We are all of opinion, that as this is *a penal action*, and the plaintiff has elected to enter the verdict on one count, he cannot now be permitted to reſort to another; for though in ſome caſes, perhaps, the jury would have no difficulty in giving their verdict on any count,

(1) See this part of the caſe under the head Attorney.

yet

yet in others they would not be warranted in ſo doing; and though in this particular caſe, the jury gave their verdict generally for one penalty, yet the plaintiff's counſel choſe to apply it to a particular count, and by that election they muſt be bound: it being admitted that this count cannot be ſupported, the judgment muſt be arreſted.

Judgment.] A diſcontinuance is cured by the appearance of the party, by the ſtat. 32 *Hen.* 8, c. 30 (1), in penal as well civil actions; neither is it a cauſe of error to enter a judgment of *miſericordia*, in a *qui tam* action for a penalty. This was a penal action on the ſtatute of 12 *Ann.* Stat. 2, c. 16, againſt uſury, to recover treble the amount of the money lent; and after judgment for the plaintiff in the court of common pleas, the defendant removed the record into the court of king's bench, by writ of error; and the two principal objections taken by the counſel, for the plaintiffs in error, were, 1ſt, That there was a diſcontinuance of the action from Hilary to Eaſter term, no day being given to the defendant in the latter term; 2dly, That a judgment of *miſericordia* was entered, inſtead of a *capiatur*. By the Court, The objection of diſcontinuance, is anſwered by the caſes in *Dyer*, 346, and *Cro. Car.* 559, where the ſtatute has been held to be no diſcontinuance in penal actions (2); and in *Jenkinſon* v. *Butes qui tam* in error, it was decided, that there was no foundation for the objection of the judgment of *miſericordia*; that was an action to recover penalties under the lottery-act, 22 *Geo.* 3, c. 47, and after a verdict for the plaintiff, in the court of king's bench, the record was removed by writ of error into the exchequer chamber, where ſeveral objections were taken, among which this was one, that there ſhould have been judgment of *miſericordia* inſtead of *capiatur*: after two arguments, all the objections were overruled, and the judgment of the king's bench affirmed.—Judgment affirmed.

Humble and another *v.* Bland *in error*, Ea. 35 Geo. 3. B. R. 6 *Ter. Rep.* 255.

ADMINISTRATORS, ſee Executors and Administrators.

(1) By the ſtat. 32 *Hen.* 8, c. 30, after verdict, judgment ſhall proceed, notwithſtanding any miſcontinuance, diſcontinuance, miſconveying of proceſs, &c.

(2) See alſo 3 *Lev.* 374, and *Doug.* 114, 115.

Admiralty.

Juriſdiction of Court of Admiralty.

Lindo v. Rodney, Hil. Ter. 22 Geo. 3. B.R. 2 *Doug.* 613.

THE juriſdiction over all matters of prize, and every thing conſequential to a capture as prize, belongs excluſively to the court of admiralty (1). On a motion for a prohibition, to ſtop the judge of the admiralty from proceeding upon a monition iſſued in the uſual form, for the condemnation of the property taken and ſeized by the land and ſea forces, under the command of Admiral *Rodney*, and General *Vaughan*, at the iſland of St. Euſtatia, upon the ſurrender of that iſland; the ground upon which it was prayed was, that *the goods were taken upon land*; and the only queſtion was, Whether the goods being taken on land, though in conſequence of a ſurrender to ſhips at ſea, excluded the prize juriſdiction of the court of admiralty? The caſe was fully argued, and Lord *Manſfield* delivered the opinion of the court.—The judge of the admiralty is appointed by a commiſſion under the great ſeal, which enumerates particularly, as well as generally, every object of his juriſdiction, but not a word of prize; to conſtitute that authority, or to call it forth in every war, a commiſſion under the great ſeal iſſues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge of the ſaid court, his ſurrogate or ſurrogates, and they are thereby authorized and required, to proceed upon all and all manner of captures, ſeizures, prizes, and repriſals of all ſhips and goods, that are or ſhall be taken, and to hear and determine according to the courſe of the admiralty, and the law of nations. A warrant iſſues to the judge accordingly, the monition and other proceedings are in his name, with all the titles of office, rank and degree; adding emphatically, on the authority under which he acts, the following words, "and alſo to hear and determine all and all manner of "cauſes and complaints, as to ſhips and goods ſeized and "taken as prize, eſpecially conſtituted and appointed." The court of admiralty is called the inſtance court, the other the prize court; the manner of proceeding is totally different, the whole ſyſtem of litigation and juriſprudence in the

(1) See the caſe of *Le Caux* v. *Eden*, in p. 173, ſupra.

prize

prize court is peculiar to itſelf; it is not like the court of admiralty. From 8 *Eliz.* c. 5, it appears, that in *civil and marine cauſes*, there were many appeals which the ſtatute reſtrains to one, to the king in chancery, to be finally decided by delegates. But *prize* is not *a civil and marine cauſe*, and the appeal lies to commiſſioners conſiſting of the privy council. A thing being done upon the high ſeas, does not exclude the juriſdiction of the courts of common law; for ſeizing, ſtopping, or taking a ſhip, upon the high ſea, *not as prize*, an action will lie, but for taking *as prize*, no action will lie (1). The end of a prize court is, to ſuſpend the property till condemnation; to puniſh every ſort of misbehaviour in the captors; to reſtore inſtantly, *velis levatis*, if, upon the moſt ſummary examination, there does not appear a ſufficient ground; to condemn finally, if the goods really are prize, againſt every body, giving every body a fair opportunity of being heard. A captor may, and muſt, force every perſon intereſted to defend; and every perſon intereſted may force him to proceed to condemn without delay. Theſe views cannot be anſwered in any court of Weſtminſter Hall, and therefore, the courts of Weſtminſter Hall never have attempted to take cognizance of the queſtion, "*prize or no prize?*" not from the locality of being done at ſea, but from their impotence to embrace the whole of the ſubject. As to plunder or booty, in a mere continental land war, without the preſence or intervention of any ſhips, or their crews, it never has been important enough to give riſe to any queſtion about it; it is often given to the ſoldiers on the ſpot, or wrongfully taken by them, contrary to military diſcipline. If there is any diſpute, it is regulated by the commander-in-chief. There is no inſtance in hiſtory or law, ancient or modern, of any queſtion, before any legal judicature, ever having exiſted about it, in this kingdom; to contend that ſuch plunder was within the rules and juriſdiction of the prize court, might be oppoſed by the ſubject-matter, the nature of the juriſdiction, the perſon to whom it is given, and the rules by which he is to judge. The queſtion then is, Whether ſuch a capture aſhore by a fleet of ſhips, and the land and ſea forces aboard, in conſequence of a previous ſurrender of the place, is within the juriſdiction of the court of prize? Two general objections have been relied on; 1ſt, That though it were given, and immemorially exerciſed, yet it cannot ſubſiſt, becauſe contrary to the ſtatutes of 13 and 15 *Ric.* 2, and 2 *Hen.* 4. 2dly, If there is no objection from theſe ſtatutes to the exiſtence of ſuch a juriſdiction, that it is not given by immemorial uſage, or the

(1) See *Le Caux* v. *Eden.*

true conſtruction of the commiſſion. As to the firſt, theſe ſtatutes manifeſtly relate to the uſurpations of the *inſtance court* of admiralty, in cauſes *civil* and marine, to *contracts*, *pleas*, and *quarrels*, only triable at law; there is not a word in any of the ſtatutes applicable to the *prize court*; there was no complaint of it, not a ſyllable of commiſſions to judge of prize; the view, purport, and tendency of the ſtatutes, is to prevent the admiralty from trying matters triable at law. The taking a ſhip on the high ſea, is triable at law, to repair the plaintiff in damages; but a taking on the high ſea, *as prize*, is not triable at law, to repair the plaintiff in damages; the nature of the ground of the action —*prize or no prize?* not only authorizes the prize court, but excludes the common law. Theſe ſtatutes do not exclude the common law in any caſe, and they confine the admiralty by the locality of the thing done, which is the cauſe of action; it muſt be done upon the high ſea. If done in ports, havens, or rivers, within the body of a county of the realm, the admiralty is excluded. But the *prize court*, has uniformly, without objection, tried all captures in ports, havens, &c. within the realm; what is ſtill more extentive, foreign ports, or harbours, are not the high ſea, any more than the ſhore, but numberleſs captures made there, have been condemned as prize: theſe ſtatutes have no view or relation to the ſubject of prize, conſequently, there ariſes from them no objection. 2. The ſecond objection is, That the juriſdiction is not given: but from the *words of the commiſſion*, it is certain, that the commiſſion has in view captures by ſhips. Hoſtilities are committed by ſhips, and the men on board, at ſea or aſhore; a fight begins, the vanquiſhed run on ſhore, get the goods out, are purſued aſhore, and the goods are taken: a fort or town is taken by the force of ſhips at ſea, and is ranſomed; or plate, money, and valuable effects taken: the means this county has of annoying and making repriſals upon an enemy, is by naval expeditions. There never was, there never will be one, no not a ſingle ſhip, which has not a view to operations upon land, if occaſion ſhould require. In many old treaties, the uſual ſtipulation is, that the ſubjects of the one prince, ſhall do no injury or violence to the ſubjects of the other, by land or ſea, or in freſh waters, or in port. It is not by accident, therefore, that the words of the commiſſion are general; all manner of captures, ſeizures, prizes, and repriſals of all ſhips and goods; it does not ſay—upon the ſea; it does not ſay—goods in the ſhip—*repriſals* is the moſt general word that can be uſed. In cauſes *civil and marine*, to give juriſdiction to the court of admiralty, the libel muſt allege the cauſe of ſuit to be done upon the high ſea; and therefore, if it had been the intention of the commiſſion, or the rule of law, it would certainly

certainly have been ſo expreſſed in the commiſſion. Alſo *upon the reaſon of the thing:* every reaſon which created a prize court, as to things taken upon the high ſeas, holds equally when they are thus taken at land: the original cauſe of taking, is here at ſea; the force which terrified the place into a ſurrender was at ſea; if they had reſiſted, the force to ſubdue would have been from the ſea: likewiſe *the authorities and immemorial uſage* ſhew, that the prize juriſdiction equally extends to goods taken by ſhips, or their crews, on land and at ſea, and that no property veſts in any goods taken at ſea, or on land, by a ſhip or her crew, till a ſentence of condemnation as good and lawful prize. "His lordſhip here ſtated ſeveral authorities, and concluded with three propoſitions;" FIRST, That ſo far back as particular caſes can be traced, which is for a century, the admiralty has judged of and condemned goods taken on land as prize, as well as goods taken on ſea; SECONDLY, That every common law authority to be found on the ſubject, allows and ſupports the juriſdiction; THIRDLY, That the legiſlature has, in many acts of parliament, recognized and referred to it, as clear, certain, and undoubted. His lordſhip then ſtated at length ſeveral authorities in ſupport of theſe propoſitions. Rule for prohibition diſcharged.

If the proceedings in the court of admiralty be erroneous, they are to be rectified on appeal; but if they have no juriſdiction over the ſubject matter, the whole is *coram non judice.* But there is a great difference between applications for prohibitions to the admiralty, *pending the ſuit*, and *after ſentence*; in the firſt caſe, the court will examine the whole caſe, and ſee the ground of the proceedings in the admiralty; but the rule is quite the reverſe after a ſentence is paſſed; in ſuch a caſe, they will not look out of the proceedings, for the party who applies for a prohibition, after ſentence, muſt ſhew a nullity of juriſdiction on the face of the proceedings. —This was an action of trover, for a veſſel called *the London*, in which there was a verdict for the plaintiff, ſubject to the opinion of the court, on the following caſe: the veſſel was taken in execution, on the 4th of May, 1787, by the plaintiff as ſheriff of Surrey, under a *fi. fa.* iſſued againſt G. P. the maſter, at the ſuit of A. P. in conſequence of a judgment obtained in the preceding Eaſter term; the plaintiff was ſerved with a notice from the defendant, on the 5th of July following, that he, the defendant, as marſhal of the court of admiralty, was in poſſeſſion of the veſſel by virtue of a writ, under ſeal of the court of admiralty, at the ſuit of A. A. and others, for a bottomry bond: the caſe then ſtated, that the maſter of this veſſel (who was alſo the owner) on 8th November, 1786, executed an inſtrument under ſeal at *Cowes*, whereby (after reciting that on a voyage from

Ladbrooke *v.* Cricket, M. 29 Geo. 3. B.R. 2 *Ter. Rep.* 653.

2 *Ter. Rep.* 649.

South Carolina, the veſſel had ſuſtained great damages, inſomuch, that he had been under the neceſſity of putting in to Cowes to repair, and that the agent of A. A. and the others had expended on the repairs 824l. 8s. 5d.) agreed that the veſſel and tackle ſhould be and remain *a ſecurity by way of bottomry*; and it was further ſtated, that he ſhould immediately ſail with the ſaid veſſel for London, and would pay the bottomry bill, and he thereby bound himſelf, his executors, &c. *and alſo the ſaid veſſel* in a penal ſum, for payment of the ſum due, and further bound himſelf not to depart with the ſaid veſſel from London till payment, &c. A. A. and the others inſtituted a ſuit in the admiralty on this inſtrument, and on January 1, 1787, a warrant iſſued from the admiralty court, impowering the defendant, as marſhal, to arreſt the veſſel, and to cite the parties intereſted to anſwer to the ſaid A. A. and the reſt, in a cauſe of bottomry, civil, and maritime: on 1ſt January 1787, the defendant arreſted the veſſel, and cited all the parties, and *was in poſſeſſion when the* plaintiff's execution iſſued; on the 16th July, 1787, the admiralty decreed the ſhip to be delivered to A. A. and the reſt, and on 22d November, 1787, a warrant iſſued to the defendant, as marſhal, to ſell the ſhip (ſtating that in a certain cauſe of bottomry between the parties, the court had awarded poſſeſſion, &c. without ſetting forth the grounds of the ſuit), by virtue of which warrant, the defendant ſold the ſhip for 980l. Two points were made; FIRST, That this inſtrument was not a bottomry bond, inaſmuch as it is of the eſſence of a contract of bottomry, that the lender of the money ſhall run the riſk of the voyage, and that both the principal and the intereſt ſhall be at ſtake upon it, which was not the caſe here, as the perſon of the borrower and his executors were by this inſtrument ſubjected to the payment of this money at all events; SECONDLY, That even if it were, the court of admiralty had no juriſdiction over the ſubject-matter of this inſtrument, it having been made within the body of a county, and under ſeal; to this it was anſwered, that this was the caſe of a mortgage of the ſhip by the owner, which was followed by the mortgagee's taking poſſeſſion of her afterwards, and that his right could not be diveſted by a ſubſequent execution. BY THE COURT, It appears, that the plaintiff's execution was not executed till a legal conveyance had been made of the ſhip in queſtion. It was clearly the intention of the parties, that this property ſhould be ſpecifically ſubjected to the demand of the perſon advancing the money, under whoſe authority the defendant took poſſeſſion of the ſhip. If no poſſeſſion had been taken under this inſtrument, it would have been fraudulent, and any other creditor might have taken her in execution; but here the title of the firſt purchaſer was conſummated

mated by taking poſſeſſion of the ſhip; it is therefore ſufficient to ſay, that the plaintiff in this caſe is not entitled to recover, and if he is not, it is immaterial to conſider in this caſe, whether the court of admiralty had any juriſdiction or not; this action is brought by the plaintiff, acting under the proceſs of this court againſt the defendant, who has alſo acted under a proceſs of that court; and the law equally protects an officer acting under the court of admiralty, as it does one acting under the common law courts. If on the face of the proceedings, the court of admiralty had juriſdiction, the officer was bound to execute the proceſs, and could not examine into the foundation of them, and that will protect him: this caſe ſtates, in general terms, that the court did pronounce a decree for the ſale of the ſhip in queſtion, and that a warrant iſſued out of that court, for ſeizing and ſelling the ſhip; ſo that we muſt take it that they had juriſdiction, for nothing appears on the face of the decree to ſhew they had not. *Poſtea* to the defendant.

Menetone *v.* Gibbons *& al.* Ea. 29 Geo. 3. B.R. 3 *Ter. Rep.* 267.

Whether the court of admiralty has or has not juriſdiction, depends upon *the ſubject-matter*; therefore they have cognizance of an hypothecation bond, given in the courſe of a voyage, though it be executed *on land, and under ſeal.* In an action of covenant, the plaintiff declared, that by a bill of ſale, of 22d November, 1782, made by the defendants to him, of a ſhip, called the *Wiltſhire*, they covenanted that they had full power to ſell and aſſign, and that the ſhip ſhould from thenceforth remain and continue unto the plaintiff, his executors, &c. freely and clearly acquitted and diſcharged of and from all former bargains, ſales, &c. whatſoever. The declaration then ſtated the breach, that before the making of the bill of ſale, to wit, on 23d September, 1778, the ſhip then being at Cork, the then maſter hypothecated the ſhip to P. B. and others, for 671l. for ſetting her forth for ſea, and furniſhing her with neceſſaries to proſecute her voyage; and gave an hypothecation bond of the ſame date, charging the ſhip with the money and intereſt: it then ſtated, that before the making of the bill of ſale from the defendants to the plaintiff, there being 500l. in arrear upon the bottomry bond, a ſuit was thereupon inſtituted in the admiralty court, and ſuch proceedings were thereupon had; that in October, 1785, the ſhip was condemned to be ſold, and was actually ſold for leſs than the ſum recovered againſt her in that ſuit: it then ſtated the loſs that the plaintiff had ſuſtained: to this the defendants pleaded, that the hypothecation bond *was under the ſeal* of the maſter, and was not therefore cognizable in the admiralty court; to which there was a general demurer and joinder. By THE COURT (after argument), The queſtion whether the court of admiralty has or has not juriſdiction depends on

on the *ſubject-matter*. If a contract be made under ſeal, by which one party covenants with another to do any particular act, this court has juriſdiction. And in the ſtruggles which have been made between the court of admiralty and common law courts, reſpecting the extent of their reſpective juriſdictions, the latter have ſaid, that if the parties have bound themſelves to anſwer *perſonally*, the former cannot take cognizance of the queſtion. *But that cannot be extended to a caſe where, from the nature of the contract, the proceedings are confined to the thing in ſpecie, over which the court of admiralty has the ſole juriſdiction.* In ſuch a caſe as the preſent, the party could have no remedy in a court of common law; for the contract is merely *in rem*, and there is no perſonal covenant for the payment of the money. In queſtions which have been brought before this court on the ſubject of *prize*, Lord *Mansfield* has always ſaid (and particularly in the laſt (1), in which he gave an elaborate judgment) in the queſtion of prize this court has no juriſdiction, it belongs ſolely to the admiralty. Nay even if the capture be on land, provided it be taken by a naval force, the admiralty court has excluſive juriſdiction over it as a queſtion of prize; and the doctrine in *Brymer* v. *Atkins*, is fully in point. Then if the court of admiralty has juriſdiction over the ſubject-matter, the circumſtance of the inſtrument being under ſeal does not deprive them of their juriſdiction. Judgment for the plaintiff.

Brymer *v.* Atkins, Hil. Ter. 29 Geo 3. C.B. 1 *Hen. Black.* 164.

The caſe of *Brymer and others* v. *Atkins and others*, mentioned in the laſt caſe, was decided in the court of common pleas, Hil. Ter. 29 *Geo.* 3, and afterwards affirmed upon a writ of error brought in B.R. Mic. 30 *Geo.* 3, and was as follows: By the 14th ſect. of the ſtat. 16 *Geo.* 3, c. 5. (made to prohibit all trade and intercourſe with the then American colonies, and ſince repealed) it was provided, that where ſhips, &c. had been taken from the Americans, and condemned as lawful prize in a court of admiralty, and the ſentences of condemnation appealed from "execution of any ſentence ſo "appealed from as aforeſaid, ſhould not be ſuſpended by "reaſon of ſuch appeal, in caſe the party or parties appellate *ſhould give ſufficient ſecurity* to be approved of by the "court in which ſuch ſentence ſhould be given, to reſtore "the ſhip, &c. concerning which ſuch ſentence ſhould be "pronounced, or THE FULL VALUE THEREOF, to the "appellant or appellants, in caſe the ſentence ſo appealed "from ſhould be reverſed."—PROHIBITION to the court of lords commiſſioners of appeals from the admiralty in prize cauſes, the declaration, in ſubſtance, ſtated (*inter alia*) the above act, and that *H.B.* commander of a ſloop of war,

(1) *Lindo* v. *Rodney* and another, *Doug.* 591, n.

captured a ſhip called the *Nicholas*, *Nathaniel Atkins* maſter; that a ſuit was inſtituted in the court of vice-admiralty in Nova Scotia for the condemnation of the veſſel; that ſuch proceedings were there had; that ſhe was adjudged and condemned as good and lawful prize; that the veſſel and cargo was, after the ſentence of condemnation, viz. on 15th May, 1776, ſold by *the public vendue maſter at public auction, to the beſt bidders, for* 4408l. 3s. *ſterling, being the utmoſt value of the ſame at Halifax.* That the defendants, on behalf of themſelves and other claimants of the veſſel, appealed from the ſentence of the court of vice-admiralty to the commiſſioners of appeals; whereupon the plaintiffs did afterwards, viz. on Auguſt 6. 1776, perſonally appear before the ſurrogate of the vice-admiralty court, *and acknowledge jointly and ſeverally, that they owed to our ſovereign lord the king, the ſum of* ——l. *of the current money of Halifax* (being exactly double the amount of the clear monies ariſing from the aforeſaid ſale), *upon condition that the party appellate, his agent, or attorney, ſhould reſtore the ſaid ſhip and her cargo, or the value thereof, to the ſaid appellant or appellants, in caſe the ſentence ſo appealed from ſhould be reverſed.* That the appeal was heard by the commiſſioners of appeals, who reverſed the ſentence of the vice-admiralty court, and decreed the ſhip and cargo, or the value thereof, to be reſtored to the appellants: that the plaintiffs afterwards, on the behalf of the captor, paid into the regiſtry of the commiſſioners 4408l. 3s. *of lawful money of Great Britain, being the full value, and clear amount of the monies ariſing from the public ſale of the ſaid ſhip and cargo, as aforeſaid:* that the defendants took out of the regiſtry the ſum paid in, but refuſed to receive it *as the full value of the ſhip and cargo*; and by petition to the commiſſioners, prayed that it might be referred to the regiſtrar to examine the ſhip's invoices and accounts, for aſcertaining the value of the ſhip and cargo; that the commiſſioners accordingly referred the ſame, and the regiſtrar reported, that 7708l. 17s. 3d. ſterling ought to be allowed the defendants, which report the commiſſioners confirmed. That proceſs being iſſued againſt the captor for the difference, he was returned *non eſt inventus.* That monitions being iſſued againſt the plaintiffs as ſureties for the captor, an appearance was given to them by the commiſſioners to ſhew cauſe againſt the payment of 3455l. 3s. 6d. the abovementioned difference. That on the 27th day of July, 1785, the commiſſioners of appeals pronounced the aforeſaid recognizance of the plaintiffs, as ſureties for the captor, to be forfeited, and decreed a monition againſt the plaintiffs, to pay the ſaid 3455l. 3s. 6d. being the remainder of the value of the ſhip and cargo in queſtion, according to the regiſtrar's report:—

THE DECLARATION then alleged, that the ſaid court of vice-admiralty had not any authority *to take any ſecurity of the*

the nature, and in the terms therein before-mentioned, nor had the ſaid commiſſioners by the laws and ſtatutes of this realm, any authority to enforce the ſame: that the ſaid commiſſioners had no authority *by references of invoices and accounts to regiſtrars or otherwiſe, to open, re-examine, ſet aſide, or in any manner to alter the valuation of any ſhip, or veſſel, or goods and effects, ſo fixed, ſettled, adjuſted, and liquidated by public ſale, after ſentence of condemnation regularly pronounced, when no fraud or colluſion is alleged and proved.* It then alleged, that the ſhip was ſold by the vendue maſter to the higheſt bidder, without fraud; that the decree of the commiſſioners was againſt the form of the ſtatute, and alſo againſt the laws and cuſtoms of the realm; concluding in the uſual form in prohibition:—there was A DEMURRER and JOINDER. The caſe was argued at conſiderable length, and LORD *Loughborough*, CH. J. pronounced the judgment of the Court (after obſerving that the vendue maſter did not ſell under the immediate authority of the court of vice-admiralty, but as an auctioneer employed by the parties), as follows:—Two queſtions preſent themſelves, FIRST, whether the ſecurity taken by the vice-admiralty court of Halifax, be ſuch as that court was competent to take? SECONDLY, Whether, ſuppoſing ſuch ſecurity to be good, the lords commiſſioners of appeals have miſconſtrued the act of parliament, which having, as was contended, fixed a defined value on prizes, has left them no diſcretion to eſtimate the value? The *firſt queſtion* may be diſpoſed of without any difficulty. It is true, a ſtrict recognizance being an acknowledgment of a debt to the king on record, cannot be taken in a court not of record: but this ſecurity, though bearing the form of a recognizance, is improperly ſo called, not being a recognizance in reality. It has none of the attributes of a recognizance, it could not be proceeded upon as ſuch, nor in its conſequence is it like a legal recognizance. It ſeems to have been taken in this form in the court of vice-admiralty at Halifax, from the inexperience of the officers, being different from that hitherto uſed in our courts of admiralty in England, in which the parties merely enter into an undertaking to ſubmit to the order of the court, according to the event of the appeal. To call it therefore what it is not, from its accidental form, would be evidently abſurd. The authorities in 1 Lord *Raym.* 223, 235. 2 Lord *Raym.* 1285, ſufficiently prove, that courts of admiralty may take ſtipulations from parties, to perform what ſhall be awarded them to do; the acts of parliament relating to this ſubject do not point out the form of the ſecurity, but direct generally that ſuch ſecurity ſhall be taken as the court of admiralty is enabled to take. Upon the juſt conſtruction, therefore, of the ſecurity in queſtion, we are of opinion that it is no more than an undertaking to ſubmit to the directions of the court; for

for we ſhould act upon very narrow principles, if we were to conſtrue this to be a ſtrict legal recognizance, only becauſe it has a reſemblance to what the court of vice-admiralty had no authority to take; operating therefore as a ſtipulation, execution upon it belongs to that court, and that juriſdiction to which the parties have agreed to ſubmit.—*The ſecond queſtion*, though ſomewhat more extenſive, is not more difficult than the firſt. It has been contended, that the ſecurity is limited to a certain defined value, and cannot be taken for any other: that defined value is ſaid to be the produce, according to the appraiſement or ſale, or place of condemnation. If this be true, the argument is well founded, that the proceeding to enforce payment of a ſecurity taken for a larger ſum, is without authority. But this propoſition is not ſupported by the expreſs words of that ſection of the act of the 16th *Geo.* 3, on which the queſtion ariſes, namely, the 14th, which only directs ſecurity to be taken to reſtore the ſhip and cargo, OR THE FULL VALUE THEREOF: no mode of aſcertaining that value is preſcribed; yet it is ſaid, that by reference to other parts of the ſame act, and to ſimilar clauſes of other acts *in pari materiâ*, the words *full value* receive a fixed meaning, and denote the value ariſing on appraiſement or ſale of the prize, at the place of condemnation. In order to introduce the interpretation contended for, we muſt be obliged to add to the deſcription of the ſecurity to reſtore the ſhip and cargo, *or the full value thereof*, words to the following effect, "at the place of ſale, ſuch ſale being made without fraud, by perſons authoriſed, &c." which would be an extraordinary latitude of conſtruction, eſpecially when no ſale is directed, no perſons appointed to make it, and no captor obliged to ſell at the place of condemnation: we are therefore of opinion, upon the ſecond queſtion, that the lords commiſſioners of appeals were not tied down to any definite meaſure of value to be given in lieu of the ſhip and cargo. Whether it ought to be the invoice value, the value at the port to which the ſhip was carried, or at the port to which ſhe would have gone, if the voyage had not been interrupted, are queſtions which will admit of much argument and doubt: but even if we thought that the court of appeals had given an erroneous judgment as to the value, if we, ſitting in a court of prize, ſhould have ourſelves determined differently, or could ſuch a queſtion have come before a court of common law, and it ſhould have been proper to direct the jury to find the value at the place of ſale, ſtill there is no ground for a prohibition: we are not to be underſtood to ſay, that the commiſſioners of appeals have in fact made an improper eſtimate of the value; but be that eſtimate right or wrong, it is our province to ſay, whether they have miſconſtrued the law; miſconſtruction of law being a ground of prohibition:

but

but as we are all of opinion, that the act in diſpute gives them authority to decide upon the meaſure of value, we have no right to prohibit them from enforcing their ſentence, and therefore muſt direct a conſultation to iſſue.

Smart & al. v. Wolff, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 323.

The admiralty court has juriſdiction over the queſtion of freight, claimed by a neutral maſter againſt the captor, who has taken the goods as prize; and a monition having iſſued, after the goods were condemned, and decreed to be delivered to the captors, at the ſuit of ſuch maſter againſt the plaintiffs, as owners or agents of the prize goods, to bring into court *the produce remaining in their hands*, to anſwer the freight, the court of king's bench refuſed a prohibition, though no *fidejuſſory* caution had been taken before the goods were delivered to the captor; but *the queſtion of freight had been reſerved* by the terms of the decree, *for future conſideration*. This was decided on a motion for a prohibition to the prize court of the admiralty; the material allegations in the ſuggeſtion, were the following:—the firſt allegation was, that all prizes are committed to the care of the court of admiralty *until* final ſentence, or *until* interlocutory order for releaſing: the 2d, 3d, 4th, and 5th allegations were, that when a ſhip is delivered to the captor, ſecurity is taken to reſtore her, &c. according to the ſentence; that after ſuch delivery, the admiralty has no juriſdiction over the party to whom the ſhip is delivered, unleſs he be bound by recognizance; that ſureties are not liable beyond the ſum taken in the ſtipulation; and that after payment of ſuch ſum, the ſtipulation is diſcharged, and that any further judgment in the ſuit is void: the 6th allegation was, that the maſter of ſuch ſhip has no lien for freight after the goods are delivered: the 7th allegation was, that if a neutral ſhip be taken with the goods of an enemy on board, and the goods are condemned, and the captors adjudged to give bail or pay freight, the maſter cannot maintain any ſuit for freight, nor can the admiralty court take cognizance of it after the property is delivered, unleſs the party be bound to pay freight by ſtipulation, and then only to the amount of the ſtipulation: the 8th allegation in the ſuggeſtion was, that the admiralty has no power to iſſue a monition, without an atteſtation or affidavit, that the defendant has in his poſſeſſion, or power, money or effects;—theſe were the grounds laid for a prohibition: the ſuggeſtion then ſtated, That in 1782, the plaintiff, *Smart*, being commander of a private ſhip of war, ſeized as prize a ſhip called *D'Arend en Jan*, on her voyage from Surinam to Amſterdam, and brought the ſame to Portſmouth, and from thence to London. That on 9th November, 1782, *Smart* inſtituted a ſuit againſt the ſhip and goods in the admiralty, and prayed a monition againſt all perſons in general. That the defendant, a Daniſh ſubject, and

and others, were afterwards admitted parties to the ſuit, as claimants to the ſhip and goods, on behalf of themſelves, and of the maſter, and of certain other owners or claimants of the ſaid cargo, as being neutral property, and on board a Daniſh ſhip furniſhed with a proper paſſport. That the judge on 19th of December, 1782, by his interlocutory decree reſtored the ſhip to the claimant, the defendant, for the uſe of the owners, as being the property of Daniſh ſubjects, and decreed a commiſſion to iſſue for the unlivery of the cargo; *reſerving the conſideration of freight and expences, together with the adjudication of the cargo, and other matters, to be heard in the regular courſe of cauſes*; againſt which decree the defendant appealed; but he afterwards abandoned the appeal. The ſuggeſtion then ſtated the ſubſequent proceedings in the cauſe, and that the judge on the 13th November, 1783, by decree condemned certain unclaimed goods as lawful prize, which decree was appealed from; but the judge, at the petition of the captor, directed the ſentence not to be ſuſpended, on the captor's giving bail to anſwer the value of the goods condemned; and on the 3d of December, 1783, the other plaintiffs, *Pearſon* and *Brymer*, became ſureties for the plaintiff, *Smart*, to abide the event of the appeal, and to pay the amount of what might be decreed to be reſtored, together with expences. That on the 7th March, 1784, the defendant, without prejudice to his appeal, *prayed that the claimants of certain goods reſtored, and the captor, might give bail to anſwer their proportions of the maſter's freight and expences on the goods reſtored and condemned*, which the judge decreed accordingly. That on the 30th of the ſame month, *Pearſon* and *Brymer* became ſureties for *Smart*, in 500l. to the defendant, *to pay ſuch proportion of freight and expences, as might thereafter be decreed for the goods condemned*. And no other recognizance or ſtipulation was entered into. That the appeal was heard before the commiſſioners of appeals for prize cauſes, on 16th July, 1784, who affirmed the decree, and remitted the cauſe. That *the defendant afterwards brought in an account of freight and expences, claimed by the maſter, on account of the goods condemned to the captor*, which account was by the judge referred to one of the deputy regiſtrars, aſſiſted by two merchants, who reported that 7593l. 6s. 7d. excluſive of the claimant's proctor's bill, amounting to 151l. 15s. 3d. ſhould be paid to the maſter by the captor for freight and charges. That report was referrred back to be reconſidered on the ground of exceſſive demands; but 4000l. was paid on 15th June, 1785, on account. After certain proceedings, a third report was made, on the 16th day of February, 1788, ſtating the ſum of 1973l. 18s. 6d. to be due from the captor to the claimant, over and beſides the ſum of 4000l. formerly paid to the defendant. That on 17th June, 1788, the judge

confirmed

confirmed that report, againſt which the captor appealed. That the claimant on the ſame day, prayed a monition to be iſſued againſt *Pearſon* and company, upon an atteſtation of the defendant, *alleging that they were at the time of the capture the owners, or agents of the owners, of the privateer*; and *that they were then in poſſeſſion of the proceeds of the goods condemned*, or of conſiderable parts thereof; which the judge decreed: and a monition accordingly iſſued, citing them to bring into the regiſtry of the court, ſo much of the proceeds of the cargo as would anſwer 1973l. 18s. 6d. and alſo to ſpecify on oath the names and abode of the owners of the privateer, at the time of the capture. The ſuggeſtion then alleged, that the property of the enemies, taken on board the ſhip, having been delivered from on board thereof, and not now in the poſſeſſion of the maſter or owners, they have departed with their lien; and therefore they cannot in the court of admiralty compel payment of any other ſum in reſpect of the freight, of the enemies property, exceeding the ſum for which the plaintiff, *Smart*, was bound by the ſtipulation. That the plaintiff, *Smart*, was bound by the ſtipulation of the other plaintiffs, *Pearſon* and *Brymer*, in 500l. to pay ſuch proportion of freight as might thereafter be decreed to the value of the ſaid ſum, and for no more. That that and every other ſtipulation, entered into by the plaintiff, *Smart*, to the maſter or owners, having been fully ſatisfied on the 15th of June, 1785, he and his ſureties or fidejuſſors are releaſed and diſcharged from all ſubmiſſion to the juriſdiction of the court of admiralty, &c. Nevertheleſs the judge of that court, after the 15th of June, 1785, took cognizance of a charge of freight, in reſpect of the enemies property ſo condemned, and on the 17th day of June, 1788, confirmed the final report of the deputy-regiſtrar and merchants; *of which charge or matter of freight, the court of admiralty had then no juriſdiction.* That the judge on 17th of June, decreed a monition to go out againſt the plaintiffs, *Pearſon* and *Brymer*, as *ſuppoſed owners* of the privateer, or as the correſpondents or *agents of the plaintiff, Smart*, to compel the payment of 1973l. 18s. 6d. to the defendant. The ſuggeſtion therefore prayed a prohibition to ſtay proceedings againſt the plaintiff *Smart*, or any other perſon as his ſuppoſed agent. It concluded with ſtating, "AND IT IS GRANTED (1), &c.—The caſe underwent

(1) Per *Buller*, J. The cloſe of the ſuggeſtion is inaccurate, and aſſumes what the party cannot allege, and what the court in this caſe cannot grant. The party can only *pray* for the prohibition: whether it ſhall be *granted* or not depends on the judgment of the court; and it muſt not be alleged on the record that it is granted, until the court have pronounced their judgment that it ſhall be ſo. Thoſe words therefore muſt be ſtruck out, otherwiſe they will miſlead poſterity. 3 *Ter. Rep.* 347.

a very

a very elaborate argument. Lord *Kenyon*, CH. J. If we entertained any ſerious doubt on this queſtion, we would give the party leave to declare in prohibition, in order that the point might be determined by the court of *dernier reſort*. But as we have no doubt upon it, there are many reaſons why we ought not to grant the prohibition. In the firſt place, it would occaſion an uſeleſs expence to the parties; and in the next, and which is a matter of greater importance, it would again put theſe kind of queſtions in doubt, which have long been ſettled as to the court of admiralty: there is alſo an additional reaſon why we, who entertain no doubt, ſhould not interfere, which is, that if the parties are diſſatisfied with our opinion, they may apply to every other court in Weſtminſter Hall for a prohibition. Theſe proceedings take their riſe from the capture of a Daniſh by an Engliſh ſhip. The ſhip and goods were libelled in the admiralty; and ſeveral perſons came in as claimants, among whom was the preſent defendant, who claimed the ſhip as belonging to a ſubject of a neutral power. As far as reſpected the unclaimed goods, they were condemned, and no appeal was entered againſt that ſentence. As far as reſpected the ſhip itſelf, ſhe was ordered to be reſtored, as being the property of a neutral ſubject. But with regard to the goods of the defendant, they were alſo condemned; againſt which an appeal was interpoſed, and the ſentence was confirmed. The court ſeeing that the maſter of the neutral ſhip had done nothing to forfeit his claim to freight, decreed that it ſhould be paid to him: and this is the conſtant practice where it does not appear that the neutral has done any thing in violation of any treaty, or of the *jus gentium*, as by refuſing to be ſearched, or to ſhew his papers, or carrying contraband goods to the enemy, and in a variety of other inſtances, by which he would forfeit his privilege as a neutral ſubject. Before this queſtion, however, was diſcuſſed, on an application to the court of admiralty, the goods were delivered to the party claiming them; but inaſmuch as a ſubſequent demand might be made, which it was in the power of that court to determine, they took bail to a certain amount, which has ſince proved to be inſufficient. But it is ſaid, that as ſoon as the property is thus delivered into the hands of the captors, the court of admiralty has no longer any control over it, and can only proceed againſt the ſureties for the amount of the bail. But that poſition would be highly inconvenient; and, indeed, would completely ſhut the doors of juſtice. For if the admiralty court be then *functus officio*, and the bail be inſufficient, what is to become of the freight? *A court of common law cannot take cognizance of freight; it involves in it the queſtion of prize, and whether or not the goods are contraband, and many other queſtions*, which

depend on the treaties made with foreign powers, of which this court knows nothing, but all which muſt be ſubjected to the deciſion of ſome forum, governed by the ſame rules in all countries. The municipal laws of this country, are not the laws by which other countries are governed; but courts of admiralty are inſtituted in all civilized countries, and found their determinations on the ſame general code of laws. The propoſition then cannot be maintained, that, when the court of admiralty has parted with the poſſeſſion, it is *functus officio:* and the argument *ab inconvenienti* applies ſtrongly againſt it; becauſe if that court has no juriſdiction, no court whatever can give relief. While the goods remain in the warehouſes of the admiralty, it is admitted that they may diſpoſe of them according to the exigency of the caſe; the ſame rule holds in common law courts, when they are ſaid to be in *cuſtodiâ legis:* but when do they ceaſe to be ſo? Not when they are ſent out of their *actual* cuſtody. The juriſdiction of that court attaches in *rem*, and is not altered by *a change of hands*; I lay ſome ſtreſs on the words "*change of hands*," becauſe, if the *legal property* be altered, as by a ſale in market overt, that might vary the caſe. But that queſtion is not affected by the monition in this caſe: that *decides* nothing; it only requires the parties to bring into the court of admiralty ſo much of the proceeds of the cargo as remain in their hands. When the parties appear in that court, and ſhew that they are not the *cuſtodes* of the property, and that they have acquired it by a legal title, which the laws of England will protect, and on which the court of admiralty cannot decide, then will be the proper time to apply for a prohibition, if that court ſtill attempts to enforce the claim. But that is not the caſe now: the property has perhaps only changed hands, and remains in the ſame ſituation as when it was in the warehouſes of the admiralty, liable to be diſpoſed of according to the exigencies of the caſe. It ſeems that it was once doubted whether that court would take a *fidejuſſory* caution; and it was contended, that, without it, they would have no juriſdiction at all: but that is not warranted; the reaſon for taking a fidejuſſory caution was to guard againſt the conſequences of delivering the property to foreigners, where that court could not follow it, or to inſolvent perſons: but that was only an *accumulative remedy*, which enabled the court the better to purſue the property, but did not ſuperſede their juriſdiction in *rem*. Then it has been contended, that the bail are not liable beyond the extent of the fidejuſſory caution, if the court can alſo proceed in *rem*; but this may operate as an accumulative remedy, as in the caſe of a pawn, the right to detain which, is not deveſted by the pawnee alſo taking a covenant as a farther ſecurity, on which he may ſue the perſon of the covenantor. The covenant is

conſidered

conſidered only as an additional remedy, and the party may proceed on both. In this caſe, in point of juſtice, the goods ought not to have been taken out of the hands of the maſter, till he had been ſatisfied for his freight. And though in order to accommodate the parties the poſſeſſion of the goods was changed, it muſt be remembered that they were charged in the hands of the party, to whom they were delivered, with the ſame lien, as whilſt they remained in the admiralty court. But then the amount of the freight claimed has been objected to: but we muſt ſuppoſe that it is commenſurate with the value of the goods: that queſtion may be diſcuſſed in the court of admiralty, and if any injuſtice has been done on that head, it may be rectified on appeal. *Aſhburſt*, J. It is certainly a general rule, that, where a court has juriſdiction in the principal queſtion, it has juriſdiction incidentally over all interlocutory matters connected with the original cauſe. That *the court of admiralty has the ſole and excluſive juriſdiction over queſtions of prize cannot be diſputed.* When a ſuit of that ſort is inſtituted, the firſt thing to be inquired into is, whether or not it be a lawful prize? if it be, the poſſeſſion is to be decreed to the captors. And the queſtion here is, Whether, having ſo decreed, that court can proceed to do juſtice in any incidental claims that ariſe in conſequence of it? I ſee no reaſon why they may not reſume ſuch a juriſdiction in *rem* for that purpoſe, after they have parted with the poſſeſſion of the goods taken. In the preſent caſe, after the admiralty had decreed the goods to be lawful prize, the maſter claimed freight, which ſubject can only be diſcuſſed in that court; for whether or not he is entitled to freight, depends on his own conduct in particulars of which a court of common law cannot take cognizance. *Generally ſpeaking, when a perſon parts with the poſſeſſion of a thing on which he has a lien, he parts with the lien itſelf: but that rule does not hold in caſes where by law he is obliged to deliver up the poſſeſſion. Now here the goods were in the cuſtody of the law, and were taken out of the cuſtody of the maſter by the power of the admiralty: but that court may decree him freight and expences in reſpect of his lien, notwithſtanding the decree of the property to the captors.* Had the queſtion merely been, whether the plaintiffs here were liable *as bail?* I ſhould have thought that they would not be liable beyond the amount of the ſum, for which they had become ſureties: but that is not the preſent caſe; for the monition only requires them to bring in ſo much of the proceeds of the cargo as remains in their hands. *They are not called upon in the characters of bail,* but *as having the poſſeſſion of the proceeds, by whatever means that may have been obtained.* It is highly convenient that the court of admiralty ſhould have that power; and ſeveral caſes have been cited to ſhew that it has been repeatedly exerciſed. Theſe

caſes have great weight, eſpecially as they are conſonant to juſtice and convenience, and there are no authorities to the contrary. *Buller*, J. The 1ſt allegation is, that all prizes are committed to the care of the court of admiralty until *final ſentence*, or until *interlocutory order* for releaſing. Now I find no foundation or authority for impoſing this reſtriction which the plaintiffs endeavour to put on that court. Every caſe that I know on the ſubject is a clear authority to ſhew that *queſtions of prize and their conſequences are ſolely and excluſively of the admiralty juriſdiction.* After the caſes of *Linds* v. *Rodney* (1), *Le Caux* v. *Eden* (2), and *Livingſton* v. *M'Kenzie* (3), it would only be a waſte of time to enter into reaſons to ſhew that this court has no juriſdiction over thoſe ſubjects. Still leſs reaſon is there for ſaying that the admiralty court ſhall be prevented from proceeding after it has made an interlocutory decree; becauſe that would be to ſay that the admiralty has juriſdiction at the beginning of the ſuit, and not at the end of it. The 2d, 3d, 4th, and 5th allegations are, that when a ſhip is delivered to the captor, ſecurity is taken to reſtore her, &c. according to the ſentence; that after ſuch delivery the admiralty has no juriſdiction over the party to whom the ſhip is delivered, unleſs he be bound by recognizance; that ſureties are not liable beyond the ſum taken in the ſtipulation; and that after payment of ſuch ſum the ſtipulation is diſcharged, and that any further judgment in the ſuit is void. Now all theſe allegations depend on the conſtruction of the 19 *Geo.* 3, c. 67. But, after the greateſt attention which I have been able to give to that act of parliament, I do not think that it *abridges the ancient mode of proceeding in the admiralty*, or *reſtrains its juriſdiction*: but it was paſſed in order to *give new powers as auxiliary to the authority and juſtice of the court*, and to expedite the proceedings in it. But theſe allegations have no relation to the cauſe before us; for this is not a proceeding againſt ſureties: no queſtion ariſes on the effect of the ſtipulation, but the proceeding is merely againſt the owners or their agents, *in re-*

(1) *Dougl.* 591, n. 1. See p. 436, ſupra.

(2) *Dougl.* 572. See p. 173, ſupra.

(3) This caſe of *Livingſton* v. *M'Kenzie* was determined by Lord *Mansfield* at *niſi prius*, in 1766, and was as follows: the ſhip *Margaret* was taken in the war before the laſt by a king's ſhip, but reſtored by the ſentence of the vice-admiralty court in Jamaica; that ſentence was confirmed on appeal here, and the cauſe was remitted back to Jamaica. The captured, however, brought an action here at common law, founded on the ſentence of reverſal: but Lord *Mansfield* was of opinion that it was not maintainable, as the queſtion aroſe out of a prize cauſe, and that the courts of admiralty ought to enforce their own decrees; and he non-ſuited the plaintiffs.

ſpect

ſpect of the property in their hands, and to compel them to bring into court *the goods*, over which the court of admiralty has undoubtedly a juriſdiction. This mode of proceeding has been purſued and eſtabliſhed by all the caſes cited by the counſel againſt the rule, and there is no authority, or even dictum, to contradict them. The 6th allegation is, that the maſter of ſuch ſhip has no lien for freight after the goods are delivered. This is as little applicable to the preſent caſe; for this is not a queſtion on the maſter's lien, but on the authority and juriſdiction of the court of admiralty. The next allegation is, that if a neutral ſhip be taken with the goods of an enemy on board, and the goods are condemned, and the captors adjudged to give bail or pay freight, the maſter cannot maintain any ſuit for freight, nor can the admiralty court take cognizance of it after the property is delivered, unleſs the party be bound to pay freight by ſtipulation, and then only to the amount of the ſtipulation. This ſeems to be a complicated and confuſed conſtruction of the act of parliament, without affording any fixed principle by which to ſteer. However, in order to divide it into diſtinct points and to conſider the effect of each of them ſeparately, I ſhall ſuppoſe that it means to aſſert, 1ſt, that by the ſtat. 19 *Geo.* 3, c. 67, the ancient juriſdiction of the admiralty, as to queſtions of prize, is totally ouſted after a ſentence of condemnation of the goods; and, 2dly, that, if the admiralty takes a ſtipulation according to the directions of that act, that court can proceed in no other way than to enforce ſuch ſtipulation. As to the firſt, *it is too clear to be queſtioned now that the admiralty court alone has juriſdiction not only over the queſtion of prize, but of all its conſequences*: it has a power to reſtore or condemn with or without coſts, as is moſt juſt: *it may reſtore the ſhip and condemn the cargo*; *in which caſes it may give or refuſe freight to the maſter of the ſhip captured, according to the nature of the cargo, and the circumſtances of the caſe.* If the firſt ſentence in this caſe had been merely to condemn the goods, I can find nothing in the ſtatute which can prevent the captured from claiming, or the court from giving to him freight. If no ſtipulation had been taken for freight, it muſt have remained for the court to decide that queſtion in its ordinary courſe: but here bail was given, and the court expreſsly reſerved the conſideration of freight and expences, and they were afterwards decreed to the maſter up to the 19th December, 1782. How far the decree is right in giving coſts and expences is not for us to decide; for even if it be wrong, it is not a ground for a prohibition, but for an appeal. But if the cargo were lawful prize, the ſhip was rightly brought into this country, and therefore I ſhould have thought that the maſter was not entitled either to coſts or expences. The

general power and authority of the court of admiralty being as I have ſtated, the queſtion is, Whether the ſecond ſection of the 19 *Geo.* 3, c. 67, has made any alteration? The ſtatute ſays, that every ſhip taken *after final adjudication* as lawful prize in the court of admiralty, and not before, ſhall belong to, and be divided among, the captors, as their proper goods and chattels. Now *final adjudication* does not mean to preclude the appeal, or to deprive any perſon of the right of interpoſing for his own intereſt. And the effect and meaning of that clauſe is only that, after all other rights and claims are adjuſted and allowed, the captors, inſtead of the crown, ſhall be entitled to the remainder of the prize; but until that time, no right is veſted in them. It ſeemed to be admitted by one of the counſel, who argued in ſupport of the rule, that ſo far from the juriſdiction of the admiralty being at an end after the decree, it might have proceeded to enforce it; for it was ſaid, that if the monition againſt theſe parties had been to compel them to give bail, the proceedings might have been legal; this ſhews that the court of admiralty is not *functus officio* on taking bail. The ſtatute does not warrant the argument, that when bail is given, that court cannot give freight. I conſider that act as an addition to the juriſdiction of the admiralty court. Bail is neceſſary, becauſe the goods may be ſent abroad, and out of the power of that court; but as long as they remain within the reach of that court, unleſs the property be legally changed, they are ſubject to the control and juriſdiction of the admiralty. The ſecond queſtion is, *Whether, as the court of admiralty has taken a ſtipulation, it is confined to proceed on that alone, or may alſo proceed in* rem *according to its ancient courſe?* I conceive that the two clauſes in the ſtatute, which apply to that part of the caſe, are calculated to *advance* and not to *reſtrain* the power of that court. They give an *additional* remedy for the benefit of the perſon who may eventually appear to be right; but do not ſtrip him of any remedy which he had before. If the thing itſelf can be found, the admiralty has a juriſdiction over it, and may compel the production of it, to anſwer the ends and purpoſes of the decree of that court. The 8th allegation in the ſuggeſtion is, that the admiralty has no power to iſſue a monition, without an atteſtation or affidavit that the defendant has in his poſſeſſion or power money or effects. Now this admits the power of that court to take the effects which are in the hands of third perſons: and if there be any foundation for inſiſting that there muſt be an atteſtation or affidavit, yet it is quite immaterial in this caſe; for at the moſt that would only prove an *irregularity* in the proceedings; whereas in prohibition the queſtion is, *Whether the court has a juriſdiction? and not whether the juriſdiction is*

exerciſed in a formal and regular way? But even admitting that this might be a ground for a prohibition, yet the fact fails. For by the proceedings it appears that there was an atteſtation that *Pearſon* and Co. were in poſſeſſion of the proceeds of the cargo, and the allegation is, that *Brymer* is one of the company. The monition iſſued againſt him as one of the company, agreeably to the atteſtation; and the allegation is merely to obtain in form that to which the party by his atteſtation had entitled himſelf in ſubſtance. And it is not denied in any part of the proceedings that *Brymer* was a partner with *Pearſon*. Theſe are the grounds laid for a prohibition, and are the legal reaſons on which the plaintiffs pray it. The ſuggeſtion then ſtates the whole proceedings in the cauſe, which it is not neceſſary to obſerve more upon than I have already done: but had there been any ground for a prohibition in this caſe, it would have been better to have brought it more to a point than to follow the prolixity of all the proceedings in the admiralty court. The ſuggeſtion then ſuppoſes that the monition iſſued againſt *Pearſon* and *Brymer* as owners of the ſhip, or as agents of *Smart*, and therefore prays a prohibition to ſtay proceedings againſt them, or any other perſons, *as agents of Smart*. But this is not warranted by the proceedings, which are founded on the plaintiffs *having the poſſeſſion of the proceeds*; and in that character they are amenable to the court of admiralty. THERE IS ONLY ONE PART OF THE OPINION GIVEN BY MY LORD, ON WHICH I ENTERTAIN ANY DOUBT; which is, that ſuppoſing the preſent plaintiffs had obtained theſe goods under a legal title, under which they might have retained the poſſeſſion, that circumſtance would be a ground for a prohibition. If they never had the poſſeſſion of the goods, they ſhould have pleaded it below: but the affidavit charging them with the poſſeſſion not being denied, it muſt be taken that they have the cuſtody of the goods. But ſuppoſing that they had obtained the poſſeſſion of them in *market overt*, or under any legal title, ſtill I think that a prohibition ought not to be granted on any account. There is a difference between prohibitions *pro defectu juriſdictionis* and *pro defectu triationis*. Where a deed is pleaded, a prohibition may be granted on account of a defect of trial; becauſe we all know that the admiralty court inſiſts on having two witneſſes to prove it, whereas the common law courts only require one. But we cannot interpoſe unleſs that defect be ſhewn: for there, as well in the eccleſiaſtical courts, if a deed or releaſe be *admitted*, that court may proceed; and if the party ſubmit to trial, he cannot afterwards apply for a prohibition. Therefore, if the plaintiffs had acquired the legal property in theſe goods, I do not ſee why they could not defend themſelves in the admiralty as well as in this court. With reſpect to what is ſaid rela-

tive to the admiralty juriſdiction in 4 *Inſt.* 135, I think that that part of Lord *Coke*'s work has been always received with great caution, and frequently contradicted. He ſeems to have entertained not only a jealouſy of, but an enmity againſt, that juriſdiction. The paſſage in 4 *Inſt.* 135, diſallowing the right of the admiralty to take ſtipulations, is expreſsly denied in 2 Lord *Raym.* 1286. And I may conclude with the words of Lord *Holt* in that caſe, that in this caſe "the admiralty had originally juriſdiction, and there is neither ſtatute nor common law to reſtrain them." *Groſe*, J. concurred. Rule refuſed.

Home v. Earl Camden and others, Tr. 30 Geo. 3 C. B. 1 *Hen. Black.* 476.

And notwithſtanding any of the prize acts, the prize courts, and courts of lords commiſſioners of appeals, have the ſole and excluſive juriſdiction over the queſtion of prize or no prize, and who are the captors; and if they pronounce a ſentence of condemnation, adjudging alſo who are the captors, the courts of common law cannot examine the juſtice or propriety of it, even though, perhaps, they would have put a different conſtruction on the prize acts; and the ſame courts have power to enforce their decrees.—IN PROHIBITION to the court of lords of the privy council, commiſſioners of appeals from the admiralty, in prize cauſes: THE DECLARATION (after reciting that all pleas of, and concerning the conſtruction of the laws and ſtatutes of this realm, and the cognizance of ſuch pleas ought to be tried and diſcuſſed in the courts of common law, and not in any court proceeding by any law differing from the common law of this realm; and that the court of the commiſſioners of appeals, proceeds by ſome law differing from the common law, and therefore has no power or authority to try or diſcuſs the validity, conſtruction, or expoſition of any ſtatute, or to expound it otherwiſe than is allowed by the common law) recited the Dutch prize act, 21 *Geo.* 3, c. 15, by which it is enacted, for the encouragement of the officers and ſeamen of his majeſty's ſhips of war, and the officers and ſeamen of all other Britiſh ſhips, having commiſſions and letters of marque, &c. that the flag-officers, ſeamen, and ſoldiers, on board the king's ſhips, ſhould have the ſole intereſt and property in all prizes which they ſhould take during the hoſtilities, after the ſame ſhould have been finally adjudged lawful prizes to his majeſty, in any of the courts of admiralty, to be divided in ſuch proportions, as the king by his proclamation of the 27th December, 1780, directed; and alſo recited that proclamation which aſcertained theſe proportions: it then ſtated, that in January, 1781, *G. Johnſtone* was appointed commander-in-chief of a ſquadron (of which the ſhip of the plaintiff was one) to be employed in an expedition againſt the Cape of Good Hope, and Major-General *William Meadows*, was appointed commander-in-chief

chief of the land forces, on the ſame expedition; that ſecret inſtructions were at the ſame time given by the king to thoſe commanders, to prevent any conteſt concerning the diſtribution of any prizes to be taken at the attack of the Cape, by the joint operation of the army and navy, that ſuch prizes ſhould be divided between the land and ſea forces, into two ſhares, to be afterwards ſubdivided in certain proportions. That the fleet, having on board the land forces under General *Meadows*, deſtined to land and attack the Cape of Good Hope, under the command of General *Meadows*, ſailed from England in March, 1781, and in the July following, arrived within a certain diſtance of the Cape, but made no attack whatever on the Cape; that on the 21ſt of July, the fleet, having the land forces on board, in an open and unfortified bay, called the Saldahna Bay, on the coaſt of Africa, at a great diſtance from the Cape, attacked and ſeized as prize, a certain ſhip, called *The Hoogskarpell*, with divers goods on board, belonging to the ſubjects of the States-General of the United Provinces. That in June, 1782, a ſuit was inſtituted in the admiralty court, praying that the ſhip and cargo might be condemned as lawful prize to the king, as being taken by *G. Johnſtone*, the commander-in-chief of the ſquadron. That in September, 1782, they were condemned as lawful prize generally, reſerving the queſtion who were the captors; and that in May, 1785, that court *pronounced for the intereſt of the army, agreeably to the ſpirit of his majeſty's inſtructions*, and decreed the prize in queſtion, to be diſtributed according to the directions of thoſe inſtructions. That *G. Johnſtone*, and the officers and ſeamen of the ſquadron, conceiving themſelves to be thereby aggrieved, appealed from that decree to the commiſſioners for hearing and dermining appeals in matters of prize, who in June, 1786, reverſed the degree, *and pronounced the ſhip and cargo to have been taken by the conjoint operation of his majeſty's ſhips, employed on an expedition againſt the Cape of Good Hope, under the command of* G. Johnſtone, *and of the army under the command of* W. Meadows, *on the ſame expedition, and condemned the ſhip and cargo as lawful prize* to the king. That *E. Taylor* (ſince deceaſed) and *J. Paſley*, were *duly appointed* agents, by the officers and crews of the ſeveral ſhips of the ſquadron, who ſoon after the decree in September, 1782, ſold the ſhip and cargo, and diſtributed part of the produce among the officers and crews of the ſquadron; and that the reſidue is now in *Paſley*'s hands, and ought to be diſtributed by him to the captors, in payment of their ſeveral ſhares, in purſuance of the ſaid ſtatute and proclamation. That the plaintiff ſued *Paſley* for the reſidue of his ſhare, in the court of king's bench, in E. 28 *Geo.* 3. and that that plea is ſtill depending. The declaration then ſtated,

ed, that the commiſſioners of appeals in matters of prize, have not by the law of this realm any power or authority to take out of the hands and poſſeſſion of any agent, ſo conſtituted, the money ariſing from the ſale of any veſſel or goods, taken from the ſubjects of the States-General of the United Provinces, which have been finally adjudged lawful prize to the king, in any of his courts of admiralty, or to compel him to bring in the ſame; yet that the commiſſioners of appeals in May, 1788, admoniſhed *Paſley* perſonally to bring in an account of the ſales of the ſhip and cargo, together with the proceeds of ſuch part thereof as might be in his hands, power, or poſſeſſion; and iſſued proceſs againſt him for that purpoſe. The defendants pleaded in the uſual form, that they did not iſſue proceſs againſt the agent, &c. but, for having a writ of conſultation, they demurred generally to the declaration. THE COURT OF COMMON PLEAS, after hearing ſeveral arguments, gave judgment for the plaintiff. Lord *Loughborough*, CH. J. The general demurer admits all ſuch facts ſtated in the declaration, as are well pleaded. Upon the laſt argument *three objections* were taken to the ſtatement of the declaration, to ſhew that upon the face of the declaration, the plaintiff has not made out a caſe which entitles him to a prohibition. The *firſt objection* was, That by the plaintiffs own ſhewing, he and all the ſquadron have forfeited their ſhare in the diſtribution of the prize, becauſe part of it was diſtributed before final ſentence of condemnation. It is of no moment to diſcuſs, whether there was any ſuch cauſe of forfeiture, becauſe the objection miſtakes the ſtate of the declaration; which, indeed ſtates, that part had been diſtributed, but alſo expreſsly ſtates, that it was after the ſentence upon the 4th day of September, againſt which ſentence there is no appeal, and which was an adjudication, condemning the ſhip and cargo as lawful prize. *The ſecond objection* is, that the appointment of *Taylor* and *Paſley*, as agents for the officers and crews of the ſquadron, is not well ſet forth, from an expreſſion in the ſtatute which ſays, that the officers and crews, and others, having intereſt in the prize, ſhall appoint agents, and then marks out the manner in which they are to be appointed; the ſubſequent part of that clauſe of the act, ſufficiently ſhews that no other perſons but the officers and crews of the ſquadron, can have any concurrence in the appointment of agents. There may be four agents, one appointed by the flag-officer, another by the captains, another by the lieutenants and other officers of that rank, and another by the private men, and thoſe who are in the fifth claſs, according to the proclamation, to ſhare the amount of the prize. There is no other deſcription of perſons, who can, under the act, concur in the appointment of agents.

But

But that is rather going further than is neceſſary for an anſwer to the objection; for this is not a caſe where the agents are parties appearing as plaintiffs, ſetting out a title; but the plaintiff *Home*, who is to make out his own title diſtinctly, ſtates as a fact, that agents were duly appointed: this is undoubtedly ſufficient upon a general demurrer. If there is any objection to the appointment of agents, and if that objection would be ſufficient to turn round the plaintiff in this caſe, it ought to have been ſet forth more particularly. Upon a general demurrer, the allegation that the agents were duly appointed, is certainly ſufficient. *The third objection* was, that the authority of the agents was determined by the death of *Taylor*; now though this too is of no moment upon a general demurrer, it is alſo not true; becauſe this is not a mere authority given to *Taylor* and *Paſley*, they have an intereſt in the proceeds of the prize, and it is certain, that where perſons are appointed with an intereſt veſted in them, the intereſt ſurvives; the ſurviving agent, *Paſley*, being poſſeſſed as agent, he muſt continue to be accountable to thoſe who have appointed him, in the character of agent. It was totally immaterial whether *Taylor* had remained; all the intereſt that was in *Taylor*, is now in *Paſley*; all that *Paſley* poſſeſſes, and all that *Taylor* together with him poſſeſſed, *Paſley* is chargeable with. He received it in character of agent, and is anſwerable for it in that character. All theſe objections were overlooked in the former argument, and for the reaſons I have given, the court are of opinion, that they are of no weight.—UPON the three firſt, and the latter part of the laſt argument, the caſe has been very fairly debated on its real merits, and WE ARE ALL UNANIMOUSLY OF THE OPINION, which I ſhall cloſe with delivering.—The prohibition was prayed upon a ground which has never been diſputed, that it belongs to the courts of common law, to controul the proceedings of all other courts, if they tranſgreſs the limits aſſigned to them; and the argument for the demurrer has fully admitted the propoſition upon which the declaration is built, to be good in law; namely, that the expoſition of the ſtatute law of the land, appertains to the king's courts of record, and ought to be diſcuſſed and determined in thoſe courts. The general grounds upon which the courts of Weſtminſter Hall proceed in matters of prohibition, were ſo fully diſcuſſed in a late caſe (1), and when the court in that caſe diſpoſed of the motion, that I avoid entering into them, and aſſume it to be a clear ground for overruling the demurrer in this caſe; if it ſhall appear on the face of the declaration, that the plaintiff has a legal right,

(1) *Brymer* v. *Atkins*.

founded

founded on an act of parliament, and that the commiſſioners of prize are proceeding to deprive him of that right, or to obſtruct him in the proſecution of it. On the other hand, if the plaintiff has either no ſuch right, or the commiſſioners of appeals are not proceeding to act in oppoſition to it, the demurrer muſt be allowed. It was admitted on both ſides, and is certainly true, that *the general queſtion of prize does not belong to the courts of common law.* By general queſtion of prize, I mean a queſtion, whether a ſhip or goods taken at ſea be lawful prize or not? It was alſo admitted, that when there is an adjudication of prize by the court of admiralty, the rights which an act of parliament gives reſpecting that prize, are the ſubject of actions at law, and are cognizable in the courts of common law. The argument in ſupport of the demurrer maintains theſe propoſitions, FIRST, that this appears to be a caſe in which the king's ſhips were not the ſole captors: SECONDLY, that the act of parliament veſts a right to the prize in the king's ſhips, only in the caſe where they are the ſole captors: THIRDLY, that the court of prize has a general authority in all caſes to diſtribute the ſhares of the prize; and, therefore, that the propoſition with which the declaration concludes, namely, that the commiſſioners of prize have not by law authority to take out of the hands of the agent, the money ariſing from the ſale of the prizes, is not a true propoſition; but that, on the contrary, the commiſſioners have a right to order thoſe poſſeſſed of the produce, to bring it into that court. The firſt propoſition then to be maintained on the part of thoſe who ſupport the demurrer, is a propoſition of fact, namely, that this appears to be a caſe in which the king's ſhips are not the ſole captors. This is founded upon the terms of the two ſentences, which are ſet forth in the declaration, together with the facts ſtated, that the fleet and army were deſtined upon a joint ſervice, and were both concurring in the capture: from reading the declaration attentively, it certainly does not appear, that *the army as ſuch* gave any aid to the capture. When I ſay *the army as ſuch* gave no aid to the capture, I mean to exclude the caſe of the army *being ſtationed on board the fleet* at the time of the capture; for though they are diſtributed amongſt the ſhips, yet they are not acting there *as an army*, but are only part of the force that is on board each reſpective ſhip. In that ſituation the ſoldiers and officers are concurring in the capture, but no otherwiſe concurring than as any paſſengers on board might be. When I ſpeak of *the army as ſuch* concurring in the capture, I am to be underſtood to mean a concurrence, in which the land forces, acting under the command of their proper officers, are carrying on ſome operation or other that may be conducive to the object, in what

the

the fleet acting as a fleet is concerned. It cannot be therefore taken from the facts ſtated in the declaration, that *the army as ſuch*, was in any reſpect operating towards the capture of the ſhip in queſtion. The ſtatement of the declaration is, that the ſquadron, of which the plaintiff's ſhip was one, with the army *on board*, took the prize. If therefore it was neceſſary for the defendant to avail himſelf of this fact, it would have been proper for him to have ſtated, by a plea, the manner in which the army acted, and what was the co-operation of the army towards the reduction of this ſhip, ſtated to be taken upon the high ſeas: but upon a demurrer, we muſt take the fact as it ſtands upon the face of the declaration. I will now proceed to ſee whether the ſentences will aid the demurrer in the aſſumption of the fact, that the king's ſhips were not the ſole captors. The firſt ſentence of the high court of admiralty holds the army, according to the ſpirit of the inſtructions, to be entitled to a ſhare in the capture. But certainly in that ſentence there is no concluſion whatever to be drawn, that the army was in fact, *as an army*, active in the capture, or in any reſpect operating towards it. According to the ſpirit of the inſtructions, giving the utmoſt latitude to that expreſſion, the judge might ſuppoſe the ſtrength of the fleet increaſed by the acceſſion of the army, and therefore taking the caſe itſelf to be within the inſtructions, that the army was entitled to a ſhare. The other ſentence ſtates, that the capture was made by the conjoint operation of the ſhips and troops. Now both theſe ſentences are perfectly conſiſtent with the allegation of facts ſtated in the declaration, that the troops were on board the fleet. Being on board the fleet, it cannot be ſaid that they had no ſhare at all, were of no weight, or of no moment in the reduction of this particular ſhip. Therefore literally taken it might be true, that the capture was the effect of the general efforts of all that were on board, whether in the character of ſeamen or ſoldiers: but this by no means furniſhes a ſtate of facts, to ſhew any acceſſion of the army, *as an army*, to the reduction of the ſhip in queſtion. Upon theſe grounds, therefore, I ſhall feel myſelf bound upon the demurrer to hold that the plaintiff has ſhewn a title of ſole captor in the ſquadron of which his ſhip was part, and that he will of conſequence be entitled to a prohibition, if in the ſequel of the declaration, he has ſhewn any act done by the court of prize, contrary to his right. In conſidering *the ſecond propoſition*, which is, that the act of parliament veſts a right to the prize only in the caſe where the king's ſhips are the ſole captors, I will go a little out of the record, and take for granted as a matter of ſuppoſition what I think ought to have been introduced in a plea upon the record, if the defendant wiſhed to avail himſelf

ſelf of it: I will take the ſuppoſition that the army had landed, and given aſſiſtance from the ſhore, in any mode in which ſuch aſſiſtance to a capture afloat could be given; upon that ſuppoſition, the queſtion will be, Whether the conſequence drawn from it is true, and can be maintained? The firſt ſentence holds the army as ſuch to be entitled to a ſhare, which may be, though the right was veſted in the king's ſhips; for there might be others concurring in the capture, who would be entitled either upon the ground of aſſiſtance, or upon ſome grounds which it is not neceſſary for me to ſtate, to have a concurrent intereſt with them in the produce of their ſhare; but it by no means follows, that the fleet, becauſe of another body concurring in aſſiſtance, ſhall have no veſted right: the ſecond ſentence has been argued, and I believe it has been argued very juſtly and fairly, according to the intent of it, to proceed upon this ſuppoſition; namely, that the caſe of a co-operation of another force, beſides that of the king's ſhips, takes the caſe entirely out of the prize-act; that propoſition undoubtedly, is not ſtated in terms upon the face of the ſentence; but it has been argued to be the ground of the ſentence, and I take it that it was the ground. I take it according to the argument which was inſiſted upon in ſupport of that ſentence, that when the ſentence proceeds to ſay, that it ſhall be condemned as lawful prize to the king, it does not mean merely to pronounce that it is lawful prize (for that is the form of the adjudication, where the right is unqueſtionably in the captors, where there is no controverſy nor any diſpute made upon it), but, that it means that the right is veſted in the king by his prerogative, and that it is at his majeſty's diſpoſal; now the prize act ſays, in diſtinct terms, that the officers, &c. of the king's ſhips, ſhall have *the ſole intereſt and property* in all ſhips and cargoes, &c. which they ſhall take, being firſt adjudged lawful prize; theſe are the terms of the ſtatute: antecedent to any ſtatute upon the ſubject, there is no doubt, but that by the law of the realm, the property of prizes taken by the king's ſhips was in the king. The effect of the prize act is, a parliamentary gift by the king of that intereſt which his majeſty would have had in the prizes, to the officers and crews of the ſeveral ſhips of the fleet, and to the owners of the privateers, which ſhall have been fitted out under the directions of the act; the expreſſions of the act are diſtinct and plain, and the operation of it is to tranſfer to thoſe who are to take, all the intereſt, which, antecedent to the act, was in the king. It reſpects only prizes taken at ſea; the expreſſion is, that they ſhall have *the ſole intereſt and property*; but certainly that mode of expreſſion does not exclude the caſe of a joint capture; which joint capture may either be by a king's ſhip and foreign allied force

(in

(in a caſe where this country is carrying on a war in conjunction with ſome other ſtate of Europe), by a king's ſhip and a private ſhip of war, or by a king's ſhip and a non-commiſſioned ſhip. In every one of which caſes, the property of what the king's ſhips take, has uniformly and repeatedly been adjudged to the officers and crews of his majeſty's ſhips. They are *ſolely entitled* to what they take, not *to what they ſolely take*, that is not the expreſſion of the act; ſo far as they are the captors, no other power has any right to interfere with them: where there are others (whether as allied force, a private ſhip of war, or a non-commiſſioned ſhip) alſo captors, they have a right in ſome caſes, as for a *quantum meruit* for aſſiſtance given; in others they have been holden to have a diſtinct and ſpecific ſhare in the capture; but that in no caſe deſtroys the right which the king's ſhips *ſolely have*, quoad *that capture which they have made:* they have *a veſted property* in what they take. The ſecond ſection of the act goes on and ſays, in like manner, ſhips taken by privateers ſhall wholly and entirely belong to the owners, to be diſtributed according to the contract they have entered into. That cannot be holden to exclude the privateer, by any fair conſtruction of the words, in caſes of joint capture. Suppoſe this caſe to happen: a king's ſhip and a privateer are jointly and equally concerned, and equal in point of force, in the reduction and capture of an enemy's ſhip; would it be a reaſonable conſtruction of the act, to ſay, to the king's ſhip, "the prize is not your ſole property?" to the privateer, "it cannot wholly and entirely belong to you, it was taken by you both conjointly, therefore, it ſhall belong to neither of you?" The propoſition ſeems to me to be morally impoſſible; the intereſt of the king's ſhip, which would in that caſe be in a moiety of the prize, would be an intereſt to them *ſolely*: the intereſt of the privateer in the other moiety, of which they would be captors, would wholly belong to them, to be diſtributed according to the contract they might have entered into with their owners. Theſe caſes are perfectly clear, and have been determined in inſtances ſo numerous, that it is quite unneceſſary to enter into a detail of them; they have been referred to in the courſe of the argument. This is the caſe of a joint expedition by ſea and land forces, and of an operation whereby the enemies' ſhips are reduced; the ſhips being always ſuppoſed to be taken on the high ſeas. It varies the caſe, where the object has been the reduction of a part of the enemy's territory; the conſequence of that reduction may be the acquiſition of property afloat, of ſhips of war taken in a harbour, of ſhips coming into a harbour after a place has been reduced. In all theſe caſes, perhaps, it would be difficult to ſay, that the capture was made by the

the king's ſhips. If a garriſon-town, with an encloſed harbour, had been reduced, and the ſhips had fallen with the place, and as a conſequence of the taking of the place, or of the reduction of the country, theſe could not be deemed to be captures made by the king's ſhips. As ſuch caſes might poſſibly happen, where expeditions have been undertaken at ſea in foreign parts, by the naval and military forces of this country, acting conjointly, inſtructions have been given for the diſtribution of ſuch booty as might be taken, which is the phraſe commonly uſed. But I do not apprehend that ever the inſtructions have been directly pointed, that the inſtructions referred to in this declaration are ſo pointed, or that they could by poſſibility be pointed to give to any part of his majeſty's ſubjects, acting under his majeſty's directions, prizes taken upon the high ſeas by the king's ſhips. A parliamentary grant cannot be controuled by the effect of any grant under the king's ſign manual. The king has not the property to part, he has parted with it all. Whatever is the proper matter of marine prize, whatever ſhips are taken afloat, and not as booty, in conſequence of the reduction of the country, are the ſubject of the act of parliament. The act of parliament attaching upon it, the right of the king's ſhips is to the entierty. In point of fact, we very well know, that when ſuch expeditions have been undertaken, agreements have been entered into by the different perſons entitled under the king's proclamation, and the different diviſions of the army, and they have put the whole together, in order to avoid diſputes. In the caſe of the *Pondicherry* prizes, ſeveral actions were tried upon them before me. Thoſe agreements had been made between the ſuperior officers, between the captains of the navy and the officers of the ſame rank in the army, but had been refuſed to be made between the third claſs in the diſtribution, the lieutenants of the navy and the captains of the army; the lieutenants of the navy had refuſed to concur in it. Though in the other caſes, the land forces were admitted to ſhare, they were not admitted to ſhare in *that claſs*, with reſpect to the prizes taken at ſea; and a recovery was had againſt the agent on that ground. But I am arguing this caſe much farther than there is occaſion to go; for admit, for the purpoſe of the argument, that a co-operation might take effect, ſo far as to give a right to the army to ſhare, does it follow, from the army being entitled to ſhare, that the co-operation of the army ſhould deſtroy and annul totally the right of the navy? that concluſion is a great deal beyond the premiſes. The intereſt in a prize taken at ſea, of which I am always ſpeaking, may, by poſſibility (I do not ſay that it cannot), be ſhared or diſtributed, but it cannot be taken away. The intereſt which is veſted, after the adjudication of

of lawful prize, in conſequence of a parliamentary grant, cannot be annulled or deſtroyed. If upon any merits, or upon any ground upon which aſſiſtance may give a right to ſhare it, a ſhare may be imparted to others; that ſhare can be aſcertained and ſupported. Yet the very ſuppoſition that it is a ſhare, admits that it muſt be a ſhare of ſomething which is veſted in ſomebody. The propoſition contained in the ſentence, ſuppoſes that the right which the navy would have had by law to every thing that is taken afloat, is by the intervention of another power co-operating with the navy, taken away and deſtroyed: which appears to me to be a propoſition directly contradictory to the act, and not founded at all in conſequence of the parliamentary gift in favour of the officers and crews of his majeſty's ſhips. If it could be ſupported, it would undoubtedly reverſe all the caſes where a co-operation by a non-commiſſioned ſhip, or a privateer, or a foreign allied force, intervenes. But in none of theſe caſes could it be ſaid, the king's ſhip was not ſolely entitled. The propoſition muſt be either general, that the king's ſhips can take a veſted right in no caſe where aſſiſtance is given them, or that they muſt in all caſes, where they are captors, have a veſted right, ſubject to ſuch claims for aſſiſtance as any other party can make againſt them. To return to the record. When I ſay, that upon the facts ſtated in this declaration, and admitted by the demurrer, it does not appear that there was ſuch aſſiſtance given by any other force, as to make it a joint operation, but that the king's ſhips had reduced this prize, and taken it, it muſt be remembered that the ſubject of the capture has been adjudged to be lawful prize, taken by the ſhips having the king's forces on board, in which reſpect the king's forces are entitled to come in for a participation under the act and proclamation; but that does not prevent a right from veſting; but, on the contrary, eſtabliſhes that the right is veſted: for it is under the proclamation founded upon the act of parliament that the troops are entitled to ſuch ſhare as upon the face of this declaration belongs to them. I now come to the terms of the ſentence; and I own, that for ſome length of time, they raiſed conſiderable doubt in my mind, what would be the reſult of this queſtion, and what would be proper for the court to do in diſpoſing of this demurrer. It is poſſible to underſtand the ſentence conſiſtently with the right of the navy; for the premiſes aſſumed by the ſentence, do not appear to form a concluſion, that the navy are not entitled. It is not inconſiſtent with the ſuppoſition that the navy is entitled; and I might underſtand the ſentence, when they adjudge it prize to his majeſty (in the common way in which ſentences are pronounced), not to be inconſiſtent with that right, if the court had gone on to pronounce afterwards, that it ſhould be diſtributed according to the terms of the proclamation,

mation, though it had contained this recital, that the prize was effected by the conjoint operation of the land forces, as well as by the officers and crews of his majeſty's ſhips. But then, after the ſentence paſſed, the declaration ſtates, that a monition iſſued upon it: conſidering the terms of that monition, I am perfectly clear in opinion, that it gives a different conſtruction, and a different effect to the ſentence. The monition is not againſt the agent merely to account for what he has received, and to bring in the account of ſales and diſburſements, but it goes on and directs the agent to bring into the court of appeals, the proceeds of the cargo remaining in his hands. It was argued for the plaintiff, that the terms of the monition were large enough to extend to the effect of overhauling the partial diſtribution already made, and to oblige the agent to bring in all that had been in his hands. I do not think it could have that conſtruction. I take it to be directed ſimply to bring in the reſidue of what is in his hands; but alſo that it directs the agent to bring into the court of prize the proceeds of the prize in his hands. Now ſuch a monition is a very uſual ſtep taken either by the court of admiralty, or by the court of appeal in prize cauſes, where the ſubject of the ſuit, the ſhip or goods, are not deemed legal prize, and where of courſe they are not veſted in the captors, in order to make reſtitution. The agent who has got the proceeds in his hands, may be directed to bring in thoſe proceeds, that they may be reſtored to thoſe to whom they belong. But I do not find that any inſtance could be quoted where a monition had iſſued againſt the agents to bring in the proceeds of the prize, in a caſe where it had been *adjudged lawful prize*; and of courſe, where upon that adjudication, it was to be diſtributed either to a privateer, or, according to the terms of his majeſty's proclamation, to the officers and crews of the different ſhips entitled. And I think it cannot be; for the act has made very ſpecial proviſions with reſpect to the payment of ſhares after adjudication; upon which adjudication a legal right is veſted. The agents are to be nominated by different claſſes of people entitled, as I have ſtated. Every ſtep of the duty of the agents is under the directions of the act. They alone are to make the ſales and appraiſements. All the produce of the prize is to be put into their hands. They are then to give public notification of the times of payment, ſo many days before actual payment is made. They are directed after ſuch notification, to make payment according to the prize liſts, and in the proportion in which the parties are entitled. They are directed to give an account, from time to time, of all their proceedings. They are directed to furniſh *Greenwich hoſpital*, in which, by law in certain caſes, an intereſt in every prize veſted in captors, is alſo veſted, with accounts, in order

der to aſcertain that intereſt. They are, throughout the whole courſe of the act, ſuppoſed to be ſubject to actions, at the inſtance of thoſe who are entitled to ſhare in the prize. It is a legal veſted right, and the method of obtaining the effect of that right, is by action againſt the agents. In particular caſes, they are furniſhed by the ſtatute with a defence to the action. As in the caſe where men bring an action againſt the agent for a ſhare having been marked *run*, it is by the ſtatute a ſufficient defence to the agent; and he is entitled to a verdict in his favour, if the planitiff does not ground himſelf upon a certificate that the *R* has been taken off. If he fails in any part of the duty impoſed upon him by the act, a penalty to be recovered in the courts of Weſtminſter Hall meets him at every ſtep. The intention of the act is obvious, and perfectly ſquares with the rules of law, that the prize being adjudged by the court of admiralty, diſtribution of the intereſt in that prize is to be managed as the diſtribution of any other legal veſted right is, according to the laws of the land, namely, by action in the courts of law. I do not care to lay it down, for I am not able to ſay that I am perfectly ſure that I ſee the whole extent of all poſſible caſes that may occur. I do not care to lay it down, that there is no poſſible caſe in which the agent of a prize may not be ordered by the court of admiralty, or court of prize, to bring in the actual proceeds of the prize; yet I profeſs I have not been able to figure to myſelf what that caſe can be. Suppoſe a caſe in which it is ſuſpected that the agents are inſolvent, or likely to become inſolvent, and that for the ſafety of thoſe intereſted, it was deſirable to take the money out of the agent's hands, and lodge it in ſome ſafe cuſtody: that appears to me, ſpeaking conjecturally, to be a poſſible matter to be done by the court of prize; for I ſhould doubt, whether in ſuch a caſe, an application could be made to the court of chancery to ſecure the money. The court of prize could not indeed make the diſtribution themſelves, nor do I find that any ſuch application has been made to them. Could there then be a ſuit againſt the agents for diſtribution? a ſuit for diſtribution might be well maintained in the court of admiralty, or if the caſe were got into the court of appeals, in that court; but what would be the decree to be made upon that? it would be a perſonal decree upon the agent; the diſtribution would be directed, the ſhares allotted, and then upon that decree the agents might be proceeded againſt perſonally. It would be a contempt of court if they did not make payment according to the order. Yet there would be a much better way, a more effectual one, by an action immediately grounded upon the right veſted, and the quantum of that right aſcertained by the order of diſtribution. But the court itſelf cannot, as I conceive, take

into their own hands to direct the proceeds of the prize to be paid over to their regiſtrar for the purpoſe of diſtributing it. The regiſtrar is liable to none of the proviſions of the act to which the agent is liable. The agent is liable to an action. But I am at a loſs to conceive, if the agent is directed to pay over all the money, how the action for money had and received could be maintained in effect againſt him, that money having been taken out of his hands. I am ſtill more at a loſs to conceive how it could be maintained againſt the regiſtrar. What ſort of an officer is the regiſtrar? is he to make diſtribution? no: is he to make notification? no. The act directs that to be made by the agent. Is he ſubject to any penalty? no; he is not the perſon to whom the act is directed, to whom the duty is enjoined, and who is anſwerable for the breach of that duty, in an action to be brought. Would the agent be protected in an action for the penalty? It would be hard that the agent ſhould be liable to it, but I do not ſee upon the face of the law, how he could be furniſhed with a defence for the non-performance of the duty enjoined by the act. But none of theſe remedies can take place againſt the regiſtrar; therefore, it ſeems the clear direction of the act, that the money is to remain in the hands of the agent, liable to the actions of thoſe who have a legal veſted right in it: that to thoſe perſons the agent is accountable; that againſt the primary intereſt of thoſe perſons, the money is not to be taken out of the hands of the agent, by order of the court of prize. The conſtruction which has been put upon the ſecond ſentence is, that there was no veſted right in this prize in the officers and crews of his majeſty's ſhips, nor in the army; but that upon the ground ſtated in the ſentence, the whole was veſted in his majeſty by his prerogative; and was to be diſpoſed of to ſuch uſes as his majeſty ſhould think fit: with that conſtruction of the ſentence, the monition, which has iſſued, is perfectly conſiſtent, but not with the idea which we take to be a well-founded idea, that by force of the act, after the adjudication of lawful prize, the plaintiff, and all other officers, and the crews of his majeſty's ſquadron, have a veſted legal right. The effect of the monition is directly in prejudice of the right of action of all other perſons concerned; it interferes with the legal duty impoſed upon the agent; and ſubverts and overturns the law with reſpect to the duty and ſituation of agents, where they are acting for perſons having a veſted right in prizes. The proceedings in this caſe prevents the plaintiff from recovering his legal veſted right; at leaſt it diſturbs him in the recovery of that right, if not totally prevents him, and ſubjects the agent and all others who are intereſted in the acts of the agent (Greenwich hoſpital included) to the courts of prize. Whereas, according to the conſtruction, which, we are of opinion, ought to be given to the prize act, all thoſe rights are to be enforced

in

in Weſtminſter Hall; they belong to the courts of Weſtminſter Hall, and do not belong to the court of prize Theſe are the grounds which I have gone through, without referring to the caſes that have been cited by name. Thoſe caſes are very well known, are in the memory of every one. The ground upon which we proceed is, that upon the face of this declaration, *the plaintiff has a legal veſted right in the ſubject of the monition*; that the court of prize cannot deprive him of that right; cannot do an act prejudicial to that right; and cannot prevent or obſtruct him in the recovery of that right.—The demurrer therefore muſt be over-ruled, and judgment given for the plaintiff in prohibition.

Lord Camden and others *v.* Home, *in error* B.R. M. 32 Geo. 3. 4 *Ter. Rep.* 382.

To reverſe the above judgment of the court of common pleas, the defendants, in prohibition, ſued out a writ of error returnable in B.R. and the caſe was twice argued in that court. Lord *Kenyon*, Ch. J. With many of the topics diſcuſſed in the court of common pleas, and which were relied on in the judgment of that court, we fully concur; but we do not think that they lead to the concluſion which was drawn from them, namely, that a prohibition ought to go in this caſe. The determination of this caſe does not neceſſarily involve in it thoſe queſtions which were ſo much preſſed, in what caſes in general a prohibition ſhould be granted to inferior courts, when they are acting in oppoſition to an act of parliament, or when they proceed in a different manner from the temporal courts. For the queſtion here turns on the propriety of the court of appeals granting the monition, ſuppoſing that all the prior proceedings in the court below were right. And in conſidering that point we may take for granted, what indeed has been, and muſt be admitted in the argument, that the prize courts are the ſole judges of the queſtion of prize, as alſo of the queſtion, who are the captors. The latter queſtion has very frequently occurred in thoſe courts in caſes where it has been doubtful whether ſhips not actually in ſight, or even within the hearing of the guns, ſhould be conſidered as preſent at a capture, ſo as to entitle the commanders to ſhare in the prize; in determining which, thoſe courts have always been influenced by this conſideration, whether ſuch ſhips were rendering any aſſiſtance, or even ready to do ſo, to thoſe by which the capture was made. I merely mention this to ſhew that thoſe courts have the ſole and excluſive juriſdiction over the queſtion, who are the captors.—By the 21 *Geo.* 3, c. 15, which was paſſed on the breaking out of hoſtilities with Holland, it was enacted that the flag-officers, &c. ſhould have the ſole intereſt and property of and in all and every ſhip, veſſel, goods, and merchandizes, taken by them during the hoſtilities, after the ſame ſhould have been finally adjudged lawful prize to his majeſty, in any of his majeſty's courts of admiralty, to be divided in ſuch proportions as his majeſty

ſhould by proclamation direct. Then, in order to aſcertain whether the ſhip taken in Saldahna Bay were or were not lawful prize, and who were the captors, proceedings were inſtituted in the admiralty court, where a deciſion was made, which not being ſatisfactory to the parties, an appeal was lodged againſt it to the lords commiſſioners of appeals; and that court decreed that the ſhip "was taken by the conjoint operation of his majeſty's ſhips and veſſels, employed on an expedition againſt the Cape of Good Hope, under the command of *G. Johnſtone*, and of the army under the command of *W. Meadows*, on the ſame expedition; and they condemned the ſhip, together with the unclaimed part of the cargo, as lawful prize to the king." Now it is admitted that that ſentence can by no means be revoked; for the litigating parties have gone to the utmoſt extent of the law, and thoſe, who by the conſtitution of the country are to decide as the dernier reſort in caſes of this kind, have decided on the queſtion of prize, and alſo who were the captors of that prize. If that be ſo, the manner in which this prize is to be divided among thoſe who are thus declared to be the captors, muſt be determined by that court. The ſentence itſelf is not objected to; the prohibition does not impute to the court of appeals the having tranſgreſſed the limits of their duty in forming it. It ſtands therefore *ex conceſſis*, that that ſentence is that from which all the rights of the parties are to reſult; and *the ſingle objection is, that that court, having ſo decided, have granted a monition to the perſon in poſſeſſion of the proceeds of the prize to bring them into court to anſwer the ſeveral claims that may be made.* And the objection is, that this monition is wrong, becauſe the proceeds of the prize are in the hands of the agent appointed by the officers of the fleet: if thoſe officers were the only perſons entitled to the prize, the objection would have had conſiderable force. But it appears from the ſentence of the court of appeals that, in the opinion of thoſe who made that decree, other perſons were intereſted, beſides thoſe by whom the agent was appointed; and that there were ſome rights in the king not diſpoſed of by the act of parliament. If ſo, why ſhould not this property be taken out of the poſſeſſion of the agent, and put under the controul of thoſe who will take care of the intereſt of all the parties concerned? And I cannot bring myſelf to doubt but that the monition to bring the proceeds into court was properly iſſued. For theſe reaſons, I am of opinion, that *the judgment of the court of common pleas ought to be reverſed.* *Aſhhurſt*, J. It is admitted, that the courts of admiralty have excluſive juriſdiction over all queſtions of prize; and if ſo, they muſt have the ſame juriſdiction over all matters that ariſe incidentally either in conſtruing acts of parliament or proclamations, in order to form their opinion

on

on the principal queſtion. It has been objected in this caſe that they have tranſgreſſed the limits of their duty, in putting a wrong conſtruction on the prize-act: but they have not put any conſtruction on that act further than ſaying that this caſe, under all its circumſtances, does not come within it. And I concur with them in that opinion. The prize-act was only meant to attach on captures by ſhips; and the legiſlature accordingly adapted all the proviſions of it to captures of that deſcription, without extending them to a joint capture both by the army and navy. Therefore it ſeems to me that this is *caſus omiſſus*, and does not fall within the purview of the prize-act. Now, whether this were a capture by the navy only, or a joint capture by the army and navy, was a queſtion of fact, of which the courts below were the proper judges. And here the court of appeals pronounced this to be a joint capture by the navy and army, *quà* army. And indeed if it were otherwiſe, the general and other ſuperior officers of the army could only ſhare as common ſailors, which cannot be taken by implication to have been the intent of the legiſlature in ſuch a caſe as the preſent. Beſides, by the prize-act, the king has a right to diſtribute the prizes taken in ſuch proportions as he ſhall declare by his proclamation: and he declared in his ſecret inſtructions, which were iſſued when this expedition was planned, and which I think have the effect of a proclamation, that in the caſe of a joint capture by the army and navy, that the prizes taken by them ſhould be diſtributed in a different manner from that inſiſted on by the navy.—Then, admitting the ſentence of the court of appeals to be concluſive, the only remaining queſtion is, Whether they have erred in iſſuing the monition to compel the agent to bring the proceeds into court? Now, it ſeems to me that, ſo far from their having exceeded their juriſdiction in taking this ſtep, it was a neceſſary conſequence of their ſentence; for, if it were a joint capture, the army were equally entitled to appoint an agent. As the navy are not entitled to the whole, it cannot be contended that their agent ought to be entruſted with all the proceeds of the prize. But the prize court are truſtees both for the army and navy; and it is fit for the intereſt of all parties that the proceeds ſhould be brought into that court till the ſeveral claims are adjuſted. It has been argued, and very properly too, that the allegation in the declaration in prohibition, that this was a capture by the navy only, is not to be admitted, becauſe it is a direct negative of the ſentence, which I am of opinion is concluſive; and therefore the parties have done right in demurring to the declaration. *Buller*, J. If it were competent to us to decide on the ſecond queſtion, Whether or not the court of appeals had miſconſtrued the act of parliament? I ſhould deſire further time, in

order to look into the authorities, particularly thoſe of *Lindo* v. *Rodney*, and *Wemys* v. *Linzee*, before I delivered my opinion upon it, not being, as at preſent adviſed, inclined to differ from that given in the court of common pleas. But I think that it is not now competent to this court to examine that queſtion. It is to be remembered that the queſtion now before us is, Whether we ſhall prohibit the court of appeals from proceeding in a prize cauſe? And in ſuch queſtions, the only point for our conſideration is, Whether the court, to which the prohibition is prayed, has a juriſdiction over the ſubject? Whatever may have paſſed in the ſeveral caſes on this ſubject in the laſt century, the grounds for granting and refuſing prohibitions are now clearly and accurately defined. If the court below have juriſdiction over the ſubject, though they miſtake in their judgment, it is no ground for a prohibition, but is only matter of appeal. Another rule equally clear is, that after ſentence, the courts of common law never grant a prohibition to inferior courts, unleſs the want of their juriſdiction appear on the face of the libel. *Hutchins* v. *Full*, *Cowp.* 422. The caſes cited by the counſel for the defendants in error will not aſſiſt them at this time: indeed moſt of them were cited, not on account of what the courts decided, but for what they ſaid they would do in particular caſes; and in all of them, except one, the prohibition was refuſed. One of them was 2 *Ro. Abr.* 306, pl. 10, where it is ſaid, that "if a parſon leaſe to a pariſhoner the tithes of his eſtate, and then ſue him for the tithes in kind, no prohibition will be granted, although the parſon ſuppoſe that the condition, upon which he leaſed, was broken; for the court below ſhall try this queſtion, having cognizance of the principal: but if they adjudge otherwiſe than is warranted by the common law, then a prohibition will be granted." That *dictum* certainly cannot now be ſupported. Another paſſage, nearly to the ſame effect, cited from the next page (1), is equally objectionable. But it appears from ſome of the caſes cited, that the court, even at that time of day were guided by this conſideration, whether the court below had juriſdiction or not; and that ſeems to be the ſum of the caſe of *Harriſon* v. Dr. *Burwell* (2). And in *Hill* v. *Good* (3). Lord Ch. J. *Vaughan* ſtates that to be the land-mark in ſuch caſes. In that caſe a clauſe in the ſtat. 32 *Hen.* 8. c. 38. was relied on, that no perſon ſhould marry within the Levitical degrees: then in caſes without the Levitical degrees, the legiſlature expreſsly ouſted

(1) 2 *Ro. Abr.* 307. pl. 13. (2) *Vaugh.* 306. (3) *Vaugh.* 302.

the

the eccleſiaſtical court. In giving the judgment there, Lord Ch. J. *Vaughan* put a caſe (1) applicable to the preſent; "If by act of parliament anciently all marriages, not prohibited by God's law, or canons of the church, had been declared lawful, the temporal courts had thereby no power to prohibit the queſtioning of any marriage more than before, for it had ſaid no more than what the law was, and did ſay, before ſuch act. For though ſuch act of parliament had been, yet it had given no new juriſdiction or cognizance in matrimonial matters to the temporal courts, but had been only directory to the courts which had the cognizance; and if any judgment had been given amiſs in them, it was to be rectified by appeal, according to thoſe ſtatutes, or by commiſſions of delegacy." So I reaſon on this act of parliament: the prize-act is directory only; the effect of it is to direct how the prize courts ſhall diſtribute the prize when they have adjudged the thing taken to be prize, and was not intended to give a new juriſdiction to the common law courts. The caſe of *Wheeler* (2), cited at the bar, ſeems to have been decided, on the ground that the eccleſiaſtical court had no juriſdiction in that caſe. It is there ſtated, that the court ſaid, "that the feaſt-day of *St. John the Baptiſt* was a holy-day by act of parliament, and that it belonged to the judges of the law to decide, whether the ſame were broken by doing of ſuch work upon that day, or not?" Now the court muſt have reaſoned thus: the act of parliament (3), gave juriſdiction to the eccleſiaſtical courts to puniſh perſons who were guilty of any offence committed againſt it, provided it were not done in harveſt-time, or at other times of the year when neceſſity ſhould require; but in thoſe two excepted caſes the eccleſiaſtical courts have no juriſdiction; that was out of the excepted caſes, and therefore the court of common pleas granted a prohibition. But if that caſe be underſtood as eſtabliſhing this point, that the eccleſiaſtical courts had no juriſdiction to conſtrue the act of parliament, it cannot be ſupported; for one of the ſections (4) of the act expreſsly gives them juriſdiction. Indeed it does not appear from the ſtate of the caſe in *Godbolt* that the court adverted to the ſtatute. And the ground of that caſe muſt have been that it appeared on the face of the libel, that the eccleſiaſtical court had no juriſdiction in that particular caſe. Another caſe was cited from 2 *Ro. Abr.* 303. pl. 27. in ſupport of this prohibition, which cannot be ſupported; for it is there ſtated that a prohibition was granted to the court, for the purpoſe *of trying the law*,

(1) *Vaugh.* 304. (2) *Godb.* 218. (3) 5 *Ed.* 6, c. 3. (4) Sect. 3.

to

to whom adminiſtration ſhould be granted, only becauſe that court *intended* to revoke the adminiſtration to a brother of the half-blood, in preference of one of the whole-blood: No prohibition can be granted for the purpoſe of trying the law, nor in caſes only where the courts below intend to do an act. And if they have juriſdiction, it is immaterial whether they give a wrong ſentence, or only intend ſo to do, ſince in neither caſe will a prohibition be granted. It is much to the ſatisfaction of the judges of the preſent times, that the principles, on which prohibitions are granted, are clearly ſettled. For on reading ſome of the caſes that were determined in the laſt century, we cannot but ſee that they happened at a time when it was the faſhion of the courts of Weſtminſter Hall to run down the eccleſiaſtical courts; and Lord Ch. J. *Vaughan* himſelf ſaid, " It does ſeem as if this court had in ſome of the caſes bordered on things that were ſpiritual," which ſhould not have been done. And in one of the old caſes, though it was admitted that the eccleſiaſtical court had juriſdiction, a prohibition to the court of delegates was granted merely to ſupport the original ſentence below. Now if the eccleſiaſtical court had no juriſdiction, that ſentence ought not to have been permitted to ſtand; and if they had, it is impoſſible to contend that the court of delegates had not the ſame juriſdiction. The only caſe on this point within the laſt century is, that of *Pierce* v. *Hopper* (1); but that does not aſſiſt the preſent caſe, for there it was only held, that the juriſdiction of the inferior courts may be confined as well to the *perſons* as to the *ſubject-matter* of the ſuit. —Then it was ſaid in this caſe, that though the parties who ſued this prohibition do not complain of the ſentence below, a prohibition ought to be granted, becauſe the monition was improperly iſſued. For the reaſons I have already given, I am clearly of opinion, that we cannot examine whether that ſentence be right or wrong. And the court of common pleas admitted, that if the ſentence below veſted a right in the king, the monition was conſiſtent with it. For towards the cloſe of the judgment in the common pleas, Lord *Loughborough* ſaid, " The conſtruction which has been put upon the ſecond ſentence is, that there was no veſted right in this prize in the officers and crews of his majeſty's ſhips, nor in the army; but that, upon the ground ſtated in the ſentence, the whole was veſted in his majeſty by his prerogative, and was to be diſpoſed of to ſuch uſes as his majeſty ſhould think fit." This they take as the ground of the ſentence of the court of appeals; and then

(1) *Str.* 249.

they

they add, "with that conſtruction of the ſentence the monition which has iſſued is perfectly conſiſtent." And indeed, it would be ſtrange if the court of appeals could give a judgment, which they could not enforce. *The ground therefore on which the court of common pleas proceeded, was this, they thought that the court of appeals had miſconſtrued the act of parliament, on which they granted a prohibition. But I am of opinion, that a court of common law cannot now examine that queſtion, and therefore, that the judgment given in the common pleas ſhould be reverſed.* GROSE, J. This prohibition was granted on an idea, that the monition was iſſued contrary to a legal right veſted in the parties, under the ſtat. 21 *Geo.* 3, c. 15. Now, whatever determination we ſhould make on the conſtruction of that ſtatute, if the queſtion were open to us, it appears clearly to have been the intention of the legiſlature, that the courts of admiralty ſhould be the ſole judges of the queſtions of prize or no prize. Even if they had not had that excluſive juriſdiction before, I think the legiſlature intended that they ſhould have it under this act of parliament. And, therefore, it is not competent to us now to look into the ſentence of the court of appeals, but for the purpoſe of underſtanding the meaning of that ſentence. Now if this be ſuch a decree as will authorize the court below to iſſue the monition, there is no ground for a prohibition; but if it be ſuch as will not warrant that court in iſſuing it, then a prohibition ought to be granted. And that brings the whole to this queſtion, What is that ſentence? The plaintiff in prohibition contends, that under this ſentence the navy are entitled to the whole proceeds of the prize, on the ground that all the intereſt in the prize was veſted in them by the act of parliament. But conſider the proceedings in this caſe; the prize act gives to the navy the intereſt in the prizes taken by them during the hoſtilities with Holland, to be divided in ſuch proportions as the king by his proclamation ſhould direct. But the king and council thought, that there might be a capture by the king's ſhips, which would not come within this clauſe in the act; for they gave to the officers who were ſent out on this expedition ſecret inſtructions to provide for the caſe of ſuch a capture. The navy firſt inſtituted a ſuit in the admiralty court, claiming the ſole intereſt in the prize under this act of parliament and the proclamation; that court decreed the ſhip to be lawful prize, but reſerved the queſtion who were the captors on this ground, that it might turn out that the army were entitled under the ſecret inſtructions: and afterwards it was decreed in favour of the army: to this an appeal was lodged in the court of appeals, where the ſole queſtion was, Whether the capture were within the meaning of the prize act,

act, or within the case alluded to in the secret instructions of the king and council? and that court determined, that it was a joint capture by the navy and army, and adjudged it good and lawful prize to the king. This sentence therefore is clearly in opposition to the right claimed by the navy; and the clear meaning of it is this, that the persons claiming under the prize act had no right, that it was not a case provided for by the act, but that it fell within the secret instructions; then the monition was properly issued. I am clearly of opinion, that whether the court of appeals were right or wrong in their decree, it is not competent to us to form any judgment upon the subject, because the legislature has placed full confidence in them; and it follows from hence, that those persons who pronounced the sentence are the best judges as to the mode in which it shall be carried into execution. I am therefore very well satisfied that no prohibition ought to be granted in this case, because the court of appeals was not guilty of any excess of jurisdiction in issuing the monition, since all the persons interested in the prize ought to have concurred in appointing the agents. To this it was answered in another court, that it is stated that they were *duly appointed*; but that only means *duly appointed by the navy*. However, without giving any opinion upon that point, I am of opinion, that it is not competent to us to examine the judgment of the court of appeals for any other purpose than that of construing it: that sentence appears to be a decided negative of the right insisted on under the prize act, by the plaintiff in prohibition, and therefore the judgment given in the common pleas in favour of that right ought to be reversed. Judgment reversed.

Home v. Earl Camden in Dom. Procer. *in error.* June 22, 1795. 2 *Hen. Black* 533.

Afterwards a writ of error was brought in parliament, and the case having been fully argued, the following question was proposed to the judges; viz. WHETHER *the declaration is sufficient in law to bar the defendants from proceeding against* John Pasley, *to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such part thereof, as may be in his hands, power, or possession?*—In answer to which, the unanimous opinion of the judges was thus delivered by *Eyre*, CH. J.—The judges are unanimously of opinion, that the declaration in this cause is not sufficient in law, to bar the defendants from proceeding against *John Pasley*, to compel him to bring in the account of the sales of the ship and cargo, together with the proceeds of such parts thereof as may be in his hands, power, or possession. This is an action in the form of it, to recover damages for proceeding after a writ of prohibition has been obtained and delivered to the party defendant. Probably in the early part of our legal history, when the struggle for jurisdiction

juriſdiction between the temporal and eccleſiaſtical courts was violent, and the jealouſy of the encroachment of the eccleſiaſtical juriſdiction upon the temporal was eager, this was a proceeding effective to the whole extent of its form. In modern and in better times, this form of proceeding is uſed for the mere purpoſe of ſubjecting the grounds in law, upon which any particular prohibition is ſought to be obtained from any temporal court, to a judicial examination, in the moſt ſolemn manner. How it was moulded to this purpoſe, will be ſeen in an inſtant, if it be conſidered that in this form of action, two things would be neceſſary to be proved: the firſt, that the defendant had proceeded in the court of peculiar juriſdiction, after the writ of prohibition had been delivered; the ſecond, that this proceeding was an injury to the plaintiff. But the plaintiff would have no ground to complain of the proceeding, after a writ of prohibition delivered, as an injury to him (though it might be a contempt, for which the party be amenable to the king), unleſs he could ſhew that the writ had iſſued properly, and that he had a juſt right to claim the benefit of it. This goes at once to all the merits of the prohibition which is ſuppoſed to have iſſued, and makes the legal ground of it the giſt of the action. Such being the nature of this proceeding, it becomes a convenient mode of trying whether a prohibition ought to iſſue, and it is made practicable by conſidering, all that relates to the contempt incurred, by proceeding after the writ had actually iſſued, as mere form, and the damages nominal. Accordingly in modern times, when prohibitions are applied for to the temporal courts, and the parties applying ſuggeſt grounds either of fact or law, for obtaining the writ, which appear to the court ſo doubtful as to be fit to be put in a courſe of trial, the party applying is directed to declare in prohibition, that is, to inſtitute a feigned action, in the form of that which is now under conſideration: in which action, in the ſhape of a queſtion, whether ſuch a prohibition as is moved for, ought to have been granted? will be ſolemnly conſidered and determined, if the parties think fit, as in the preſent inſtance, in the *dernier reſort*, by your lordſhips. So long as the temporal courts direct parties to declare in prohibition, a prohibition cannot arbitrarily iſſue, nor upon any but the moſt ſolid and ſubſtantial grounds; and the balance, in which are to be weighed al the different juriſdictions, in which the public juſtice of th country is adminiſtered to the people, will be holden by your lordſhips. In the preſent caſe, the plaintiff has declared in prohibition, and the queſtion propoſed by your lordſhips to the judges, goes to the very foundation of his ſuit; it is tantamount to a queſtion, whether upon the caſe ſtated in this declaration, a prohibition to the effect of the prohibition

tion ſtated in this declaration, ought now to iſſue to the lords commiſſioners of prizes? The ground made by this declaration, for a prohibition to reſtrain the prize court from iſſuing proceſs, to compel the bringing in the account of ſales and proceeds of the ſhip and cargo, is a ſuppoſed contravention of the prize acts now in force, particularly the ſtatutes of the 12th and 21ſt of his preſent majeſty. It is aſſumed, that if a court of peculiar juriſdiction will proceed contrary to the proviſion of the ſtatute law of the realm (and that if ſuch a court miſinterprets any of thoſe proviſions, it does ſubſtantially proceed contrary to them), this is a good ground for a prohibition; but it is not neceſſary to the deciſion of your lordſhip's queſtion, that the judges ſhould affirm or deny this propoſition in the extent ſtated. It undoubtedly belongs to the king's temporal courts to reſtrain courts of peculiar juriſdiction, from exceeding the bounds preſcribed to them; and by far the greater part of the inſtances in our books, in which prohibitions have iſſued, are caſes of plain exceſs of juriſdiction. But ſome of the inſtances go beyond an exceſs of juriſdiction, and ſeem rather to fall under the head of wrong and injuſtice done to the party, by refuſing him, in the courſe of a proceeding ſtrictly within the juriſdiction, ſome benefit or advantage, to which the common or ſtatute law entitled him, perhaps in oppoſition to the civil or common law, by which the general proceedings of thoſe courts are regulated. The caſe of a leaſe (1) offered to be proved in an eccleſiaſtical court by one witneſs, and rejected becauſe by their law two witneſſes are neceſſary; and the caſe of a copy of the libel, which by the ſtatute law they are required to give, demanded and refuſed, are among thoſe inſtances. On the other hand, it muſt be admitted, that the miſinterpretation of either the common or ſtatute law, in a proceeding confeſſedly within the juriſdiction of thoſe courts, and where they are bound to exerciſe their judgment upon the one or the other, ſeems to be rather a matter of error, to be redreſſed in the courſe of the appeal which the law has provided, than a ground for a prohibition: the anſwer to this is, that the king's temporal courts, and your lordſhips, in the laſt inſtance, are by the conſtitution of this country to declare the common and expound the ſtatute law, and that the poſſibility of two different rules prevailing upon the ſame law, one in the king's temporal courts, and the other in courts of peculiar juriſdiction, ought not to exiſt, and is effectually prevented without any unreaſonable interference, or breaking in upon the courts of peculiar juriſdiction, by the temporal courts iſſu-

(1) 1 *Show.* 158, 172, *Shutter* v. *Friend.* 12 *Co.* 63, b. *Robert's* caſe.

ing

ing their prohibitions in every ſuch caſe. But this is no more than ſaying, " Proceed to the very extent of your " juriſdiction without interruption from us, only remember- " ing, that you are always to declare the common law as we " declare it; and that when any queſtion ariſes, touching the " expoſition of the ſtatute law, if the ſubject is originally of " temporal juriſdiction and comes incidentally before you, " it is to be expounded by you as we expound it; or if the " ſtatute concerns your proceedings only, you are to ex- " pound it as we ſhall ſay it ought to be expounded, when " the queſtion is brought before us in prohibition." I underſtand the claim of the temporal courts, as it is ſtated in the famous controverſy in the beginning of the reign of *James* the Firſt (1), is to iſſue prohibition to this extent; and though ſome of the caſes in our books have been ably diſtinguiſhed at the bar, and made reducible to the head of exceſs of juriſdiction, yet we find traces of continual claim to iſſue prohibitions in the inſtances above mentioned. In the caſe of *Brymer* v. *Atkins*, it is ſtated broadly, and diſtinctly aſſerted; and in *Full.* v. *Hutchins*, *Cowp.* 422, Lord *Manſfield*, in delivering the opinion of the court, plainly alluded to it, in the following paſſage: " Where matters which " are triable at common law ariſe incidentally in a cauſe, " and the eccleſiaſtical court has juriſdiction in the principal " point, this Court will not grant a prohibition *to ſtay trial.* " For inſtance, if the conſtruction of the act of parliament " comes in queſtion, or a releaſe be pleaded, they ſhall not " be prohibited, unleſs the court proceed *to try* contrary to " the principles and courſe of the common law, as if they " refuſe one witneſs, &c.; and this is expreſsly laid down " by Lord *Hale*, 2 *Lev.* 64, Sir *W. Juxon* v. Lord *Byron.*" But it muſt be remembered, that in the argument of this very caſe, in the court of king's bench, this doctrine was queſtioned by Mr. Juſtice *Buller*, upon the general principle, that miſinterpretation of an act of parliament would be the ſubject of *appeal*, and *not of* prohibition; upon the authority likewiſe of a paſſage in Chief Juſtice *Vaughan*'s argument of one of the caſes reported by him, diſtinguiſhing between ſtatutes directory to the eccleſiaſtical court, and other ſtatutes, and upon other grounds, which will be very fit to be conſidered, when it ſhall become neceſſary to the determination of a caſe in judgment, before a temporal court, in prohibition, to lay down the preciſe rule upon it. It is not neceſſary ſo to do in the preſent caſe, ſince we all agree. But allowing the plaintiff all he has aſſumed reſpecting the authority of the court of common pleas to iſſue a prohibi-

(1) 2 Inſt. 601, 602; Art. Cleri. 4 Inſt. 99, 100.

tion, he has made no ground for it in the declaration, for he has not ſhewn that the prize court has contravened the prize acts, either directly or by miſtaking the ſenſe of them. It is ſtated in the declaration, that, by the prize acts, the property of ſhips taken by the navy, after condemnation, veſts in the captors: this is true, *ſub modo*; but, in the ſenſe in which it is true, it has no application to the caſe ſtated in the declaration. To give it application, they ſay that the navy were the captors of the ſhip named in the pleadings, which, if we are to underſtand them to mean ſole captors, in whom the ſole property by the prize act would veſt, is an averment inadmiſſible, ill pleaded, and, therefore, to be rejected, as being directly contrary to the ſentence of condemnation. They proceed to aver, that, by the prize acts, the navy-agents have the entire diſpoſition of the prize, and that *Paſley* was the ſurviving navy-agent, duly appointed; from whence they infer their *gravamen*, that a proceeding to take the ſhip and cargo out of his hands defeats and diſappoints the proviſions of the prize acts, and is therefore ſuch a contravention of thoſe acts as will be a ground for a prohibition. Not to quarrel with the title of *Paſley* to act as an agent, it is obvious that the third propoſition, that the navy-agents have the entire diſpoſition of the prize, depends on the ſecond, namely, that the navy were the captors; for if the navy were not the captors, or not the ſole captors; in the one caſe they cannot have the entire diſpoſition of the prize, upon any reaſonable conſtruction of the prize-act, and in the other they would have nothing to do with it. But if it were admitted, that they had made out every one of theſe propoſitions, ſtill their concluſion would fail; for, in order to maintain that the prize court had contravened the prize acts, by proceeding to take the ſhip and cargo out of the hands of the navy-agent, it ought to have been ſtated in the declaration, *that it had been pleaded and alleged in the prize court*, that *Paſley* was the agent of the navy, duly appointed, and therefore, that the court ought not to proceed to take the ſhip and cargo out of his hands. Upon a view of the precedents in *Raſtall*'s Entries, Tit. Proh. 445; and *Coke*'s Entries, Tit. Proh. 448, it appears to have been a conſtant form of declaring, that the court proceeded in the courſe objected to, notwithſtanding the party had pleaded and alleged the ſtatutes of which he claimed the benefit, and the facts which were neceſſary to bring his caſe within thoſe ſtatutes. And it ſeems to be a ſubſtantial defect in this caſe, becauſe apparently it would be the duty of the court, after it had pronounced ſuch a ſentence as would veſt the property in the captors, in order to execute that ſentence, to take all the neceſſary ſteps for delivering the ſhip and cargo into the hands of ſuch perſons as ſhould be made appear to the court

to be the agents for the captors, duly appointed. It was indeed thrown out in the argument at the bar, that the judge of the prize court is to be conſidered, after ſentence, as *functus officio*, and, conſequently, that his monition, or any other proceeding, would be an exceſs of juriſdiction. This, if it could be maintained, would reduce the caſe to a ſhort point, and would be a very clear and diſtinct ground for a prohibition. But we find no ground for this argument in the acts of parliament, or in the common law; and if you were to ſuppoſe that ſuch a monition had not been ſtrictly warranted by their own courſe of proceeding in the prize court, your lordſhips, who cannot look beyond this record, cannot take cogniz nce of an irregularity of this nature: but in truth there is no ground for this argument. In the nature of things, the proceeds of ſhip and goods, taken as prize, muſt often find their way to the hands of thoſe who have no right to retain them; it is therefore eſſential to the prize juriſdiction, that the prize courts ſhould have power to call for them, for the benefit of the captors: ſeveral caſes have been ſtated, where ſuch monitions have in fact iſſued, and where the captors concurred that it would be for their benefit that they ſhould iſſue: it is therefore untrue, as a general propoſition, that, after ſentence, the prize court is *functus officio*, and cannot iſſue ſuch a monition; and if it were true, it would be but an irregularity in their proceedings, according to their own law, of which your lordſhips could not take cognizance, and which, therefore, you could not pronounce to be an exceſs of juriſdiction. —To return to the examination of the propoſitions ſtated in the declaration, with reference to the prize acts: the language of theſe prize acts(1) is, that the navy ſhall have *the ſole intereſt and property* in the ſhips and goods which ſhall be captured; the word *veſt* is not uſed, yet we heard a great deal in the argument reſpecting *the veſting* of this ſole intereſt and property. But it was not very diſtinctly ſtated *at what time* this ſole intereſt and property ſhould *veſt*: the ſtatutes ſay, *after the ſame ſhall have been finally* adjudged lawful prize to his majeſty. There is nothing definite in theſe words, conſidered as the deſcription of a point of time when this property ſhall veſt, within the whole interval, between the original ſentence of condemnation in the court of prize, in which the ſhip is firſt libelled, and final ſentence of condemnation in the court of appeal in prize cauſes. What happened in this caſe happens in many others; the judge condemns the ſhip and cargo as prize, reſerving the conſideration of the queſtion, who were the captors?

(1) 19 Geo. 3. c. 67 and 21; Geo. 3. c. 15.

It is agreed on all hands, that, ſince the paſſing of the prize acts, the prize court has juriſdiction to determine who are the captors; a queſtion often litigated in the firſt inſtance, if there be no doubt but that the ſhip is good prize, but perhaps great doubt who will ultimately turn out to be the captors; the judge pronounces by his interlocutory ſentence, that the ſhip is lawful prize, and thereupon makes many convenient arrangements for the benefit of thoſe who ſhall eventually turn out to be the captors, reſerving the queſtion who are the captors, for future conſideration. It alſo often happens, that there are no parties litigating that queſtion until after the definitive ſentence has been pronounced in the court below. The ſtrongeſt of two or more joint captors takes poſſeſſion of the prize at ſea, carries her into a port in the plantations, and procures her to be condemned there to himſelf, as ſole captor: the joint captor does not arrive till after the ſentence; he may then interpoſe his claim, and may appeal and have the benefit of his claim upon the hearing of the appeal. The effect of the appeal is to ſuſpend the force of the ſentence; not always, indeed, to the extent of ſtaying the execution, for, in certain caſes, the execution of the ſentence is directed not to be ſuſpended; but from the moment of the appeal being interpoſed, the ſentence is no longer final; on the contrary, it is liable to be reverſed in part, or in the whole: at what period, then, ſhall we ſay, *that the ſole intereſt and property* of ſhips or goods, captured by the navy, ſhall veſt in the captors? This point was but indiſtinctly argued at the bar: it was rather inſinuated than argued, that, in this caſe, the intereſt and property veſted, as ſoon as the judge below pronounced his interlocutory decree, that the ſhip was good prize; reſerving the queſtion who were the captors. But it is a conſtruction of the ſtatute, too abſurd to be ſeriouſly maintained, that the property, which, by the expreſs words of the ſtatute, is not to be had by the captors, till after the ſhip ſhall have been finally adjudged lawful prize to his majeſty, ſhould veſt in perſons of a certain deſcription, before it is known who ſhall anſwer that deſcription. Does this intereſt and property veſt as ſoon as by poſſibility it could veſt, by the effect of a definitive ſentence, adjudging the ſhip to be prize, and who were the captors? If there be no appeal, it may then veſt: but an appeal interpoſed, by the expreſs words of the prize-act, it cannot veſt until after the final adjudication. Therefore, can there be ſaid to have been a final adjudication, while an appeal is depending? Shall the intereſt and property veſt, only to be diveſted if the event of the appeal ſhould be againſt the perſons firſt adjudged to be the captors? Such a conſtruction is not neceſſary to effectuate any of the purpoſes of the act, and is not ſimply unneceſ-

ſary.

ſary, but it would break in upon the general courſe of the proceeding in the prize court, and fruſtrate ſome of the proviſions of the prize-act, made in aid of the authority of that court; at leaſt it is entirely inconſiſtent with them. It is not neceſſary to ſecure the prize to the captors; and it was ſo ſtated by the civilians, and agreed by the court, in the caſe of *Smart* v. *Wolf* (1), that pending the ſuit in the prize-court, the ſhip and goods are in the cuſtody of the court: the intereſts, therefore, of all thoſe who are concerned in the capture, are under the protection of the court. It is perfectly inconſiſtent with the plan of the prize-act, that *the intereſt and property* ſhould veſt in the captors, at any time before the final adjudication, in the court of appeal.—The allegations contained in this declaration, reſpecting the appointment of the agents directed by the prize acts to be appointed, for ſelling prizes and diſtributing the proceeds among the captors, their powers, proceedings, and the concluſion againſt the authority of the commiſſioners of prizes to interfere with them, are ſo connected with this queſtion, reſpecting the veſting of the intereſt and property in the captors, that I ſhall conſider them in the next place. Thoſe allegations are, "that *E. Taylor*, ſince deceaſed, and "*J. Pasley*, were *duly appointed* agents, by the officers and "crews of the ſeveral ſhips of the ſquadron; who, ſoon "after the decree, in 1782, ſold the ſhip and cargo, and "diſtributed part of the produce among the officers and "crews of the ſquadron, and that the reſidue is now in "*Pasley*'s hands, and ought to be diſtributed, by him, to the "captors, in payment of their ſeveral ſhares, in purſuance "the ſaid ſtatute and proclamation. That the plaintiff "ſued *Pasley* for the reſidue of his ſhare, in B.R. in Ea. 28 "*Geo.* 3; and that that plea is ſtill depending: then ſtating, "that the commiſſioners of appeals, in matters of prize, have "not, by the law of this realm, any power or authority to "take out of the hands and poſſeſſion of any agent, ſo con-"ſtituted, the money ariſing from the ſale of any veſſel or "goods, which have been *finally adjudged* lawful prize to his "majeſty, in any of the ſaid courts of admiralty, &c. &c." —Now, if it be the true conſtruction of the prize acts, that *no intereſt or property veſted* in the navy, until *after the final adjudication* by the commiſſioners of appeals, it follows, that *Pasley*'s proceeding to ſell and to diſtribute part of the proceeds, ſoon after the ſentence in the admiralty court, muſt be without colour of authority. In this ſtage of the proceedings, the court could only act under the authority of the prize court, and in the manner in which ſuch agents uſually do act; for I take it to be clear, in point of fact, that agents are frequently appointed before ſentence, and

(1) See p. 446, ſupra.

that the captured ſhip and goods are left under their care and management, by common aſſent.—Acting under the authority of the prize court, they would be to account to the prize court; acting without the authority of the prize court, they would be in the condition of mere ſtrangers, who had poſſeſſed themſelves of the proceeds of a prize, to whom it is admitted, a monition might, and ought to be iſſued, to compel them to bring in thoſe proceeds; the allegations, therefore, which reſpect the appointment of agents and their proceedings, are inſufficient, in law, to warrant the concluſion, which is the main ground of this prohibition—that the commiſſioners of prize appeals had no power to take the proceeds of this ſhip and cargo out of their hands: it might be added, they prove the direct contrary. The caſe here is the ſtronger againſt the authority of theſe agents, inaſmuch as, upon the interpoſing of the appeal, there was no direction that the execution of the ſentence ſhould not be ſuſpended; ſo that the whole effect of the firſt ſentence of adjudication became inoperative to any purpoſe whatſoever, and there was no pretence for the agent's aſſuming to act by virtue of it. If we turn once more to the prize acts, and take a view of thoſe ſections which reſpect the appointment, powers, and duties of theſe navy agents, we ſhall find, that though perhaps they may be appointed before the final adjudication of the prize, they have nothing to do until after the final adjudication has taken place; that the proviſions of the prize-act are in proper conformity to the powers and authorities veſted in the prize court, up to that period; and that they are conſiſtent with the opinion now declared reſpecting the intereſt and property of their principals. By the 31ſt ſection, all appraiſements and ſales are to be made by the agents, which muſt be appraiſements and ſales after final adjudication; for all appraiſements and ſales to be made, at any time prior to the final adjudication, are to be made under the order of a judge of the admiralty court, and under the direction of perſons to be appointed by *claimants*, as well as captors. By the 33d ſection, they are directed to regiſter their powers of attorney in that court in which the prize ſhall be condemned; and by the 34th ſection, the entry is to contain, among other things, the date of the condemnation. The reſult of the different ſections, which give powers, or impoſe duties upon theſe agents, is, that they all reſpect ſales, in order to diſtribution, and the intereſts of Greenwich hoſpital, ariſing out of thoſe ſales. The reſult of theſe obſervations, upon thoſe parts of the declaration which reſpect the intereſt and property of the navy, as captors, and the powers and authorities of their agents, is, that this whole caſe reſts upon two *fundamental errors*: the firſt, that an intereſt and property *veſted* in the navy, as captors,

captors, long before it could, by any poſſibility, veſt; the ſecond, that *the navy agents had authority*, under the prize acts, to take upon themſelves *the management and diſpoſition* of the prize, long before ſuch authority could be derived to them. When this is diſtinctly ſeen, the whole falls to the ground. Hitherto I have treated the caſe as if the navy were to be conſidered as they are ſtated in this declaration to have been, *the ſole captors:* but the contrary is, or at leaſt muſt be taken to be upon theſe pleadings, the fact. It is from the ſentence only that we can collect who are the captors. Your lordſhips cannot take cognizance of it as a matter of fact, to be averred in pleading; it as a matter of adjudication, by a court of excluſive juriſdiction: you muſt have it under the ſanction of the judicial authority of that court, or no notice at all can be taken of it. The averment in the declaration is, therefore, impertinent, and muſt be rejected, and we muſt look at the ſentence: looking at the ſentence, and not having the aſſiſtance of the libel, and the reſt of the proceedings in the cauſe, which might have explained it, *it is not an adjudication that the navy were the ſole captors.* The plaintiff, therefore, has failed altogether to maintain that propoſition. If it could be of uſe to him, he might poſſibly ſucceed in an attempt to prove, that this ſentence does adjudge that the navy were joint captors. But this would be of no uſe to him in this cauſe. It is not the caſe which he makes by his declaration; and if it were, the concluſion in favour of the juriſdiction of the prize court, with reſpect to the iſſuing the monition, would be irreſiſtible. The prize-act would then be quite out of the caſe, which would reſt entirely upon the ordinary juriſdiction of the prize courts. As joint captors, the navy can never have the ſole intereſt and property in the prize; the navy agents cannot have the ſole intereſt and property in the prize; the navy agents cannot have the ſole management and diſpoſition of it. The prize acts have not provided for the caſe of joint captors. The prize courts may have extended the benefit of the ſtatutes to the caſe of ſome joint captures, by an equitable arrangement and diſtribution, which has been ſubmitted to, but it appears to be perfectly impoſſible to found a right to the *ſole agency*, upon *a joint capture*; and it does not appear, that, under the prize acts, *a joint agency* could be framed, which would be effectual. The conſequence of all this is, that, of neceſſity, this monition muſt iſſue, in order to execute the ſentence, if we underſtand the ſentence to have adjudged, that the navy were joint captors. I might here conclude, but, as it was very apparent from the argument at the bar, that, in truth, it is the ſentence of the commiſſioners of prize appeals, and not the monition, which is the real ground of complaint, it may be neceſſary

to ſhew to your lordſhips, that every complaint againſt the ſentence muſt be laid out of the caſe. You are ſitting here, in a court of error, but your juriſdiction is confined to the enquiry, whether the ground ſtated in this declaration, for iſſuing ſuch a prohibition, as that which is deſcribed in theſe pleadings, is or is not ſufficient in law? The ſentence is before your lordſhips as part of that gound, and the effect of it in that view, I have already ſtated; but it is before your lordſhips as a ſentence unimpeached. The complaint made to the temporal court, is not that the ſentence is wrong (which indeed the temporal court had no juriſdiction to correct if it were wrong), nor is the complaint, that the ſentence was an exceſs of juriſdiction, or in any other reſpect a ground for prohibiting the prize court to carry it into execution. The caſe in the declaration is, that upon the authority of the ſentence, coupled with the other matters of fact and law ſtated in the declaration, the plaintiff is entitled to aſk, that the proceeds ſhould not be taken out of the hands of the navy agents; and the plaintiff cannot now deſert that ground, when he finds it untenable, and take up an objection to the ſentence. Your lordſhips are not a court of original juriſdiction, to grant prohibitions; and, indeed, the cauſe and the parties would be placed in a very ſingular ſituation, if there could now be a prohibition iſſued to prevent the carrying this ſentence into execution; for the ſentence of the court below is undoubtedly reverſed, and if the commiſſioners of prize appeals were to be prohibited from carrying into execution the ſentence of reverſal, there would in effect be no ſentence at all, and the crown, the navy, and the army, as far as I ſee, would be without remedy. In the courſe in which the commiſſioners of prizes are proceeding, regular or irregular, the proceeds of this prize will be collected; and if the object of their proceedings be, as probably it is, to place the fund in the hands of the crown, the honour and juſtice of the crown will be an unfailing reſource to the parties.—The judgment of the court of B. R. reverſing that of the court of C. B. was accordingly affirmed.

Velthaſen v. Ormſley, Tr. 29 Geo. 3. B.R. 3 *Ter. Rep.* 315.

But if it appear, that the court of admiralty is proceeding in a queſtion over which it has no juriſdiction, a court of common law will grant a prohibition, without impoſing any terms on the party applying for it.—This was a rule for a prohibition to the admiralty court, in which the defendant had libelled the plaintiff for running foul of and breaking his veſſel; and the ſuggeſtion ſtated, that this happened on the river Thames, and in the body of the county of Kent: it was admitted that the admiralty had no juriſdiction, but it was prayed, that the court might not grant the prohibition, till the plaintiff put in bail to an action which had been commenced againſt him in a court of common law, and to which

which he had not yet appeared; this was prayed on the ground, that the plaintiff was a foreigner, and the ſhip a foreign veſſel; and as both the ſhip and the plaintiff were gone abroad, the only ſecurity which the defendant had to anſwer the damage done to him, was the bail given to him in the admiralty court; and the caſe of *Wharton* v. *Pitts*, Salk. 548, was cited. BUT the Court ſaid, that as the reaſons of the judgment in that caſe, were not declared by the reporter, and as the caſe itſelf was not mentioned in any other book, the court were of opinion, that it was not a ſufficient authority to warrant them in impoſing the terms prayed for. Rule abſolute.

See alſo PROHIBITION.

Advowſon.

Right of Preſentation.

A B. being ſeized of the advowſon of a donative, the church in his life-time becomes void, then A.B. dies (the church being ſtill void), having firſt made his will; the plaintiff, his executor, brought this *quare impedit*, ſuppoſing himſelf entitled to this turn, as an executor is in the caſe of a preſentative benefice: after two arguments, THE WHOLE COURT were clearly of opinion, that the right of donation deſcended to the heir of A.B. and that his executor had no title, which he would have had, if it had been a preſentative benefice.—It was ſaid by the court, in giving this judgment, that before the council of Lateran, all benefices were like what donatives are now, that no lapſe could have incurred in ancient times, and that biſhops had no right of inſtitution before the time of Ric. 2. *ante concilium Lataranenſe*, ſays *Bracton*; *nullum currebat tempus contra præſentantes*, *Seld. Hiſt. Tithes*, cap. 12, fo. 380: and the CH. J. ſaid, the author of the *Codex* never read this chapter of *Selden*, or he has impoſed upon the public: he ſaid, there is no caſe in the books to exclude the heir of a donative from his term in this caſe, that a patron of a donative can never be put out of poſſeſſion by an uſurpation. Repington v. the Governor of Tamworth School, Ea. Tr. 3 Geo. 3. C.B. 2 *Wiſ.* 150.

The prerogative preſentation to a church (the advowſon of which is held by ſeveral in common) does not ſupply the turn of the patron otherwiſe entitled to preſent.—In an action of *quare impedit*, the plaintiffs declared upon their ſeiſin of the advowſon of Allhallows, Honey-lane, in 1663, and The Grocers' Company, v. the Archbiſhop of Canterbury and Backhouſe, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 779.

and of the ſeiſin of the Archbiſhop of Canterbury, of St. Mary-le-Bow, and St. Pancras, Soper-lane, in 1662, by preſentment, or collation of their ſeveral clerks, and inſtitution and induction thereon. That the churches were all burnt down in the great fire of London, 1666, and by ſtat. 22 *Car.* 2, c. 11, it was, among other things, enacted, ſect. 63, that the ſaid pariſhes of St. Mary, St. Pancras, and All-hallows, ſhould be united, and the church of St. Mary-le-Bow rebuilt, as the pariſh church; and ſect. 68, that the ſeveral patrons of all the churches united by that act, ſhould preſent to the ſeveral rebuilded churches by turns. The firſt preſentation to be made by the patron of ſuch of the ſaid churches, the endowments whereof were of the greateſt yearly value. By virtue whereof, the archbiſhop and the company became ſeiſed of the advowſon ſo united, and entitled to preſent in turns. That on the 23d of September, 1679, Archbiſhop *Sancroft* collated *Timothy Puller*, in right of his archbiſhopric, as his *firſt* turn; on whoſe death, Archbiſhop *Tillotſon* collated *Samuel Bradford*, the 21ſt of November, 1693, in right of his archbiſhopric, as his *ſecond* turn. That *Bradford* being made Biſhop of Rocheſter, King *George* 1, by virtue of his prerogative royal, on the 10th of July, 1720, preſented Dr. *Samuel Liſle*; and *Liſle* being made Biſhop of St. Aſaph, King *George* 2, by virtue of his prerogative, on the 16th of February, 1744, preſented Dr. *Thomas Newton*: and that church being now void by his reſignation, it belonged to the plaintiffs in their turn, being the *third* turn to preſent, &c. But that the defendants, the archbiſhop and *Backhouſe*, hindred them. To this declaration the archbiſhop demurred generally; but the defendant *Backhouſe* pleaded, that he was parſon, on the collation of the archbiſhop; he admitted the declaration, as far as to the union of the three churches, and the ſeiſins of the archbiſhop and the company; and that they were entitled to preſent in ſuch manner and form as in the declaration mentioned. But he ſaid, that at the time of paſſing the act, St. Mary was of greater value than either of the other churches, and All-hallows of greater value than St. Pancras; viz. St Mary, 33l. 12s. 3½d. All-hallows, 19l. 3s. 9d. St. Pancras, 13l 6s. 8d. by reaſon whereof, the archbiſhop was entitled to the firſt turn, the Grocers' Company to the ſecond, and the archbiſhop to the third. That archbiſhop *Sancroft* collated *Puller*, as in his firſt turn; upon whoſe death it belonged to the company to preſent as in their turn, being the ſecond turn; but that Archbiſhop *Tillotſon* uſurped, and collated *Bradford*. He then ſtated the two prerogative preſentations as above, and the reſignation of *Newton*; by virtue whereof it belonged to the preſent archbiſhop, to collate to the ſaid church in his turn, being the third turn; and that he collated the

the defendant *Backhouſe*. To this plea the plaintiffs replied, proteſting the endowment of Allhallows was not at the time of the act of greater value than St. Pancras; and that Archbiſhop *Tillotſon* did not uſurp as alleged; and they ſaid, that it belonged to the plaintiffs in their turn, being the third, to preſent. And they traverſed, that it belonged to the plaintiffs to preſent to the ſaid church, at the ſecond turn. The defendant *Backhouſe* demurred to this replication; becauſe the plaintiffs had not traverſed, or put in iſſue any matter of fact, but had only traverſed, and attempted to put in iſſue, a matter of law. After this caſe had been twice argued, THE COURT gave judgment as follows.—There are two principal queſtions in the preſent caſe; the firſt, ariſing on the archbiſhop's general demurrer, Whether the plaintiffs have ſet forth a good title in themſelves, upon their own declaration? The ſecond, ariſing upon the defendant *Backhouſe*'s plea, Whether the defendants have ſet out a better title? Upon the firſt queſtion, four objections were taken to the count, by the defendant's counſel. 1ſt, That the plaintiffs have not averred any ſeiſin in themſelves, of the advowſon of theſe united churches: the ſame objection was taken in the caſe of *Reynoldſon* v. *Blake*, 3 *Levinz*, 435. And certainly an averment of ſeiſin by preſentation in themſelves, or thoſe under whom they claim, is abſolutely neceſſary; but we are of opinion, that there is a ſufficient averment of ſeiſin in the preſent caſe. For the plaintiffs have ſtated a ſeiſin of Allhallows in themſelves, before the union; they have ſtated the act of union, their title to preſent by turns, and the archbiſhop's preſentation in conſequence. If this advowſon is to be conſidered as one newly created by the act, it is impoſſible the rule ſhould hold, of the neceſſity to ſtate a prior ſeiſin, upon the firſt claim of the patron to preſent. All that can be ſtated and averred in ſuch a caſe is ſtated and averred in the preſent; or if this be a derivative advowſon, ariſing from the union of the three component parts, the derivative ſeiſin is ſurely ſufficiently ſtated and averred. 2dly, It was objected, that the plaintiffs ſhould have ſtated what the *rota* of preſentations is, and have ſet out the yearly value of each church at the time of the union, in order to have determined that *rota*. And, to be ſure, it is neceſſary to ſtate the commencement of a right to preſent by turns, either by words, or by neceſſary intendment. If a manor be divided into three parts, with one-third of the advowſon appendant to each, the very appendancy is ſufficient to ſhew, by neceſſary intendment, that the right commenced by preſcription, and in the caſe at bar, there is ſufficient ſtated by way of hiſtory, to ſhew the priority and *rota* of the turns; viz. that the archbiſhop preſented in right of his ſee, upon the vacancies in 1679 and 1693, being the

the *firſt* and *ſecond* turns; and that now it is the right of the plaintiffs to preſent, being the *third* turn. As to the value, if a diſpute had happened at the *firſt* vacancy, in 1679, it would have been neceſſary to have ſtated the value, in order to aſcertain the title to the *firſt* preſentation; but as that is not neceſſarily the criterion to determine the *ſecond* or *third*, it is not neceſſary to ſet it out upon the preſent vacancy. 3dly, It was objected, that the plaintiffs claiming the third turn, have not ſhewn this to be the third, but rather the fifth. But we are all of opinion, that *though, in point of fact, this is the fifth vacancy, yet it is but the* third *turn, as between the patrons; becauſe the prerogative preſentations do not ſupply the turn of the patron.* Theſe prerogative preſentations appear to be as old as *Edward* 3d's time, and were exerciſed under *Henry* 8, and Queen *Elizabeth*. The law concerning them was doubted in the time of *Car.* 2, and ſince; but was finally determined in favour of the crown, in king *William*'s time. This is not a right of patronage in the king; nor is it a right of eviction, for it ejects nobody; nor an uſurpation, for it is a rightful act. But *it is a contingent caſual right, ariſing upon a particular event, namely, the incumbent's becoming a biſhop.* It was determined in the caſe of St. *James*'s pariſh, that the ſtatute of 1 *James* 2, which veſted the preſentation in the biſhop of London, and Lord *Jermyn*, by turns, did not bar this right of the crown, which ariſes *toties quoties* the event ſhall happen. But then this does not ſupply, it only ſuſpends or poſtpones the turn of the patron. *It poſtpones the turns of both, or all the patrons, if more than one, but does not take away the right of one*, and leave the reſt intire, which would be rank injuſtice; and this being the act of law, *nemini facit injuriam.* The fourth objection was, that it is not averred that the third belongs to the plaintiffs. But this is merely conſequential, and the court will draw the conſequence, as it is ſtated, that the archbiſhop preſented of right in the firſt and ſecond turn; it follows, that the Company muſt now be entitled to the third; there being three churches united, and of courſe three turns of preſentation. Therefore, we are all of opinion, that on the face of the declaration, the plaintiffs have ſet out a good title in themſelves, and conſequently, that the demurrer of the archbiſhop is bad. Next, as to the plea of the defendant *Backhouſe*, which purports to make out a better title than the plaintiffs; it is obſervable, that the act of 1 *James* 2, for St. *Martin*'s and St. *James*'s pariſhes, veſts an alternate preſentation in the biſhop of London, and Lord *Jermyn*, and that the biſhop ſhould preſent firſt. Had a ſimilar rule been laid down here, as, that firſt the archbiſhop, ſecondly the Company, thirdly the archbiſhop ſhould preſent, and ſo on *alternis vicibus*, it might

have been neceſſary to determine the queſtion, Whether upon an uſurpation by the archbiſhop's predeceſſor in the ſecond turn, the Company ſhall preſent in the third turn; or ſhall wait till the fifth comes round? But as our preſent opinion is, it will not be neceſſary to determine it; for we think, that no ſuch *rota* is clearly eſtabliſhed by the act. The firſt turn depended on the comparative value of the endowments, there the act ſtops, and gives no rule for determining the ſecond turn. Where there are only two churches united, and conſequently only *two* turns, the fixing of the *firſt*, conſequentially fixes the *ſecond*; but that is not the preſent caſe. This is a ſingular inſtance out of thirty-four unions, of uniting more than two pariſhes. The words of the general rule do not reach this caſe, which probably was forgot, and certainly not expreſſed in the act. There being then no poſitive rule for fixing the ſecond turn, let us conſider what could have been done, in caſe the right had been diſputed in 1693. It might perhaps have been determined by analogy to the rule for the firſt turn; by analogy to the union of two churches, where the preſentations are alternate; by analogy to preſentation by parceners, or tenants in common, of one advowſon; or they muſt have reſorted to equity, or perhaps to parliament to ſettle it. Still the rule muſt have been uncertain, and arbitrary. They therefore very wiſely agreed it, in 1693, which agreement we collect from the acquieſcence; though what was the rule by which that agreement was framed, does not appear. There is no reaſon to ſuppoſe, that it either was, or ought to have been, ſettled by the value in the king's books, upon which the defendant reſts his plea. That could not be the rule, even in the firſt preſentation; for the words of the act are, "thoſe churches where endowments *are* of the greateſt value;" referring to the time when the act was made. The value in the king's books, is never the ſtandard of private, but only of public rights. Thus, in 17 *Eliz.* c. 28, ſubſidies are to be rated, according to the value by the exchequer records; and by the general ſtatute of union, 17 *Car.* 2. c. 3, the right of patronage is ſettled, according to the real value of the living; but the king's rights are ſaved, according to the value in the king's books. And the ſame diſtinction occurs in the very next clauſe of the ſtatute now under conſideration. Perhaps the *rota* was ſettled in 1693, according to the real value of the livings, at the time of the union; or according to the order in which the pariſhes are named in the act; or becauſe the archbiſhop's church was rebuilt, and the Company's not; or becauſe the archbiſhop's two livings put together, are more than double to that of the Company's; or from deference to the archbiſhop's ſtation; or from other cauſes. But agree they moſt certainly did. The Company with-

withdrew its claim, gave the archbiſhop the advantage, and ſuffered him to collate in the ſecond turn, as well as the firſt, without any diſpute; and the archbiſhop ſhall not now be admitted to controvert the acts done by his predeceſſor, in right of his ſee. This acquieſcence is an evidence of an agreement on both ſides, which neither ſhall now contradict. We therefore think, that the defendant *Backhouſe* has made out no title by his plea; and this being the caſe, it is immaterial how regular the replication and traverſe may be. But the plaintiffs ſeem to have judged rightly, in not traverſing the value of the livings, which would have been an immaterial traverſe, becauſe the value is not the criterion which governs the ſecond turn; rightly alſo, in not traverſing the uſurpation of archbiſhop Tillotſon, for that is only a conſequence that muſt reſult, or not reſult, from the right to the ſecond turn, which is therefore the proper and material thing to be traverſed. And this is not merely a traverſe of a point of law, but a law connected with fact, which is clearly traverſable. Upon the whole, we are of opinion, that there muſt be judgment for the plaintiffs.

Calland *v.* Troward, Tr. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 324.

But the royal prerogative of preſenting to a church, vacant by the incumbent being promoted to a biſhopric, does not deſtroy the effect of a prior grant of the next preſentation, by the owner of the advowſon. This was an action of covenant, and the DECLARATION ſtated, that by a certain indenture, dated 26th July, 1791, the defendant, in conſideration of 7000l. *granted, bargained, and ſold* unto the plaintiff, in fee, *the advowſon, donation, free diſpoſition and right of patronage and preſentation in, and to, the rectory of Bletchingley, in the county of Surrey*, of which the Reverend *Matthew Kenrick* was then incumbent; and by the ſame indenture, the ſaid defendant covenanted, that he was ſeized of the ſaid advowſon in fee, *without any manner of condition, contingent, proviſo, power of revocation, limitation, uſe, or truſt, or other matter, reſtraint, cauſe, or thing whatſoever, to alter, change, charge, revoke, defeat, determine, or make void the ſame*; and further, that he had good right, full power, and lawful authority to bargain and ſell, and that the ſaid advowſon were free from all charges and incumbrances whatſoever. It was then averred, that before the making of the ſaid indenture, to wit, on 30th May, 1745, Sir *K. C.* was ſeized of the ſaid advowſon, as of fee; and the church being then full of one *John Thomas*, clerk, the then incumbent thereof, the ſaid Sir *K. C.* by a deed-poll of that date, *granted unto* Matthew Kenrick, *eſq. the next preſentation of the ſaid advowſon.* That the ſaid church being ſo full of the ſaid *John Thomas*, and the ſaid *Mathew Kenrick*, eſq. being ſo entitled, *the ſaid* John Thomas *was afterwards*, to wit, *on 1ſt June, 1774, created Biſhop of Rocheſter, whereby the king, by virtue of his prerogative, became*

came entitled to preſent, and accordingly did preſent the ſaid Matthew Kenrick, *his clerk, to the ſaid vacant church*, who was duly inſtituted and inducted, and ſtill is incumbent; and the ſaid church being ſo full of the ſaid laſt-mentioned *Mathew Kenrick*, the incumbent thereof, the ſaid *Mathew Kenrick*, eſq. before the making of the ſaid indenture, to wit, on 11th day of Auguſt, 1777, by a certain indenture, under ſeal, *granted and aſſigned* unto the ſaid *Mathew Kenrick*, the incumbent, the *ſaid next preſentation*, by virtue whereof the ſaid laſt-mentioned *Matthew Kenrick* became, and is, poſſeſſed and entitled to the next preſentation, contrary to the form and effect of the ſaid indenture and of the ſaid covenant of the ſaid defendant, in that behalf, and ſo, &c. aſſigning the breach in the uſual form. To this declaration there was a general demurrer. By the Court (after argument)—The merits of this demurrer depend upon the queſtion, Whether the grant of the next preſentation, donation, and free diſpoſition of and to the rectory of Bletchingley, is either ſatisfied or diſappointed, by the next preſentation happening to be a prerogative preſentation, on an avoidance in conſequence of the incumbent being made a biſhop? It is ſaid, that the grant being of the next preſentation, the grantee can take nothing but the next preſentation, and conſequently if he cannot take that, he can take nothing. It is ſaid likewiſe, that the *next* is the *firſt*, and that the grant of the *next* is not a grant of the ſecond, or that which is not the next, and literally it certainly is not; but the language of a deed is to be expounded between the parties to it, and with reference to the ſubject-matter of it. As between the grantor and grantee (where every thing is to be taken againſt the grantor, that his grant may take effect), is not this a grant of the firſt preſentation, which it belonged to the owner of the inheritance of this advowſon to make, and which he could lawfully, or at leaſt could by poſſibility, make? The whole title being by law ſubject to a prerogative preſentation paramount, or rather collateral, to it, which ſuſpends the effect of it, and prevents it from being productive for a time, and which is founded on the general law of the land, of which all take notice, and by which all are bound; could this prerogative preſentation have been in the contemplation of the parties to this contract, unleſs for the purpoſe of being tacitly excepted out of it? And ſhall the general law of the land, contrary to one of its moſt eſtabliſhed maxims (1), work to the prejudice of the grantee, by a ſtrict and literal expoſition of the words of the grant? Grant *imports covenant*; and ſhall the grantor be conſtrued to have contracted,

(1) *Lex nemini facit injuriam.*

and

and bound himſelf to do that which by no poſſibility he could do? To grant that which by no poſſibility he could have to grant, and which both parties knew at the time of the grant, that by no poſſibility he could have? A man may certainly take upon himſelf to grant that intereſt, which is not in him, which he has not to grant; but ordinarily it will be an intereſt of ſuch a nature, that by poſſibility he might have it. It was argued, that the grantor of the next preſentation might, by uſing other words, have effectually granted the next preſentation which it ſhould belong to the owner of the inheritance to make: ſuppoſe he had ſaid, *his* next preſentation, inſtead of *the* next preſentation; no circumlocution could expreſs with more certainty what it was that he meant to grant: we are then to examine the difference between the effect of the word *his*, and that of the word *the*; we admit that the difference would be of great importance in ſome caſes. If, for inſtance, in an action of treſpaſs for taking goods, the plaintiff were to ſtate in his declaration, that the defendant had taken *the* goods, inſtead of *his* goods, it would be a fatal objection on the record, becauſe it is neceſſary, in ſuch an action, for the plaintiff to ſhew that his goods have been taken; but if a man bargains and ſells *the* goods deſcribed in the bill of ſale, it will amount to the ſame thing as if he had ſaid *his* goods. It is certainly true, that deeds are to be expounded with more ſtrictneſs than wills, or other writings framed with leſs ſolemnity; but this ſtrictneſs chiefly regards the technical ſenſe of law terms: it never was the rule of conſtruction of deeds, that the words were to be taken in their literal or grammatical ſenſe, if the plain intent and meaning of the deed demanded that they ſhould be underſtood in any other ſenſe which the words would bear. It muſt be admitted, that the expoſition of this grant of the *next* preſentation attempted by the defendant, receives great countenance from the caſe of *Woodley* v. *the Biſhop of Exeter*, *Cro. Jac.* 691, and in *Winch.* 94. There the plaintiff intitled himſelf by a grant of the next avoidance of the church: the incumbent was created a biſhop, and had a *commendam* for ſix years; and according to the report of the caſe in *Winch*, after the ſix years the king preſented, and then the incumbent died, whereby the church became void, and the plaintiff preſented. *The Court*, viz. Lord Chief Juſtice *Hobart*, Mr. Juſtice *Winch*, and Mr. Juſtice *Hutton*, held, that when the incumbent is created a biſhop, if the grantee of the next avoidance do not then preſent, he hath loſt his preſentation, for he ought to have *the next* avoidance, and can have no other, and that if the next avoidance ſhould be taken from him by a former title (except in dower only), ſtatute, or by any other title whatever, he hath loſt it for ever;

ever; for he cannot claim any by the grant but the next; and they denied the caſe put by Lord *Coke*, Lit. 379. *a.* that if one deviſeth the third avoidance and dies, and the feme recover the third, the deviſee ſhould have the fourth: according to the report in *Croke*, *Hobart*, J. ſaid, that the preſentee of the king being in the next turn after the grantor, the grantee hath no remedy, but muſt ſuffer the prejudice by reaſon of the prerogative. In *Winch*'s report of this caſe, *Bro. Abr.* Tit. *Preſent*, pl. 52. is cited, "if a man grant the next preſentation to *A.* and afterwards, and before avoidance, he grants the next preſentation to *B.* the ſecond grant is void, for it was granted over by the grantor before, and the ſecond grantee ſhall not have the ſecond preſentation, for the grant does not import that." This caſe is certainly law: every grant may be defeated by an elder title: perhaps dower is an elder title; and therefore we are not bound to maintain the caſe in *Co. Lit.* which is denied in *Woodley* v. *the Biſhop of Exeter*, to be law. If a man has not in him, in point of title, the thing which he grants, it is apparent that his grant cannot take effect: the fallacy of the argument is in the application of this doctrine to the caſe of a prerogative preſentation intervening, which ought not to be conſidered as a preſentation by an elder title, but as ariſing out of a prerogative right, collateral to the title, operating not to defeat, but to ſuſpend the title, leaving every thing derived out of the title, or in any manner connected with it, in *ſtatu quo*. The king preſents, not by reaſon of title to the advowſon, but *ratione prerogativæ ſuæ*. Theſe obſervations furniſh an anſwer to the caſe of *Woodley* v. *the Biſhop of Exeter:* but *Winch*, who argued that caſe, puts a caſe which he admits to be law; and which is of itſelf ſufficient to overturn that caſe: "I grant, ſays he, that if two co-parceners had an advowſon, and the eldeſt preſented, and then ſhe granted the next avoidance, that in this caſe the grantee ſhall have the next, which may be granted, and the reaſon is, becauſe ſhe may not diſpoſe of the eſtate to another," in order to reach the concluſion, that the grantee ſhall have the next which the eldeſt could grant, it will be neceſſary to conſtrue the grant of the next avoidance, to be not literally a grant of the next avoidance, but of the next to which the grantor could lawfully preſent: this conſtruction muſt be grounded upon the intent of the parties, and upon theſe rules ſtated by Lord *Coke*, *Co. Lit.* 183. *Quælibet conceſſio fortiſſime contra donatorem interpretanda eſt, et legis conſtructio non facit injuriam.* If we inquire into the effect of a prerogative preſentation upon the title of the advowſon, independent of the queſtion of conſtruction of the grant of the next preſentation, with which it is entangled in this caſe. We ſhall find that a prerogative preſentation to a church of which the advowſon is in common, has not in practice paſſed for the turn of the

otherwiſe

otherwiſe rightful patron: inſtances have occurred in London, where the union of churches has occaſioned a diſtribution of turns to preſent; and we all remember the caſe of *The Grocers Company* v. *the Archbiſhop of Canterbury*, 2 *Black.* 770. The point was ſolemnly adjudged. In that caſe, all the principles which govern this caſe, except as to the conſtruction of the grant, are recognized.—There muſt be therefore judgment for the plaintiff.

Troward v. Cailland *in error*, B.R. M. *Ter.* 36 Geo. 3. 6 *Ter. Rep.* 439. affirmed on error, in *Dom. Procer.* May 16, 1796, 1 *Ter. Rep.* 778.

To reverſe the above judgment of the court of common pleas, a writ of error was brought in B.R. and the caſe was argued there: after which the court unanimouſly confirmed the judgment of the common pleas.—Lord *Kenyon*, Ch. J. This caſe may be diſtinguiſhed from that of *Woodley* v. *the Biſhop of Exeter*, in *Winch* (1): that was merely a gift of the next turn; and if that turn were taken by ſome other perſon, the gift was defeated; but this was a grant for what the law calls a valuable conſideration; and it was not intended that the deed ſhould be fruſtrated by the prerogative of the crown interfering. It was a maxim adopted by Lord *Coke*, that the words of a deed ſhould be taken moſt ſtrongly *contra proferentem:* here the grantor intended to convey to the grantee an abſolute right. It was an intention that he might lawfully carry into execution; and we ſhould not give effect to the legal intention of the parties, if we did not decide in favour of the defendant in error. The only thing that ſeems to be in our way is the caſe in *Winch*; and that, for the reaſon already given, does not controul our judgment in the caſe. *Aſhhurſt*, J. Of the ſame opinion. *Groſe*, J. In the caſe of *Woodley* v. *the Biſhop of Exeter*, Lord *Hobart* meant to rely on the intention of the teſtator; for he ſaid, "when he gave him the firſt, it is idle to ſay that he ſhall have the ſecond, for that departs from the meaning of the words; and in every grant the law implies *quantum in ſe eſt*, and no man may ſay that the deviſor did intend to warrant that from ancient titles." So that that caſe is diſtinguiſhable from the preſent; for this was the caſe of a purchaſe, and the grantor intended to warrant the preſentation againſt all other titles. Beſides which, Lord Chief Juſtice *De Grey*, in 2 *Bl. Rep.* 774, ſpeaking of the caſe of *Woodley* v. *the Biſhop of Exeter*, ſaid, "that caſe is not clearly ſettled to be law: See *Dyer* 228, in marg." Now the marginal note in *Dyer* is directly

(1) His Lordſhip obſerved, that the caſes in *Winch* are in general well reported; but thought it rather extraordinary, that *Hobart* had not recorded the ſame caſe in his excellent volume of reports: He added, that in the preface to *Benloe*'s and *Daliſon*'s Reports, it ſeems as if theſe were not really the reports of Sir *H. Winch*; for it is there ſaid, "the book called *Winch*'s Reports; but improperly enough aſcribed to that learned judge:" and it appears certain that ſeveral of the caſes in that book were decided after Sir *H. Winch*'s death.

contrary

contrary to the caſe of *Woodley* v. *the Biſhop of Exeter*, and thoſe notes were added by Chief Juſtice *Treby*. That caſe is founded on a clear and undiſputed principle, that the law will not do an injury to any perſon. *Lawrence*, J. In *Winch*'s Entries, p. 877, the terms of the deviſe in the caſe of *Woodley* v. *the Biſhop of Exeter* are ſtated, "*dedit et legavit cuidam* Johanni Baſſet *filio ſuo primam et proximam advocationem prædictæ eccleſiæ de L. quæ primo et proxime contingeret poſt mortem ipſius Arthuri*;" which expreſsly confine the power of preſenting to the firſt turn; and therefore the words of that caſe diſtinguiſh it from the preſent. Judgment affirmed.

A lay patron may revoke his preſentation, and ſuch preſentation cannot be void for ſimony. Upon a bill being brought in the court of chancery, to ſet aſide the grant of an advowſon for fraud, &c. that court thought proper to ſend a caſe to the court of common pleas, for their opinion touching the effect of a certain inſtrument, revoking a preſentation to the living. The caſe ſtated, that *T. S.* being ſeiſed in fee, by leaſe and releaſe, of the 7th and 8th of February, 1764, and by fine, in conſideration of 525l. conveyed to *T. H.* and his heirs, the advowſon of *Huſbands-Boſworth*, in the county of Leiceſter. That in Hilary term, 1765, *S.* filed his bill in chancery againſt *H.* to ſet aſide the tranſaction as fraudulent. That in October following, while that ſuit was pending, the incumbent died; whereupon *S.* preſented *R.*, and *H.* preſented his brother *K.*, and the biſhop of Lincoln inclining to inſtitute either of them, each brought his *quare impedit* againſt the other, and againſt the biſhop. That in Eaſter term, 1767, *H.* and *K.* filed their croſs-bill, and on the 12th of December, 1769, while both cauſes were at iſſue, *S.* and *H.* by indenture agreed, that in conſideration of 1050l. more paid by *H.* to *S.*, and all coſts, *S.* ſhould diſcontinue his *quare impedit*, and that the original and croſs bills ſhould both be diſmiſſed; and *S.* by that indenture, grants, bargains, ſells, and confirms unto the ſaid *T. H.* and his heirs, the ſaid advowſon. On the ſame day, *S.* wrote a letter to the biſhop, acquainting him that all diſputes were at an end between him and *H.*, and that he had by indenture of that date, confirmed the title of *H.* and his heirs to the advowſon; *he therefore by this letter recalled and made void his preſentation of* R., *and deſired the biſhop to deliver up the ſame to be cancelled, and to accept* K. *as his clerk, in the ſtead of* R., *the quare impedit* brought by *S.* being then diſcontinued. And the queſtion upon this caſe was, Whether the ſaid letter, or inſtrument, was a good and effectual revocation of the preſentation in law? By the Court (after argument), There is no doubt, but that by our law, a lay patron

Rogers v. Halled and others, Mic. Ter. 16 Geo. 3. C.B. 2 *Black.* 1039.

tron may revoke his preſentation at any time. The canon law itſelf allows it under another name, by permitting the patron to *vary*. But by the common law it is expreſsly held, that the patron may revoke. Now, as to the queſtion, Whether *S.*, being no longer legal patron, could revoke his preſentation? it was an objection that did not lie in the mouth of the preſent plaintiff, who was *R.*, the clerk by him preſented; for if the legal intereſt of *S.* ceaſed by the firſt conveyance in 1764, then he had no right to preſent in 1765. If the objection ariſes from the confirmatory deed in 1769, the anſwer is, that the deed of 1764, and that of 1769, are all one tranſaction, and there is no priority between them; ſo that in this reſpect, the revocation is to the full as good as the preſentation. In regard to ſimony, there is none, this being a *bona fide* compromiſe, and not any corrupt agreement; beſides, the very eſſence of ſimony is, that it is a corrupt agreement to preſent, and here was no agreement to preſent at all. The Court further ſaid, that the preſentation was certainly revocable, by the principles of the common law; becauſe it veſted no right in any one, not even in the clerk preſented. For if the clerk had a right, the law would give him a remedy to recover it when invaded; but there is no ſpecies of common law action open or competent to a clerk, to recover a preſentation when obſtructed, but to the patron only.

Hardinge *v.* the Biſhop of Winchester, and Wakefield, Mic. Ter. 18 Geo. 3. C.B. 2 *Black.* 1162.

Where two churches are united by act of parliament, after the next avoidance of both, the patron cannot preſent to the united vicarage upon the next avoidance of one.--In *quare impedit* for diſturbing the plaintiff's preſentation to the vicarage of Kingſton-upon-Thames, and Sheen, otherwiſe Richmond, in the county of Surrey, the plaintiff declared, upon a private act of parliament, of the 9th *Geo.* 3; which act recited, that the vicarage of Kingſton comprehended the ſeveral chapelries, or curacies, of Peterſham, Sheen, alias Richmond, Kew, Eaſt Moulſey, and Thames Ditton, and the hamlets of Hook and Ham; that the plaintiff was the lay impropriator of the ſaid pariſh, and its dependencies, and patron of the ſaid vicarage. That the vicar of Kingſton had immemorially nominated to the ſaid ſeveral chapelries, or curacies, and that ſuch nominees had uſed to hold the ſame, notwithſtanding the deceaſe of the vicar, or other avoidance; but that ſuch right had been litigated, and never decided. It alſo recited divers inconveniencies which attended the then ſituation of the ſaid vicarage, and chapelries; and therefore it was enacted, that from and after *the then next avoidance* of the vicarage of Kingſton, and of the chapelry and curacy of Sheen, otherwiſe Richmond, the ſucceeding vicar of Kingſton and his ſucceſſors, ſhould

ſhould for ever hold and enjoy the ſaid vicarage of Kingſton and Sheen. And that the ſaid vicarage of Kingſton and Sheen, with the hamlets of Ham and Hook, ſhould be a diſtinct vicarage, by the name of the vicarage of Kingſton-upon-Thames, and Sheen, otherwiſe Richmond, divided and exempt from the reſt of the ſaid vicarage, and curacies, or chapelries; and that the vicar of the ſaid new vicarage ſhould, from thenceforth, be a body corporate, &c. And that the vicars of the two reſpective vicarages of Kingſton-upon-Thames and Sheen, and of Kew and Peterſham, and the curates of the perpetual curacies of Eaſt Moulſey and Thames Ditton, ſhould, from and after the next avoidance of the ſaid vicarage of Kingſton, as aforeſaid, be preſented, inſtituted, collated, and inducted, or licenſed, as other parſons, vicars, or perpetual curates, were accuſtomed to be. And that the perpetual advowſon of both the ſaid vicarages and curacies, ſhould be veſted in the plaintiff and his heirs; and that the perpetual advowſons of Kingſton and Sheen, and of Thames Ditton, and Eaſt Mouliey, ſhould be for ever united, and veſted in one and the ſame perſon, and never ſeparated or divided. The declaration then ſtated, that, at the time of paſſing the ſaid act, *George Wakefield*, clerk, was vicar of Kingſton, and held and enjoyed the curacy of Sheen, as part and parcel of the ſame. That, on the firſt of May, 1776, *George Wakefield* died, whereby the ſaid vicarage of Kingſton became vacant, for the firſt time ſince the paſſing of the act; whereupon it belonged to the plaintiff to preſent to the ſaid vicarage of Kingſton and Sheen, but that the defendants hindered him, &c. The defendant, the biſhop of Wincheſter, in his plea, diſclaimed all title but as ordinary. But the other defendant, *Wakefield*, pleaded three ſeveral pleas: Firſt, that the vicar of Kingſton had immemorially enjoyed the nomination to the chapelry of Sheen; and that the curate ſo nominated had, for a long time, viz. for 500 years, uſed to hold the ſaid chapelry, notwithſtanding any avoidance of the vicarage, by death, or otherwiſe. That, in the ſaid ſtatute, an exception is made, as to all the vicarial rights of the then vicar of Kingſton, with reſpect to the nomination of curates to the ſeveral curacies therein mentioned, in caſe of the avoidance of ſuch curacies, during his life; except only, as to the claim of right of amoving the curates from their ſeveral curacies. That, on the 1ſt of January, 1776, the ſaid *George Wakefield*, being then vicar of Kingſton, nominated the defendant to the curacy of Sheen, alias Richmond, being then vacant, to which he was lawfully licenſed, &c. and ſtill is curate, as aforeſaid. Second, that the ſaid act was paſſed, upon the petition of the lay impropriator and patron, without the participation of the vicar. And third, that the vicar of Kingſton had immemo-

rially uſed, upon any vacancy of the chapelry of Sheen, to take upon himſelf the cure, and to collect the profits thereof, until he nominated another. That the curacy being vacant at the time of making the ſtatute, *George Wakefield*, the vicar, then ſerved the cure, until afterwards, viz. on the 1ſt January, 1776, he nominated the defendant to the ſame. To the firſt plea the plaintiff demurred, becauſe, firſt, it did not ſhew how the curacy became vacant, and whether after or before the act of parliament. Secondly, it did not confeſs or deny, that, at the paſſing of the act, the ſaid *George Wakefield* was vicar of Kingſton, and held the curacy of Sheen, as parcel of the ſame; or, that the ſaid vicarage became vacant by his death; or, that the ſame was the next avoidance thereof, after paſſing of the act. And thirdly, that no material iſſue could be taken on the ſaid plea. The plaintiff alſo demurred to the ſecond plea, for the ſame cauſes. And to the third plea he replied, that the ſaid *George Wakefield* held the curacy of Sheen, as part and parcel of his vicarage, and belonging thereto. Upon the firſt argument of theſe demurrers, THE WHOLE COURT were extremely clear, that the plaintiff's declaration was ill; for that, upon his own ſhewing, the union of the vicarage of Kingſton, with the chapelry of Sheen, was not to take place according to the act of parliament, until after the next avoidance, as well of the chapelry of Sheen, as of the vicarage of Kingſton; when, and not before, it was to form a new vicarage of Kingſton and Sheen united. Now the plaintiff, in his declaration, has only ſtated an avoidance of the vicarage of Kingſton, ſince the paſſing of the act, but no avoidance of the chapelry of Sheen ſince that time, which muſt happen before the new vicarage can ſubſiſt; as, therefore, there is not, in fact, at this time, any ſuch vicarage as the vicarage of Kingſton and Sheen, no *quare impedit* will lie for a diſturbance of the right of preſenting thereto. Judgment for the defendant.

Powell v. Milburn, Mic. Ter. 13 Geo. 3. C.B. 3 *Wiſ.* 355.

In an action for money, had and received to the plaintiff's uſe, in order to try his right to *a donative church, with cure* of ſouls, the queſtions were, firſt, Whether the plaintiff, as incumbent of this donative church, is not within the ſtatutes of 13 *Eliz.* c. 12 and 13; and 14 *Car.* 2, c. 4, and obliged to comply with the requiſites therein? Secondly, Whether it was not neceſſary for him to have proved, upon the trial of the cauſe, that he had conformed to thoſe requiſites? And the caſe was as follows: *W. I.* and *E.* his wife, being ſeiſed, in right of the wife, of the advowſon, or right of donation, of the church of C. which is a donative, with *cure of ſouls*, they nominated the plaintiff *P.* thereto, in June, 1770, who was then in prieſts' orders, and had ſubſcribed the 39 articles, and the three articles in the 36th canon, at the time of his ordination; but he did not prove, upon the trial of this action, that he had ſubſcribed theſe articles

articles in the preſence of the biſhop of Durham, who is ordinary of the dioceſe in which the donative in queſtion lay; nor that he had publicly read the ſame in the church of C. with declaration of his unfeigned aſſent thereto; nor that he had ſubſcribed the declaration, or acknowledgment, contained in the ſtatute of 13 and 14 *Car.* 2, c. 4, ſince his nomination to the donative; nor had any licenſe from the biſhop of Durham, to preach, or officiate in the church of C. The general queſtion, therefore, in this caſe, was, Whether the plaintiff was in a ſituation to maintain the preſent action? And, under this general queſtion, the two particular queſtions, above ſtated, were made. THE COURT ſaid, that though their judgment would not be upon the firſt queſtion, yet they would, however, ſay ſomething concerning public and private intereſt in advowſons, benefices, and church-livings. In the caſe of a *preſentative* benefice, the patron has his private intereſt, and right of preſentation; and the biſhop or ordinary has his right of admiſſion, inſtitution, and induction of the clerk. In the caſe of the *donative*, both the private and public acts to be done are in the donor, and nothing is in the biſhop; ſo that by the donation, in this caſe, the plaintiff had induction to the church of C. But ſtill a donative hath all the properties of eccleſiaſtical benefices, eſpecially when it is with *cure of ſouls*, as this is. It is clear, by the 13 *Eliz.* c. 12, that the incumbent of any benefice, with cure, muſt be 23 years of age, in deacons' orders, and muſt ſubſcribe and read the 39 articles; that, by the 13th and 14th *Car.* 2, he muſt read the Common-prayer, ſubſcribe, &c.; and, by other ſtatutes, muſt take the oaths of allegiance and ſupremacy, &c. Theſe acts of parliament ſeem to extend to incumbents of donatives, as well as to incumbents of all other eccleſiaſtical benefices; for no perſon is to be admitted to any benefice with *cure of ſouls*, unleſs he is 23 years of age, and in deacons' orders. Could, therefore, the plaintiff have taken this donative if he had not been 23 years of age, or in deacons' or prieſts' orders, and had not read and ſubſcribed the articles? He certainly could not. And although there is the word *induction* in the latter proviſion, in ſect. 3, of the 13th *Eliz.* yet that ſtatute extends to all livings with cure, as well donative as preſentative; ſo, likewiſe, the ſtatute 13, 14 *Car.* 2, extends to both ſorts of livings, and to all chapels, and places of public worſhip. It ſpeaks of patrons, and donors; it may mean conferring, giving, collating, preſenting; and the following clauſes of the ſame act extend to deans, prebendaries, &c. ſome whereof are of private donation. But it was objected in argument, that the acts required to be done by theſe ſtatutes are againſt the right of the donor. There is, however, no weight in the objection;

becauſe the intereſt of the donor, or his right of donation, is not thereby affected; for the acts required to be done by theſe ſtatutes, only concern the intereſt and good of public policy; and as the biſhop has juriſdiction over the moral characters of incumbents, ſo theſe ſtatutes have given a check upon their political principles. If it were neceſſary for the court to give judgment upon this firſt point, the caſe in 3 *Lev.* 82, of *Carver* v. *Pinkney*, ſhews, that a ſtipendiary prieſt, or a donative, is within the ſtatutes of ſimony and of conformity. Secondly, ſuppoſing an incumbent of a donative church to be within the ſtatutes of the 13th *Eliz.* and 13th and 14th *Car.* 2, and obliged to comply with and perform the requiſites therein, the ſecond queſtion, upon which the Court now give their judgment, is, Whether it was not neceſſary for the plaintiff to have proved, upon the trial of this cauſe, that he had conformed to thoſe requiſites? It may be proper to conſider the nature of the preſent action, which is an action for money, had and received to the uſe of the plaintiff? It has been introduced, of late years, to try queſtions of this kind, as a ſort of fictitious action; and, in the preſent caſe, it was brought to try who had the right to nominate to the donative church of C.? whether Mr. *I.* in right of his wife, or the crown, or any other perſon had this right? But there was no fact propoſed to be tried, relating to the queſtion, Whether the plaintiff had performed the requiſites in the before-mentioned ſtatutes? We are all of opinion, that, in this action, it was not neceſſary for the plaintiff to enter into any ſuch proof; and we will preſume, that he conformed to all thoſe requiſites, as no proof has been offered to the contrary; for although it may be ſaid, that this is obliging the defendant to prove a negative, yet he might eaſily have brought theſe requiſites into queſtion, becauſe they are generally entered in public regiſters; and if no ſuch entries could have been found, reſpecting the plaintiff, that might have induced a ſuſpicion, that he had not performed the requiſites, and might be fit for the conſideration of a jury. However, it appears by the caſe ſtated, that the plaintiff has complied with the moſt material requiſites: that he was in prieſts' orders, ſubſcribed the articles, &c. and therefore, upon the whole, we think he is well entitled to this donative.

The K. *v.* the Marquis of Stafford and S. Giffard, eſq. Ea. T. 30 Geo. 3. B.R. 3 *Ter. Rep.* 646.

The court of king's bench granted a rule for the defendants, as being lords of the manor of S. to ſhew cauſe, why a *mandamus* ſhould not iſſue, to command them to allow, and preſent to the ordinary of the peculiar juriſdiction, the nomination of *W. M.* clerk, to be ſtipendiary prieſt, or curate of the chapel of W. in the ſaid manor of S. in order that he might obtain a licenſe from the ordinary? This application was founded on affidavits, which ſtated the uſage

to

to be as follows: that the miniſter of this chapel ought to be appointed by the inhabitants of W. having lands of inheritance within the town of W. and preſented and allowed by the lord of the manor of S. That it appeared, from an ancient roll of the manor, dated in the 6th year of *Jac.* 1, that certain proceedings had been had before the commiſſioners of charitable uſes. And that it had been agreed, that certain copyhold lands, therein mentioned, ſhould be let, &c. toward the reparation of the chapel, and the maintenance of a ſtipendiary prieſt, or curate, for the ſaying of divine ſervice, miniſtering the holy ſacraments, &c. who ſhould be from time to time choſen, nominated, and appointed, by the inhabitants of W. having land there, as aforeſaid, and preſented and allowed by the lord of the manor of S. And that the perſon ſo appointed, ſhould conform to the eccleſiaſtical government, and reſide on the curacy; and on complaint to the lord of the manor, by the inhabitants, of his non-reſidence, inſufficiency, negligence, or any other miſdemeanor, the lord of the manor ſhould give him half a year's notice to reform, and if he did not reform, ſhould preſent and allow another curate, to be nominated and appointed by the inhabitants, as aforeſaid. The roll concluded with ordering, that the lands ſhould be granted to nine perſons for the above truſts, and that other truſtees ſhould be afterwards regularly choſen in ſucceſſion. The affidavits then ſtated, that the profits of thoſe lands had, ever ſince that time, been appropriated accordingly. That, on the death of the late incumbent, in December, 1781, *W. M.* and *A. H.* were the candidates; and, in order to determine the election, a poll was propoſed by the defendants. That *M.* had 67 votes, and *H.* 29. On which the former was nominated and appointed, by a proper inſtrument. But that the defendants refuſed to allow his nomination, and preſent him to the ordinary. From the affidavits on the other ſide, it appeared, that this was, originally, a free and private chapel, built by, and belonging to, the lords of the manor of S. and is purely a donative, without the admiſſion, inſtitution, or induction of the ordinary, or any other eccleſiaſtical authority; and has not been augmented by Queen *Anne*'s bounty. That the immediate predeceſſor of the laſt incumbent, who was appointed in 1720, was conſtituted and allowed to be miniſter by the defendant's anceſtors, by a deed, which after reciting, that the major part of the inhabitants of W. having lands there, had, as much as they might or could, elected and nominated *E. H.* and had deſired them, the defendant's anceſtors, to allow him, &c. They preſented, &c. and that *H.* entered upon and performed the office without any other inſtrument. A ſimilar appointment was then ſtated for the late incumbent, in 1744.

And, with reſpect to the late election, it was ſtated, that 49 of *M*'s electors were not reſident in the town of W. but in adjoining diſtricts, within the hamlet of W. and that only four who voted for *H.* were liable to that objection. That the defendants had approved of *H*'s nomination, and allowed and preſented him accordingly; and that *M.* was a man of indecent and immoral life; that, within the laſt three years, he had been repeatedly and notoriouſly guilty of drunkenneſs, ſwearing, gaming, lewd converſation, and other immoralities; aud that he had not only neglected his duty as a miniſter, but had been actually in a ſtate of drunkenneſs while in the performance of divine ſervice. In ſhewing cauſe againſt this rule, three points were inſiſted on. 1ſt, That the defendants did not act merely miniſterially, in allowing the nomination by the freeholders; but that they had a right to approve, or reject the perſon ſo nominated, 2dly, That this benefice was purely a donative; and though the defendants, who were the patrons, could not arbitrarily reject the perſon nominated by the reſident freeholders, yet that they might reject him for any cauſe, which would be a ſufficient ground to warrant a biſhop in rejecting a perſon preſented to him, in the caſe of a preſentative benefice. And that it ſufficiently appeared by the affidavits, that *M.* was a man of ſuch an immoral character, as would have juſtified any biſhop in refuſing to admit him. And 3dly, That *M.* had another ſpecific legal remedy by *quare impedit*, which was a complete anſwer to an application for a *mandamus*. As to the firſt point, the Court ſaid, it would be too much to determine that queſtion on affidavits. As to the ſecond, if the defendants were to be conſidered as truſtees, they were in the execution of that truſt to exerciſe a proper diſcretion, and to judge whether the party were or were not *idoneus*, as a biſhop may do in the caſe of a preſentative, and may abſolutely reject the nominee on account of his being illiterate; but of this queſtion of fitneſs, he is the ſole judge, for it cannot be tried by a jury. But that as *M.* had been rejected on account of immorality, and indecent conduct, that queſtion might be properly determined by a jury; to whom he had a right to appeal on the truth of the facts alleged againſt him. If, however, theſe facts were true, the defendants might return them upon the record. And as to the third point, the court ſeemed to think, that a *quare impedit* would not lie; and therefore, as the party had no other remedy, they made the rule abſolute. But on this matter being again mentioned the next day, the Court opened the rule; and deſired that the third queſtion might be argued again. Which being accordingly done, the Court ſaid, It appears from the ancient roll referred to in the affidavits, that certain proceedings have been had before the commiſſioners of charitable

ritable uſes, reſpecting the lands appropriated to the maintenance of the curate, and therefore it ſeems as if the inhabitants have only an equitable right; if ſo, this Court cannot interfere at all, or if the inhabitants have a legal right, ſuch right may be aſſerted in a *quare impedit*. So that *quacunque via data*, the rule muſt be diſcharged. Perhaps a better remedy will be, an information in the court of chancery, in the name of the attorney-general: for a party applying for a *mandamus*, muſt make out a legal right, though if he ſhews ſuch legal right, and there be alſo a remedy in equity, that is no anſwer to an application for a *mandamus*. For when the Court refuſes to grant a *mandamus*, becauſe there is another ſpecific remedy, they mean only a ſpecific remedy at law.

Where the grant of *a rectory* by the crown, contained an exception of *all churches and vicarages* thereto belonging, a *perpetual curacy* belonging to the rectory has been held to paſs, not being included in the exception. On the trial of a *quare impedit*, at the aſſizes, a verdict was found for the plaintiffs, ſubject to the opinion of the court of C. B. upon the following caſe.—In the reign of *Hen.* 3, the rectory of C. was appropriated to the abbey of C. and from that time, to the time of the diſſolution of the abbey, the pariſh church of C. was ſerved either by ſome of the monks, or by ſome perſon whom they employed, there not appearing ever to have been a vicarage endowed. After the diſſolution of religious houſes, the abbey of C. was demiſed by *Edw.* 6, to one *Ward*, for 21 years; and in the grant, after the demiſe of the rectory, there is an exception of all woods, and underwoods, and a demiſe of the advowſon of the vicarage of the church of C. The reverſion expectant on that term for years, was ſold by Queen *Elizabeth* to *Allan* and *Freeman*; the letters patent of *Eliz.* begin, by reciting the former demiſe, and then the Queen grants the reverſion of the rectory, with the appurtenances, as before ſpecified in the patent, and the demiſe for years; after this, there is a grant of the whole rectory, with a very ample deſcription, and all general words of grant, which concludes with granting it to *Allan* and *Freeman*, in as full a manner as it was poſſeſſed by any abbot of C. This undoubtedly granted expreſsly more than was contained in the terms of the demiſe to *Ward*; becauſe it directly grants the woods and underwoods, which were excepted out of the demiſe to *Ward*. There was a vicarage belonging to the rectory of J. but none to the rectory of C. But during the time that the rectory of C. remained in the crown, an annual ſtipend of 5l. 6s. 8d. was paid by the crown to the curate. *Thomas Dickinſon* was admitted to the curacy in 1642, on the nomination of the grantees. In 1661, one *Oddie* was licenſed

Arthington and Hardcaſtle v. the Biſhop of Cheſter, and Jackſon, Ea. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 418.

to

to ſerve the curacy. Afterwards one *Turner*, was licenſed in the ſame manner, and that *Turner*, in 1708, was inſtituted to the rectory and vicarage of C. on the preſentation of Queen *Anne*, by lapſe. In 1727, on the ſuppoſed death of *Turner*, one *Humphry Dickinſon* was inſtituted to the vicarage of C. on the preſentation of King *George* 2, patron *pleno jure*. *Turner* afterwards appeared, and claimed the church, upon which *Dickinſon* gave it up. In 1737, one *Lonſdale* was nominated to the curacy by the impropriators, while *Turner* was in poſſeſſion. By a proceſs in the conſiſtory court of Cheſter, *Turner* was diſpoſſeſſed; and in 1739, *Lonſdale* was licenſed to the curacy of C. which he enjoyed till his death, in 1789; and by the death of *Lonſdale*, there is now an avoidance. Lord *Loughborough*, CH. J. (after the caſe had been fully argued) delivered the opinion of the court as follows.—In this caſe, THE QUESTION for the determination of the Court was, What paſſed by the grant of Queen *Elizabeth* to the perſons under whom the preſent parties claim? for if all the intereſt in the rectory paſſed, the curacy, which is incident to the rectory, undoubtedly paſſed along with it. It was contended for the plaintiffs, that upon the true conſtruction of the grant, no exception can be intended of the curacy; and that if ſuch exception had been inſerted in the grant, it would have been void, as repugnant to the grant itſelf; becauſe the rector of an impropriate rectory, where there is a vicarage endowed, and no perpetual curacy, is obliged by law to find a curate to ſerve the church, and give him a reaſonable allowance. He may make the beſt terms he can, but it is the duty of the biſhop, by eccleſiaſtical cenſures, to compel the performance of divine ſervice for the ſake of the church. That queſtion would lead pretty far, but it is immaterial to enter into the conſideration of it, if, on a thorough view of the grant, together with the facts of the caſe, there is no reaſon to ſay that the curacy was excepted; for that appears to us to be the true conſtruction, and confirmed by the uſage. The grant of *Eliz.* begins with a recital of the demiſe to *Ward*, but it would not be juſt to conclude, that it meant to give no more, for it is manifeſt that *Ward* had not all which the grantees afterwards had; becauſe there is an expreſs reſervation in the demiſe to him, of a part which they enjoyed; he was to have the profits of the rectory, paying a rent of 20l. *per annum* during the term; but the tranſaction with *Allan* and *Freeman* was for an abſolute ſale, at a large price paid. The grant does not ſtop ſhort; it was neceſſary to recite the term, becauſe it was a grant in fee, and the purchaſer under the crown acquired a right during the remainder of the term to the rent. It therefore begins with giving to the grantees the reverſion, after the term for years,

years; and goes on in explicit and diſtinct words, granting this and all other commodities and emoluments whatever belonging to the rectory, parcel of the poſſeſſions of the abbot of C. It mentions expreſsly the woods, underwoods, and trees, and cloſes a very long recital of the particulars, with the words *in as ample a manner and form as any abbot of the abbey of C. had poſſeſſed and enjoyed the ſame.* The general exception which follows, was to prevent dilapidations, which were at that time very common, to the deſtruction of churches. In the exception of the vicarage it is perfectly clear, that the nomination to the curacy is not in terms included; yet it was argued, that in a grant of the crown, which is to be favourably conſtrued, the court would extend the meaning to a reſervation of the nomination to the curacy, if the words of the grant could juſtify that extenſion to be made. But the words of this grant hardly juſtify ſuch an extenſion. If there had been an exception of the advowſon of a vicarage, ſpecifically named in the grant of the rectory of C. the argument would have had this ground to ſtand upon, namely, that ſomething muſt be meant to be excepted; that as in reality (there being no vicarage at C.) the only nomination which could be made was to the curacy, it muſt be implied that the curacy was meant, though improperly deſcribed as a vicarage. But that is not the caſe, the words in the grant are general, and ſufficiently anſwered if there be a vicarage belonging to either of the livings. Now to one of the livings, viz. J. there is a vicarage belonging: that fully ſatisfies the words of the exception; they are not nugatory, nor is it neceſſary in the conſtruction of them that there ſhould be an intention in the grant to make any exception whatever relative to the rectory of C. Beſides this, there are ſubſequent words in the grant, which go pretty far to ſhew that this could not be the intention; for there is a proviſion on the part of the crown, to indemnify the purchaſers from all burthens, charges, and rents, which might be iſſuing out of the object of the grant; and a particular exemption from the payment of a penſion of 4s. *per ann.* payable out of the rectory of J. to the vicar. Now the nomination to that vicarage being intended to be reſerved for the crown, in the general mention which is made of all burthens, iſſuing out of the things granted, the payment of this annual ſtipend to the vicar of J. is particularly noticed; but there is no exemption from the payment of any allowance to be made to the curate. The effect therefore of the grant would be, according to the argument, to make the grantee of the rectory ſubject in law to the payment of the curate, without giving him the power of nomination; and we ſhould intend a reſervation ſecuring the nomination to the curacy, from the fund out of which the proviſion for the curate muſt come.

This

This would certainly be contrary to good policy, and productive of miſchief, by making it queſtionable who was to maintain the curate, and leaving the eccleſiaſtical court deſtitute of the means to compel ſuch maintenance, by ſequeſtering the profits of the living. The curate alſo would be left without having any reſort to the perſon by whom he was nominated, for a proviſion for his ſubſiſtence. It is too much therefore to contend, without ſpecial words, that a reſervation ſhould be made by intendment, out of the general words of the grant, when there is no part of the ſubject-matter, nor any thing in the nature of the caſe, which would tend to induce ſuch an intendment; and when both reaſon and policy are againſt it. If this intendment were to hold, then the queſtion would ariſe, which was argued at the bar with a great deal of force, but which it is not neceſſary now to enter into, Whether ſuch a reſervation could be made? The uſage it was ſaid, ſtands very looſely on behalf of the impropriators; but it is certainly in their favour. The firſt nomination of which there is an account was made by the impropriators; how the next perſon was appointed, does not appear. The nomination of *Turner* which followed, and which is the firſt exerciſe of the right of the crown, is ſtated to have been by lapſe; from which it is to be preſumed, that the crown had no original right to nominate. The next preſentation of *Dickinſon*, in 1727, is ſtill leſs in favour of the right of the crown, becauſe it was clearly made on complete miſinformation; there was no vacancy, no avoidance, and *Turner* had ſtill the title to the living. It muſt have been made on a ſuppoſition, either that he was dead, or that there was an avoidance by ſome other means. It was a preſentation granted by the crown, in a caſe which neither entitled the crown, or any one elſe. *Turner* appeared, and *Dickinſon* gave up the church to him, and he reſumed the poſſeſſion. While *Turner* was ſo in poſſeſſion, the impropriators nominated *Lonſdale*, and on a ſuit in the conſiſtory court, the Biſhop of Cheſter affirmed their right to nominate, and *Turner* was in conſequence diſpoſſeſſed; which could not have happened, if the right had been in the crown. All, therefore, that we know of the enjoyment of the right of nomination of this curacy, from the time of the grant down to the preſent time, is, as far as it goes, in favour of the plaintiffs; and there is no inſtance of a clear right of nomination on the part of the crown. It is for theſe reaſons that we are of opinion, there ought to be judgment for the plaintiffs.

Wolferſtan *v.* the Biſhop of Lincoln and Whitehead, Tr. Ter. 3 Geo. 3. C.B. 2 *Wilſ.* 174.

The grant of the next preſentation, or of an advowſon made after the church is actually vacant, is a void grant, *quoad* the fallen vacancy, upon the ground of public utility, and the better to guard againſt ſimony; but not for the

the *fictitious* reaſon of its having then become a choſe in action; but *no lapſe* incurs *till after* induction to a ſecond benefice. In *quare impedit* to permit the plaintiff, who was the grantee of the advowſon in fee, to preſent to the north mediety of the church of Great Sheepy, in the county of Leiceſter: THE DECLARATION ſet forth *a grant* of the advowſon *made to the plaintiff* in fee by the perſons ſeiſed of it, viz. *on the 9th of November*, 1759. It then ſet forth the ſtatute 21 *Hen.* 8, c. 13, § 9, againſt pluralities; and ſtated the facts neceſſary to ſhew his right to the action, viz. that Great Sheepy is a rectory, a benefice with cure of ſouls, of above the yearly value of 8l. that *T. G.* the incumbent, *accepted and took another benefice with cure of ſouls*, namely, the living of *Seale*; and was inſtituted, admitted, and inducted in poſſeſſion of the ſame: that thereupon the plaintiff preſented *T. H.* to the rectory of *Great Sheepy*, who tendered himſelf to the biſhop, and was refuſed. The biſhop's PLEA (1) admitted the incumbency of *T. G.* and his acceptance of the living of Seale; but ſuppoſed the avoidance of his former church to have been made by his *inſtitution* to the ſecond, on the 31ſt of October, 1759, *as the plaintiff had before alleged*; and then by computing *from the inſtitution*, ſhewed that ſix months elapſed: whereupon he collated *T. W.* to it, by lapſe, on 20th June, 1760. The REPLICATION (2) ſpecified the time of *T. G's induction* to *Seale*, to have been upon 22d December, 1759; and alleged, that upon 20th June, 1760, the day when the biſhop collated his clerk *T. W.* ſix months *from the induction* of *T. G.* to *Seale* had not elapſed. The biſhop's REJOINDER inſiſted upon the lapſe incurring at the end of ſix months from the time of *T. G's inſtitution to Seale*; and traverſed his refuſal of *T. H.* before he himſelf had collated his own clerk, or that *T. H.* tendered himſelf to him *before* he had collated the other, or within ſix months after the inſtitution of *T. G.* to *Seale*. To this rejoinder the plaintiff DEMURRED, both generally and ſpecially: and the biſhop joined in demurrer.—The pleadings on the part of the incumbent were ſimilar to thoſe of the biſhop. The chief queſtion was, *Whether the church was void upon the inſtitution to the ſecond benefice*, or not before the induction to it, ſo as the biſhop could collate without notice? for if it was not void before *induction*, then the biſhop had collated two days too ſoon. The caſe underwent ſeveral very elaborate arguments on this queſtion; and alſo on an objection to the ſetting forth of the plaintiff's title; that it appeared from the day of the date of the grant in the count, that *the benefice was vacant when the grant was made*; and ſo

(1) Which was a bad one. (2) Which was an informal one.

the

the plaintiff had no ſort of right to preſent. THE COURT were clearly of opinion, that the day of the date of the deed of grant, in the count, coming under a *videlicet*, and being never taken notice of again in any part of the pleadings was totally immaterial, and ſo the plaintiff had ſhewn a good title. AND they were alſo clearly of opinion, that the church was ſo void upon inſtitution to the ſecond living; that the patron might preſent immediately thereupon if he pleaſed; but that the biſhop had no right to collate by lapſe without giving notice; but they thought that lapſe would run from the time of induction, without notice given him, and therefore, without ſaying more, they unanimouſly gave judgment for the plaintiff (1).

The biſhop of Lincoln v. Wolferſtan, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1504. 1 *Black.* 490.

The defendants in the above caſe, afterwards brought a writ of error upon the above judgment, returnable in B.R.; and it appeared manifeſt to that Court, that the *plea*, the *replication*, and the *rejoinder*, were all of them bad (2); ſo that it ſtood now upon THE DECLARATION *only*. The caſe was again very elaborately argued; AND THE COURT were extremely clear, that, as to lapſe, the avoidance of the former benefice does not take place till induction to the ſecond; and Lord *Mansfield* and Mr. Juſtice *Wilmot* both ſaid, that this was a fact ſo ſettled, that it ought not now to be diſputed (3). THE COURT were, alſo, equally clear, that a grant of a next preſentation, or of an advowſon, made *after* the church is *actually* fallen vacant, is a void grant *quoad* the fallen vacancy (4). But they thought, that *the fact* was not ſufficiently aſcertained upon theſe

(1) Before the judgment was given in the above caſe, the defendants moved for leave to amend their pleas, in order to have put their defence upon the plaintiff's defect of title, and not upon lapſe of time; but the court refuſed it, becauſe it was a total changing of their defence, and was not like an amendment, but was making new pleas, 3 *Wilſ.* 201.

(2) The court were of opinion, that the time of inſtitution was not materially averred in the rejoinder, being only under a *ſilicet*, and that the *plea* was bad, by not confeſſing, traverſing, or avoiding the fact ſaid in the declaration, that the living became void the 22d of December; but merely ſtating a new fact, the vacancy by inſtitution, on the 31ſt of October, *as the plaintiff had before alleged*, whereas he alleged no ſuch thing, 1 *Black.* 493.

(3) *Wilmot*, J. obſerved upon the firſt argument, that though the patron has ſix months from the induction to preſent, ſo that no lapſe ſhall incur within that ſpace of time, yet he may, if he pleaſes, preſent before the induction.

(4) Lord *Mansfield*, and *Wilmot*, J. both ſaid, that the true reaſon why a grant of a fallen preſentation, or of an advowſon *after avoidance*, is not good, *quoad* the fallen vacancy, is the public utility, and the better to guard againſt ſimony; not for the fictitious reaſon of its being then become *a cooſe in action*.

pleadings:

pleadings: for though it appears clearly enough, "that the grant was made on the 9th of November, 1759," ſtill it does not appear "at what time *T. G.* was *inſtituted* to the ſecond benefice;" conſequently the objection cannot be let in, "that it was vacant when the grant was made." It is no where averred, "that the grant was ſubſequent to the avoidance," nor is there any thing that appears upon the pleadings, ſufficient to ſupport the objection. THEREFORE they affirmed the judgment, unleſs cauſe —. Afterwards it was attempted to be ſhewn, that "if a proper time be alleged, where the preciſe exact time is the giſt of the action, the day under the *ſilicet* is then material." But THE COURT were ſtill of opinion, that this objection could not be got at upon theſe pleadings; for all the pleadings are bad, except the plaintiff's declaration, which is good. The whole ſtands therefore *upon the declaration only*; which ſtates the conveyance of the right to the plaintiff to preſent, to be by a grant made on the 9th of November, and upon the face of it ſhews a good title in the plaintiff to preſent; which ſtands alone and unanſwered. The plea means, indeed, to put the matter upon the queſtion, "Whether the ſix months ſhould be computed *from the inſtitution*, or from *the induction?*" But the plea, and likewiſe the rejoinder are both *out of the caſe*; for they are both of them bad, and being bad, there is a total end of them, to every intent and purpoſe whatſoever. You cannot therefore extract from them a fact to deſtroy the plaintiff's title; for they are nullities, and juſt as much ſo as if they had never been pleaded at all. *Per Cur.* Judgment affirmed.

Barret, *& al. v.* Glubb, *& al.* Hil Ter. 16 Geo. 3. C. B. 2 *Black.* 1052.

But although a grant of an advowſon, made after the church has actually fallen vacant, is void, *quoad* the fallen vacancy, yet it is good as to the advowſon itſelf, unleſs it be a corrupt purchaſe, as appears from the following caſe:— On a caſe ſent out of chancery, on a queſtion, Whether the preſentation was void, as being on a ſimoniacal contract? the facts ſtated were, that the plaintiff having notice that *Charles Morgan*, clerk, then incumbent of the rectory of Higham, in the county of Somerſet (which is a rectory with cure of ſouls), was on his death-bed, and that it was uncertain whether he would live over the night, purchaſed the advowſon of the defendants. The incumbent died the next day, and the purchaſer preſented the plaintiff as his clerk, upon that avoidance. The queſtion was, Whether the ſaid preſentation was void, as being on a ſimoniacal contract? BY THE COURT (after argument), An advowſon is a temporal right, not indeed *jus habendi*, but *jus diſponendi*. The exerciſe of that right is by preſentation, the right itſelf is a valuable right, and therefore an advowſon is held

held to be aſſets, in caſe of lineal warranty; it is real aſſets alſo in the hands of the heir, and the truſtee or mortgagee of an advowſon, are bound to preſent the clerk of the *ceſtui que truſt*, for the mortgagor. Thus far it is a valuable right, and properly the object of ſale. But the exerciſe of this right is a public truſt, and therefore ought to be void of any pecuniary conſideration, either in the patron or preſentee. It cannot, it ought not to produce any profit; it is not veſted in guardian *in ſocage*, nor is he accountable for any preſentation made during the infancy of his ward. It is held, that an advowſon will not paſs by the words commodities, emoluments, profits, and advantages; and in *quare impedit*, the patron could not, at common law, recover damages. Simony, as ſuch, was unknown to the common law, though corrupt preſentation was; but what is or is not ſimony now, depends on the ſtatute of the 31ſt. *Eliz.* c. 6, which did not adopt all the wild notions of the canon law, but has defined it to be a *corrupt* agreement to preſent. *Now no conveyance of an advowſon can be affected by this act, unleſs ſo far as it affects the immediate preſentation, and therefore a ſale of an advowſon, the church being actually vacant, is ſimoniacal and void, in reſpect to the preſent vacancy.* But it has never been thought, that the purchaſe of an advowſon, merely with a proſpect, however probable, that the church would ſoon become void, was either corrupt or ſimoniacal; though, by common law, if a clerk, or a ſtranger with the privity of the clerk, contracts for the next avoidance, the incumbent being *in extremis*, it was held to be ſimoniacal. The preſent caſe was the purchaſe of an advowſon in fee, and no privity of the clerk appears. The church was not actually void, but in great probability of being ſo, which, however, was by no means equivalent to a certainty; we ſhould, therefore, go beyond every reſolution of our predeceſſors, to determine this to be ſimony. For ſuppoſe this had been the purchaſe of a manor, with an advowſon appendant, and the incumbent being *in extremis*, What muſt be done if the preſent caſe be ſimony? Muſt we have declared the appendancy to be ſevered, or that the whole manor was purchaſed corruptly for the ſake of the advowſon? The Court therefore certified their opinion that the preſentation was not void, it not appearing to them to have been made upon a ſimoniacal contract.

Affidavit.

Affidavit to hold to Bail.

IF the defendant is arreſted in a *qui tam* action on an affidavit which entitles the cauſe, he may be diſcharged on common bail.—This was an action for penalties on the lottery-act, 35 *Geo.* 3, c. 36, and the defendant was arreſted on an affidavit entitled "*R. King*, q. t. v. *Cole*," on a motion to diſcharge the defendant out of cuſtody on filing common bail, on ſeveral objections; the firſt of which was, that the affidavit was entitled in a cauſe before any cauſe exiſted: the court without going into the other objections held the firſt to be fatal. R. King, q. t. v. Cole, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 642.

It has been decided under the lottery-act, 27 *Geo.* 3, c. 1, that the plaintiff ought to make an affidavit previous to the ſuing out of the writ, ſpecifying the amount of the penalties ſued for, and ſuch amount ought alſo to be ſpecified in the firſt proceſs (1). This was an action brought to recover certain penalties under the lottery-act, 27 *Geo.* 3. c. 1, the writ was a common bill of Middleſex in debt, not ſpecifying the amount of the penalties, nor giving the defendant any information that the action was commenced on the lottery-act. Nor was there any affidavit made previous to the ſuing out of the writ. But the penalties ſued for were ſtated in the declaration, which the defendant took out of the office in the ordinary courſe. He then obtained a rule to ſhew cauſe, why the bill of Middleſex ſhould not be quaſhed, and the ſubſequent proceedings ſtayed for irregularity; on the ground, that previous to the ſuing out of the writ, the plaintiff ſhould have made an affidavit, ſpecifying the amount of the penalty ſued for, or that it ſhould have been ſtated in the bill of Middleſex itſelf. After hearing counſel on both ſides, the Court were unanimouſly of opinion, that the act of parliament is imperative, that the amount of the penalty ſued for ſhall be King, q. t. v. Horne, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 349.

(1) The annual lottery acts now reſtrain perſons from ſuing for the above penalties, except in the name of the attorney-general, or ſome officer appointed by him: and it is alſo expreſsly enacted by theſe acts, that the informer ſhall not arreſt the body of the defendant, unleſs the amount of the penalty is inſerted in the writ, or an affidavit thereof is previouſly made and filed. See ſections 38th and 39th of the annual lottery acts.

ſpecified in the firſt proceſs; and that as the plaintiff had not purſued the regulation of the act, the proceedings could not be ſupported. The ſtatute has alſo directed that an affidavit ſhall be made, though perhaps the plaintiff may waive holding the defendant to bail. There is no diſtinction in the act, between bailable writs and thoſe which are not ſo; but the words, "the firſt proceſs ſpecifying therein the amount of the penalty ſued for, &c." relate to the whole of the antecedent part of the clauſe. And this regulation ſeems founded in reaſon, that it might be notorious on what account the informer ſued; ſo that it ſhould not afterwards be in his power to compromiſe with the defendant, and deprive the king of his ſhare of the penalties. Therefore the rule was made abſolute.

King, *q. t. v.* Pacey, Hil. Ter. 36 Geo. 3. C.B. 2 *Hen. Black*, 661.

But the laſt caſe ſeems to have been overruled in C.B.—This was an action of debt for the penalties of the lottery-act, 27 *Geo.* 3, commenced by bill in B.R. and removed into C.B. by *habeas corpus*, and in which the defendant was holden to bail for 500l. A rule was obtained to ſhew cauſe why the proceedings ſhould not be ſet aſide, on two grounds: 1ſt, Becauſe *the writ did not ſtate the amount of the penalties ſued for, or the cauſe of action:* 2dly, That it did not ſtate the plaintiff to be an officer appointed by the commiſſioners of ſtamp duties. The firſt objection was founded on ſtat. 27 *Geo.* 3, c. 1; the ſecond on 33 *Geo.* 3, c. 62. The former ſtat. § 2, after giving the action, goes on to ſay, "and upon every ſuch action, &c. a *capias* or other writ ſhall and may iſſue, *the firſt proceſs ſpecifying therein the amount of the penalty or penalties ſued for, whereof an affidavit ſhall be firſt duly made and filed*, &c." The latter ſtatute enacted, ſect. 38, "that no action ſhall be commenced unleſs in the name of the attorney-general, or in *the name or names of ſome officer or officers appointed by* the commiſſioners of ſtamps:" the bill of Middleſex, on which the defendant was arreſted, ran in the following words: "to anſwer to *R. King, who is appointed by the commiſſioners of his Majeſty's ſtamp duties, to proſecute in this behalf*, as well, &c. and alſo to *a bill of the ſaid* R. *to be exhibited againſt the ſaid* William, *for* 500l. *debt*." The affidavit of the informer was, "that during the drawing of the laſt Engliſh lottery, the above-named defendant incurred divers pecuniary penalties to the amount of 500l. by inſuring by himſelf, his clerks, or agents, divers tickets in the ſaid lottery, contrary to the form of the ſtatute, &c." In ſupport of the firſt objection, the caſes of *R.* v. *Horne*, and *Goodwin* v. *Perry*, were cited and relied on. BUT, *Per Cur.* We all think that we are not concluded by the caſe of *the K.* v. *Horne*: and that on a mere view of the ſtatute, it is ſufficient to ſtate in the writ the *ſum* which

is

is ſued for as the debt. If we go further, and hold that it is neceſſary to deſcribe this ſum as being the amount of certain penalties, we muſt go on and require the ſtatute to be particularly ſet forth. But if this had been the intent of the legiſlature, it would not have expreſſed itſelf ſo looſely in the ſtatute: we cannot therefore put that conſtruction upon it, unleſs we were forced to do ſo by the words of it: there is no hardſhip in the contrary conſtruction; for where the party has notice by the affidavit to hold him to bail, for what he is ſued, he is not miſled or taken by ſurpriſe; and the court being informed of the cauſe of action is enabled to take care of the king's ſhare of the penalties. Rule diſcharged.

And where ſeveral perſons have ſeparately incurred penalties, a ſeparate affidavit muſt be made and filed againſt each of them.—In an action brought againſt four printers of different newſpapers, for publiſhing illegal lottery ſchemes, the plaintiff filed one affidavit, in order to hold them to bail, and afterwards ſued out one writ againſt them all; but he declared againſt them ſeverally, as for ſeparate offences. Whereupon the defendants obtained a rule to ſhew cauſe why the writ ſhould not be quaſhed, becauſe the affidavit, which is the firſt ſtep to be taken under the lottery-act, could not be ſupported; the objections taken to it were, that each defendant was obliged to take a copy of the *whole*, whereas three-fourths of it did not relate to him; and that the office-copy was neceſſarily ſtamped with four ſtamps, when one would have been ſufficient, if the affidavit had affected only one defendant. After cauſe had been ſhewn, the Court were of opinion, that the affidavit could not be ſupported, for the reaſons urged by the defendant's counſel; and that they were not to be haraſſed with the unneceſſary expence of taking copies of thoſe parts of the affidavit, which related to offences not imputed to them individually. From whence it neceſſarily followed, that the writ muſt be quaſhed; becauſe the words of the act of parliament are poſitive, that no proceſs ſhall be ſued out, until an affidavit has been firſt duly made and filed. And though in ordinary caſes, a party may waive the taking advantage of any trifling irregularity in the mode of proceeding, by not objecting to it in the firſt inſtance, yet the defendants in this caſe could not waive this objection; becauſe the court are to take care that an action on a penal ſtatute, ſhall not be commenced in a mode prohibited by that ſtatute. Therefore the rule was made abſolute.

Goodwin, *q. t.* *v.* Parry, *idem.* *v.* Smith and two others, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 577.

But an affidavit to hold to bail on the lottery acts is ſufficient if it ſtate that the defendant "*inſured* or *cauſed to be inſured*," the allegation being ſufficiently poſitive.

Pritchett, *q. t.* *v.* Croſs, Hil. Ter 32 Geo. C.B. 2 *Hen. Black.* 17.

Watſon v. Shaw and others, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 654.

The defendants had been held to bail, on an affidavit made by one *M.* ſtating, that the defendants. after the making of an act of parliament in the 27th year of the reign of his preſent Majeſty, entitled, " An Act for licenſing Lottery Office Keepers, and regulating the Sale of Lottery Tickets," and during the drawing of a lottery ſo eſtabliſhed, viz. on the 14th March, 1788, and on divers other days, did take and receive of the deponent *divers ſums of money*, and in conſideration thereof, did promiſe and agree to pay the deponent *divers other ſums of money on certain events and contingencies, relating and applicable to the drawing of certain tickets, or numbers, in the ſaid lottery*; and that the defendants had thereby incurred divers pecuniary penalties to the amount of 500l. Two objections were taken to this affidavit, 1ſt, becauſe the act of parliament was miſrecited, the offences imputed to the defendants being againſt an act of the 22d of the preſent king, and not the 27th. 2dly, Becauſe the affidavit did not ſpecify the particular offence. The Court were clearly of opinion, that the firſt objection was fatal; the party was not bound to ſet forth the year in which the act paſſed, but having undertaken to do ſo, and miſrecited it, it could not be rejected as ſurpluſage; beſides, he referred to another act of parliament which had no relation to the matter. But they held that the ſecond objection was ill founded, for the party had ſtated the nature of the offence, which was all that was neceſſary.

Davis v. Mazzinghi, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 705.

The defendant was arreſted for inſuring lottery tickets, upon an affidavit which only ſtated, that he had forfeited ſuch a ſum by inſuring, &c. without ſtating that the defendant was indebted to the plaintiff, or that the debt was ſtill due. But the Court were of opinion, that the affidavit was ſufficient; for the plaintiff could not take upon him to ſwear that it was a debt due to him, becauſe any other informer might have previouſly commenced an action againſt the defendant; and as no perſon is entitled to the penalty till the proceſs is actually ſued out, it was not a debt due to the plaintiff at the time of making the affidavit; beſides, the clauſe in the act of parliament, 27 *Geo.* 3, c. 1, is very general, it only directs that the plaintiff ſhall ſwear to the amount of the penalty ſued for, without making mention of the debt, and here the plaintiff ſwore to the forfeiture, which is the cauſe of action.

Holland v. Bothmar, Ea. Ter. 31 Geo. 3. B R. 4 *Ter. Rep.* 228.

A rule was obtained to ſhew cauſe, why the defendant ſhould not be diſcharged out of cuſtody, for a defect in the affidavit on which he was held to bail. The action was brought upon the lottery-act, 22 *Geo.* 3, c. 47, to recover penalties for inſuring ſeveral tickets to different perſons; and the affidavit alleged, that the defendant had promiſed and agreed to pay thoſe ſeveral perſons divers ſums of money,

on

on certain events and contingencies relating to the drawing certain tickets or numbers, &c. without adding, that *the defendant had taken and received any money in conſideration of ſuch promiſes*; which it was ſaid was fatal. Another objection was alſo taken to the affidavit, becauſe it included ſeparate offences, by inſuring with ſeveral perſons. But after hearing counſel on both ſides, the Court thought that there was no foundation for either of the objections. That the firſt was anſwered by the poſitive words of the ſtatute; and as to the other, that ſeveral penalties for offences of a ſimilar nature, may be recovered in one action; as in the caſe of bribery, where the defendant is frequently charged in the ſame declaration with bribing different perſons. And therefore the rule was diſcharged.

A rule was made abſolute for diſcharging the defendant on common bail, for a defect in the plaintiff's affidavit to hold him to bail, which was not poſitive, as the act, 12 *Geo.* 1, c. 29, § 2, requires it to be; but only that the defendant was indebted to him in ſuch a ſum AS APPEARS by agreement bearing date ſuch a day. Lord *Mansfield* ſaid, that if this was a ſettled point it muſt be adhered to, but he owned he was not ſatisfied with the reaſon of it; for if the party had ſworn poſitively that the defendant *was indebted to him* in ſuch a ſum, his adding the words of reference would not excuſe him from perjury, if the fact ſhould be untrue. But Mr. Juſtice *Denniſon* obſerved, that vaſt numbers of ſuch affidavits had been held inſufficient, and the defendants had always been diſcharged on common bail, when the affidavits were only couched in terms of reference. The act of parliament requires poſitive oath of the debt, whereas ſuch affidavits cannot be ſaid to be poſitive oaths of it, being only expreſſed in words of reference to ſomewhat elſe, and not in terms of abſolute aſſertion.

Jennings v. Martin, Mic. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1447.

A like rule was made abſolute, and for the ſame reaſon, the words of reference in the affidavit being *as appears by a bill of exchange*, &c.

Bright v. Portier, Ea. 5 Geo. 3. B.R. 3 *Burr.* 1687.

An affidavit to hold a perſon to bail ran in theſe words: that the defendant was indebted to the plaintiffs in 200l. *upon promiſes*. This the Court held to be too general, and that the nature of the demand was not ſtated with ſufficient certainty.

Cope v. Cooke, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 467.

The defendant, who was an executor, was arreſted on an affidavit, ſtating, that he had by letter promiſed to pay the plaintiff a legacy of 100l. and that the plaintiff not receiving the ſaid ſum, cauſed ſeveral applications to be made to the defendant for payment thereof without effect; *therefore the defendant is juſtly indebted to the plaintiff in the ſum of* 100l. *for the reaſons hereinbefore mentioned.* On an objection taken to the ſufficiency of this affidavit, THE COURT ſaid, that an affidavit to hold to bail muſt be poſitive, and nothing ought to

Mackenzie v. Mackenzie, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 716.

be left to be collected by inference; but there is a difference between the practice of this court, and that of the common pleas; here the affidavit must be positive as to the debt, but there the defendant is suffered to file a cross-affidavit, and the plaintiff may afterwards file an additional one, in order to supply the defects of the first. Therefore, as no cross-affidavit is permitted to be filed in this Court, in answer to the plaintiff, it is absolutely necessary that the affidavit on which the defendant is held to bail should be positive. Now in the present case, the plaintiff does not swear that the debt is still due, it may be true that he made several applications without effect, and yet it may have been paid afterwards; this Court are so strict in construing affidavits to hold to bail, that in one instance they held an affidavit *that the defendant was indebted to the plaintiff in* 5000l. *for money had and received, and for which he had not accounted*, to be insufficient, which was a much stronger case than the present. Defendant discharged on filing common bail.

Powell *v.* Portherch, Tr. Ter 27 Geo. 3. B.R. 2 *Ter. Rep.* 55.

The defendant was held to bail on an affidavit which stated, that he was indebted to the plaintiff in so much for work and business done by the plaintiff as an attorney, *as appears by the master's allocatur*. But the Court were of opinion that this affidavit was not sufficient; because the plaintiff had not sworn that the debt was still due.

Wadham *v.* Erett, Ea. Ter. 4 Geo 3. C.B. 2 *Wilf.* 227.

A motion was made for an attachment for the non-payment of costs, according to a rule upon the plaintiff for that purpose, and the prothonotary's *allocatur*; upon an affidavit that *on or about* the 9th day of February, the deponent served the rule with the *allocatur*, and demanded the costs of the plaintiff, which he refused to pay. The Court held this affidavit to be insufficient, because the words *on or about* leave the day of the service and demand uncertain, and for any thing that appears to the contrary, it might be upon a Sunday, which is *dies non juridicus*; the Court therefore gave leave to amend the affidavit, for there is no rule to shew cause in this case; but an attachment goes at once, if the affidavit be sufficient.

The King *v.* Smithies, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 351.

On a motion for an attachment against the defendant for not obeying a rule of the court, an objection was taken to the affidavit, because it did not state that the defendant had been served with a copy of the rule personally, and that the original rule was at the same time shewn to him. And the Court being of opinion, that this was absolutely necessary, were about to discharge the rule; but it being suggested, that the defendant had been served with the rule in the regular manner, the Court gave the prosecutor an opportunity of making an additional affidavit as to that fact.

Williams *v.* Jackson, Hil.

An affidavit to hold a person to bail in these words, "that *J. J.* is justly indebted unto this deponent in the sum of

of 20l. and upwards, *according to the bill of this deponent delivered to the ſaid J. Jackſon*, which is for work and labour, &c." was objected to as inſufficient, and the Court being of opinion that the debt was not poſitively ſworn to, they diſcharged the defendant out of cuſtody on filing common bail. Ter. 30 Geo. 3. B R. 3 *Ter. Rep.* 575.

To an affidavit ſwearing that the defendant was indebted to the plaintiff *in the ſum of* 500l. *and upwards*, an objection was taken that it did not from thence appear *how the debt aroſe*, and the Court diſcharged the defendant on common bail. Cooke *v.* Dobree. Ea. Ter. 28 Geo. 3. C.B. 1 *Hen. Black.* 10.

On a motion that the defendants might be diſcharged on filing common bail, it appeared that they had been held to bail in an action of trover, upon an affidavit in which the plaintiff ſwore, "That the defendants had poſſeſſed themſelves of divers goods belonging to him, and had refuſed to deliver them up, and that *they or ſome of them* had converted and diſpoſed of them to their own uſe." It was inſiſted, that the words *they or ſome of them* were not ſufficiently preciſe to hold the defendants to bail; and if not, that the other words alone were clearly not ſufficient; poſſeſſion and refuſal being only evidence of a converſion. But the Court held, that the affidavit was ſufficient; for as the plaintiff ſwore poſitively that all the defendants had poſſeſſed themſelves of the goods, and that they had all refuſed to deliver them up, this was of itſelf a converſion; they could not have refuſed to deliver up the goods, unleſs they had been demanded, and if all the defendants did not refuſe to deliver them up, the plaintiff was perjured; the ſubſequent words, that *they or ſome of them* had converted, were ſurpluſage. Charter *v.* Jaques, Hil. Ter. 17 Geo. 3. B.R. *Coup.* 529.

But where the affidavit to hold to bail ſtated, that the defendant was indebted to the plaintiff in 23l. and upwards *in trover:* on an objection taken to this affidavit, the Court were of opinion, that it was not ſufficiently poſitive, and held that a word ſo technical as *trover*, ought not to be uſed in an affidavit to hold to bail, they therefore diſcharged the defendant on common bail. Hubbard *v.* Pacheco, Ea. 29 Geo. 3. C.B. 1 *Hen. Black.* 218.

A bond was given, conditioned for the payment of bills of exchange drawn in England on *A.* in the Eaſt-Indies, in caſe ſuch bills ſhould be returned to England *proteſted for non-payment*. The affidavit to hold the obligor to bail, after ſtating, "That he was indebted to the deponent, the obligee, in a certain ſum," ſtated alſo the condition of the bond, and, "That the ſaid bills were not paid *to his knowledge* or *belief in India*, or elſewhere, but that they were *proteſted for non-acceptance in India*, and were ſtill unpaid." On an objection taken to this affidavit for inſufficiency, the Court felt no difficulty in declaring their opinion, that the affidavit was ſufficiently poſitive ſo far as it ſtated the knowledge or belief Hobſon, *& al. v.* Campbell, Tr. 29 Geo. 3. C.B. 1 *Hen. Black*, 245.

of the deponent, that the bills were unpaid; there being authorities enough to prove that a more positive ſtatement was not required, where, from the nature of the queſtion, the party could only have a ground of belief, and could not make a direct aſſertion. But here the condition of the bond being ſet out, it appeared that the affidavit had introduced a new term, namely, that the bills were returned proteſted for *non-acceptance*, which was material, and rendered the affidavit bad; and therefore the bail-bond was ordered to be given up to be cancelled, on the defendant's entering a common appearance.

Wheeler *v.* Copeland, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 364.

In an action for double rent under the ſtatute, the defendant was held to bail on an affidavit, ſtating a notice to quit, and that the defendant held over notwithſtanding, "*by reaſon of which, and by force of the ſtatute*," an action had accrued to the plaintiff, to recover from the defendant 108l. &c. *Per Cur.* The affidavit does not ſtate poſitively that the defendant is indebted in ſo much to the plaintiff, it is only argumentative, which is not ſufficient in an affidavit to hold to bail.

Jacks *v.* Pemberton & *al.* Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 552.

An affidavit, "That the defendants were indebted to the plaintiff in 245l. for money lent by the plaintiff to the defendants for the uſe of another, and for which the defendants promiſed to be accountable, and to repay, or cauſe to be paid, *or ſecured* to the plaintiff," has been held inſufficient to hold the defendants to bail. *Per Cur.* It is not ſufficient for a plaintiff to ſwear poſitively to a debt, without ſhewing alſo the nature of that debt: the plaintiff ſwears to a debt in the beginning of the affidavit: but he then ſwears to a concluſion of law; and afterwards diſcloſes premiſes which do not lead to that concluſion: *non conſtat*, but that the money advanced by the plaintiff has been ſecured according to the contract: and if this affidavit be defective, we cannot permit the plaintiff to file a ſupplementary one; that is againſt the practice of this court.

Crooke *v.* Davis, M 11 Geo. 3. B R. 5 *Burr.* 2690.

If *debt* and *aſſumpſit* be joined together, the defendant cannot be held to bail upon the affidavit. In this caſe the Court determined an affidavit made to hold the defendant to bail, to be inſufficient for that purpoſe: it having but *one* ſtamp; and joining together an action of *debt* on bond for 800l. and an *aſſumpſit* for 150l. on promiſes; and they accordingly diſcharged the defendant upon common bail in both the actions.

Gilby *v.* Lockyer, Tr. Ter. 19 Geo. 3. B.R. 3 *Doug.* 217.

So two or more defendants in different actions cannot be held to bail upon one affidavit. On a motion to ſet aſide the proceedings in a cauſe for irregularity, it appeared that the defendant and two other perſons had been held to bail in ſeparate actions, upon one affidavit. The Court, after taking time to conſider, ſaid that the judges of the court of common

common pleas, and the barons of the exchequer, had been conſulted, and they all agreed that they never knew of its being the practice in their courts, that more than one defendant ſhould be inſerted in the ſame affidavit; and that if ſuch a practice had prevailed, it was without their ſanction or knowledge; they all diſapproved of it, and conſidered it as contrary to the meaning of the act of parliament, and a fraud upon the ſtamp duties; therefore the proceedings were ſet aſide.

The defendant, the maker of a promiſſory-note, was held to bail on an affidavit, ſtating, that *the defendant and the indorſer* were ſeverally indebted to the plaintiff in the amount of the note: the affidavit was on one ſtamp only: the maker and the indorſer were alſo included in the ſame writ with ſeveral *ac etiams:* it was moved on the behalf of the defendant, to ſet aſide the bail-bond for this defect in the affidavit; and this was oppoſed by the plaintiff on the ground that the defendant had waived the objection by puting in bail above. BUT the Court held there was a diſtinction between a mere irregularity, and a complete defect in the proceedings: that this was of the latter kind, and could not be waived by the adverſe party, though the former might: and they added, that the revenue was alſo injured by having only one inſtead of two affidavits. Huffey *v.* Wilſon, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 254.

So, where the defendant was arreſted on an affidavit, which ſtated, that "he was indebted to the dean and chapter in 35l. 3s. 4d. and was alſo indebted to Sir *M. B. Folkes*, in 48l. 8s. 6d. for coſts in certain actions commenced by them againſt the ſaid defendant," but only one writ was ſued out, that in the name of the dean and chapter of Exeter, and no proceedings except the above affidavit were had by Sir *M. B. Folkes*, a rule was obtained, calling on the plaintiffs to ſhew cauſe why the proceedings ſhould not be ſet aſide, on account of the affidavit to hold to bail embracing two diſtinct cauſes of action to two plaintiffs. *Per Cur.* The Court will not, in any inſtance ſuffer two cauſes of action to be joined in the ſame affidavit; in ſome caſes it would be a fraud on the ſtamp duties. At any rate, it is a vexatious proceeding againſt the defendant, becauſe he muſt take a copy of the whole affidavit. Dean and Chapter of Exeter *v.* Seagell, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 688.

The defendant was held to bail on an affidavit, which ſtated, that "the defendant was indebted to the plaintiff in 50l. under a certain agreement in writing, of ſuch a date, by which the defendant agreed to forfeit the ſum of 50l." A rule was obtained to ſhew cauſe why the *ac etiam* part of the writ ſhould not be ſtruck out, and the defendant diſcharged on common bail. *Per Cur.* This is in the nature of ſtipulated damages; but the plaintiff ſhould have ſhewn the breach of the contract; and not having done ſo, the defendant muſt Stinton *v.* Hughes, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 13.

be

be discharged out of custody on filing common bail; but there is no occasion to strike out the *ac etiam* part of the writ.

Long *v.* Linch, Hil. Ter. 11 Geo. 3. C.B. 3 *Wils.* 154. 2 *Black.* 740.

But where the plaintiff granted a lease of lands in Ireland to one *S.* for a term of years, and the defendant gave a bond to the plaintiff in the penalty of 5000l. conditioned that *S.* should pay the rent at the days and times mentioned in the lease. And the plaintiff afterwards brought an action against the defendants, and made an affidavit that 2,300l. was due and owing to him for arrears of rent under the lease; the Court held this affidavit sufficient to hold the defendant to bail.

Spalding & *al. v.* Mure, and two others, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 363.

The plaintiff sued out an original writ against the *three defendants*, in which was a set of counts against them, *as surviving partners of Gregory*, and another set against them in their own names only: two of the defendants were outlawed, and the defendant *Mure* was held to bail in 20,000l. for money had and received by the four partners, *Gregory* being dead. *The declaration* contained counts against the defendants in their own right, without saying that they were the surviving partners of *Gregory*; whereupon a rule was obtained, calling on the plaintiffs to shew cause why the proceedings should not be set aside for irregularity, and why an exoneretur should not be entered on the bail piece. *Per Cur. The plaintiffs have abandoned their right to bail by the variation between the affidavit to hold to bail, and the declaration*; therefore the latter branch of the rule must be made absolute on the defendants filing common bail. But we cannot set aside all the proceedings for irregularity; if the defendants think that the variance between the original writ and the declaration is fatal, they may take advantage of that on a writ of error. Formerly, such an objection might have been taken advantage of by the defendants craving oyer of the writ: but the Court have laid down a rule, that the defendant shall not have over of the writ for the purpose of setting aside the proceedings: the plaintiffs, upon this declaration, cannot go into the whole of their case: under a count for money had and received by the three defendants to the use of the plaintiff, the latter cannot give evidence of money had and received by the defendants and *Gregory*. If *Gregory*, indeed, had been alive, the defendants must have pleaded in abatement that *Gregory* undertook jointly with them, if the fact were so (1): but as *Gregory* is dead, no such plea in abatement could be put in, and the present defendants may object at the trial to any evidence being given under

(1) See p. 2. supra.

this

this declaration of promiſes made by them jointly with *Gregory*.

In an action brought by the aſſignees of a bankrupt to recover a debt, they ſwore to the debt in theſe words, (the bankrupt having refuſed to make the affidavit) "*as appears to theſe deponents by the laſt examination of the bankrupt, and as theſe deponents verily believe.*" And they alſo ſwore, that they themſelves had not received the debt, or any part of it, and that they believed it to be ſtill due. An objection was taken to the ſufficiency of this affidavit, and a motion made to diſcharge the defendant on common bail; but the Court, after taking time to conſider, were clearly of opinion, that this affidavit was ſufficiently poſitive to ſupport a demand of ſpecial bail, for the Court ought never to lay down a rule to be conſtrued to rigidly, as to put unreaſonable difficulties upon the ſuitors, and render them liable to inconveniences worſe than thoſe which the rule was intended to prevent. Barclay, *&c. al.* aſſignees, *v.* Hunt, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1992.

So, where three aſſignees of a bankrupt brought an action againſt the defendant to recover a debt, and *only one of them made an affidavit* that the defendant was indebted to the plaintiffs for goods ſold, as appeared by the bankrupt's books, *and as the deponent believed.* On an objection being made to this affidavit for inſufficiency, the Court were clearly of opinion that it was ſufficient. And they obſerved, that the conſequence of not allowing it to be good, would be to prevent the aſſignee who made it, from arreſting the defendant at all, unleſs the other aſſignees would aſſiſt him. Swayne *v.* Crammond, Hil. Ter. 31 Geo. 3. B.R. 4 *Tr. Rep.* 176.

The executor of *W. S.* brought an action againſt the defendant, to recover a debt due to his teſtator, and in order to hold him to bail, the plaintiff made an affidavit in the following words: "That the defendant is juſtly and truly indebted unto this deponent, as the ſole executor of *W. S.* his late father, deceaſed, in 1000l. and upwards, for money had and received by the defendant as receiver of the rents and profits of the ſaid *W. S.* deceaſed, as appears to this deponent to be the true balance upon the ſaid defendant's ſtewardſhip account, by him delivered to this deponent, as executor of the ſaid *W. S.* and from the ſeveral articles of diſburſement therein contained having been carefully examined with the vouchers." To this affidavit it was objected, that *the plaintiff has not added, that he* believed *the account to be true*; and the Court were of opinion, that the affidavit was for that reaſon inſufficient. The general rule is, that there muſt be a *poſitive* affidavit; the caſes of aſſignees, executors, &c. are by way of exception to that rule, and a party claiming under that exception, muſt ſhew a caſe where it has been allowed; in theſe caſes, if he ſwears that he believes it to be true, that is as much as he can do; becauſe the tranſaction Sheldon *v.* Baker, Hil. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 83.

action in general does not lie within his own knowledge, but there is no caſe where the affidavit has been allowed to be ſufficient to hold the defendant to ſpecial bail, without adding the *belief* of the party who makes it.

Roche, executor of Burnett, v. Carey, Mic. Ter. 13 Geo. 3. C.B. 2 *Black.* 850.

In the court of C.B. the affidavit to hold to bail was for 650l. due to the teſtator, *as appears by his accounts:* on its being moved to diſcharge the defendant on common bail, *the Court* permitted a ſupplementary affidavit to be produced, that *the plaintiff believed the ſaid ſum* to be due.

In what Caſes the Court will receive an Affidavit.

K. v. Harriſon, M. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 60.

It is the practice of the court to receive affidavits againſt a rule for a criminal information without any title, until the rule is made abſolute.

R. King, *q. t. v.* Cole, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 642.

And it has been decided in *R.* v. *Robinſon* (1), that the affidavits on a motion for leave to file a criminal information *ought not* to be entitled; and if they are, they cannot be received (2); but the affidavits produced on ſhewing cauſe againſt the rule, may or may not be entitled; and all affidavits made after the rule is made abſolute muſt be entitled.

Bevan *v.* Bevan, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 601.

A ſubmiſſion to an award having been made a rule of court, there being no action, a rule was granted to ſhew cauſe, why an attachment ſhould not iſſue againſt the defendant for diſobeying the award. The affidavits on which cauſe was to be ſhewn were objected to, becauſe they were not entitled in any cauſe; and it was ruled by the court, that they could not be read, for if they were falſe, the parties could not be indicted for perjury. The defendant then objected on his part to the reading of the affidavits on which the rule was founded, for the ſame reaſon, becauſe they were not entitled in any cauſe; but the Court were of opinion, that there was no proceeding in the court till the rule for the attachment was granted, and conſequently that the affidavits on which that rule was obtained need not be entitled in any cauſe.

Buggin *v.* Bennet, Ea. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2035.

In moving for a prohibition, where the want of juriſdiction appears upon the face of the proceedings, an affidavit to verify the truth of the ſuggeſtion is not neceſſary; though every ſuggeſtion which does not appear upon the face of the proceedings, but is collateral and out of them, ought to be verified by affidavit.

Rex *v.* Woodfall, Mic. Ter.

Where there is a doubt upon the judge's report, as to what paſſed at the time of bringing in the verdict, the affi-

(1) 1 *Strange*, 704.

(2) See alſo *R.* v. *Almon*, Tr. Ter. 5 *Geo* 3. 6 *Ter. Rep.* 642.

davits

davits of jurors or bye-ſtanders, may be received upon a motion for a new trial, or to rectify a miſtake in the minutes. But the affidavit of a juror, as to what he then thought or intended, never can be read. 11 Geo. 3. R.B. 5 *Burr.* 2667.

A motion was made to ſet aſide a verdict, upon the affidavit of two of the jurors, who ſwore that the jury being divided in their opinion, toſſed up, and that the plaintiff's friends won; but the Court ſaid, that they could not receive ſuch an affidavit from any of the jurymen themſelves, in all of whom ſuch conduct is a very high miſdemeanor; but that in every ſuch caſe, the Court muſt derive their knowledge from ſome other ſource, ſuch as from ſome perſon having ſeen the tranſaction through a window, or the like, and therefore the motion was refuſed. Vaiſe v. Delaval, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 11.

The Court was moved, that the *poſtea* might be amended, by inſerting the ſum of 61l. inſtead of 30l. agreeable to the real finding of the jury. It was an action of treſpaſs againſt the ſheriff of Durham, for having unjuſtly ſold a coal-keel, or lighter; it was proved at the trial, that the ſheriff had actually ſold it for 31l. but ſeveral of the witneſſes on the part of the plaintiff proved it to have been worth 60l. the jury gave their verdict for 30l. damages. And now the plaintiff produced *an affidavit made by all the jurymen*, ſaying, that they meant to give the 30l. as damages, for the ſeizing and detaining the veſſel, *over and above* the 31l. for which it appeared that the veſſel had been actually ſold; and that they conceived the prothonotary would of courſe add the 30l. to the 31l. and thereby make the whole 61l. which the jury intended to give. But the Court refuſed the application, ſaying, that it would introduce a very dangerous practice, if they were to admit ſuch an affidavit as this; they laid no ſtreſs upon its being made by all the jury, for if it could be made by all, upon the ſame principle it might as well be made by ſome; if any doubt had ariſen as to the meaning of the jury, or if they had found a ſum inadequate to the value proved, the proper time for requiring an explanation was at the trial, but it was too late now; ſuch a practice would be productive of infinite miſchief; and it was better that the preſent plaintiff ſhould ſuffer an inconvenience, than that ſuch a rule ſhould be introduced. Jackſon v. Williamſon, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 281.

The defendant's bail and ſeveral other perſons made an affidavit, that the bail entered into the recognizance at the inſtance and requeſt of the defendant's attorney, and upon his promiſe to ſave them harmleſs; notwithſtanding which promiſe, their goods had been taken in execution on a judgment upon the bail-bond, for 170l. and upwards. The bail therefore moved the court, that the defendant's attorney might be obliged to make them ſatisfaction for the value of their goods. But the Court ſaid, This is only a breach of a parol Beal v. Langſtaff, Hil. Ter. 8 Geo. 3. C.B. 2 *Wilſ.* 371.

parol promiſe, and as there is nothing criminal, we cannot interfere in a ſummary way, but you muſt bring your action. It was then moved that the bail might have the affidavit returned to them, but the Court ſaid, It has been read, and is now filed, and become a record of the Court, and therefore cannot be taken off the file.

The King *v.* Sharpneſs, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 228.

The defendant, who was keeper of a priſon, having been convicted of letting a priſoner eſcape, was brought up to receive judgment; when the counſel for the proſecution offered to read an affidavit in aggravation, which was made by a perſon who had been examined as a witneſs upon the trial. And the Court were of opinion, that the affidavit was admiſſible; and therefore permitted it to be read, but gave the defendant leave to anſwer it.

The King *v.* Wilſon and others, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 487.

An information had been granted againſt the defendants, for obſtructing an exciſe-officer in the execution of his duty, to which they ſuffered judgment to go by default. And being afterwards brought up for judgment, affidavits were read on the part of the proſecution, in order to aggravate the punihment. The counſel for the defendants wiſhed to have an opportunity of anſwering theſe affidavits, alleging, that they could not come prepared to anſwer the matter of which they could have no previous information. BUT THE COURT ſaid, It is not the practice, in general, to give the defendant an opportunity of anſwering at a future time, the affidavits produced by the proſecutor; and as far as theſe affidavits had already gone, there was no reaſon to break through the general rule in this particular caſe. When a defendant is brought up for judgment, the only object which the Court have in view, is to diſcover the real truth of the tranſaction; and it is much more probable, that that object will be obtained by the practice which has hitherto prevailed, which requires that each party ſhould come prepared to diſcloſe all the circumſtances of his caſe, than by a contrary practice, which would prove a ſource of infinite perjury. If, however, in the courſe of hearing the affidavits, the Court ſhould be of opinion that any point is not fully and ſufficiently explained, they will give the defendants an opportunity of explaining that part of the charge.

Lee *v.* Ganſel, *Cowp.* 13.

An objection was taken to the reading of an affidavit, becauſe the perſon who made it ſtood convicted of perjury, and the conviction was produced; but the Court held, that a conviction upon a charge of perjury is not ſufficient, unleſs followed by a judgment, becauſe upon a motion in arreſt of judgment, it may be quaſhed.

King *v.* Wallace, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 403.

An affidavit ſworn before the agent of the proſecutor cannot be received to ground an attachment on. A writ of *habeas corpus* had been directed to the defendant, to produce a certain perſon who was charged to be in his cuſtody; for

making a falſe return to which writ, the Court granted a rule to ſhew cauſe, why an attachment ſhould not iſſue againſt him. But it appearing, that the affidavits on which the attachment was moved for, were ſworn before the attorney for the proſecution, the Court thought they were not at liberty to receive information from any ſource ſo connected with the cauſe eſpouſed by that party. They had already ruled the ſame point in the caſe of Mr. *Smithies*, recorder of Colcheſter, againſt whom an attachment had been moved for, for non-compliance with a writ of *mandamus* to grant an inſpection of the corporation books; and the Court added, that if it were poſſible to make any diſtinction in theſe caſes, they ſhould be more ready to admit it in the caſe of a *habeas corpus*, like the preſent; becauſe the court were peculiarly called upon to preſerve the liberty of the ſubject by every means in their power; but the rule was invariable, and founded on the wiſeſt and moſt obvious principles.

If a rule to ſhew cauſe be diſcharged on an affidavit which contains an anſwer falſe in itſelf, the Court will not afterwards open the matter on an affidavit which diſproves the contents of the former one.—The defendant obtained a rule to ſhew cauſe, why there ſhould not be the like judgment as in caſe of a nonſuit, upon an affidavit which barely ſtated, in the uſual form, that the plaintiff had not proceeded to trial, after having given notice of trial in the regular courſe; which rule was diſcharged on ſhewing cauſe, upon an affidavit diſcloſing an agreement between the parties, made after the notice of trial, to diſcontinue the action on the defendant's paying the plaintiff twelve guineas. And now the Court was moved to diſcharge the latter rule, upon an affidavit of three perſons, denying the agreement *in toto*, and diſproving every fact contained in the plaintiff's affidavit. But Lord *Kenyon* ſaid, if the plaintiff's affidavit was untrue, he might be indicted for the perjury; but that that was not a ſufficient ground to induce the Court to open the matter again, as the only object of it was the coſts. And he thought, that if it was ſuggeſted at the time, that ſuch an anſwer as was made in the preſent inſtance to the rule for judgment as in caſe of a nonſuit was falſe in fact, the Court would ſuſpend their judgment in it, till the matter was examined; therefore the Court refuſed the rule.

Davis *v.* Cottle, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 405.

A criminal information having been granted againſt the defendant, he, before the trial at *niſi prius*, diſtributed certain hand-bills in the aſſize town, vindicating his own conduct, and reflecting on that of the proſecutor. This matter being diſcloſed to the judge at *niſi prius* by an affidavit, was held by him to be a ſufficient ground for putting off the trial.

The King *v.* Joliffe, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 285.

trial. And that affidavit being returned to the court of King's Bench, they granted another information upon it againſt the defendant, conſidering the affidavit taken at *niſi prius*, as taken under the authority of the court.

Agreement.

Weakly *ex dem.* *yea v.* Backnell, Mic. Ter. 17 Geo. 3. B.R. *Cowp.* 473.

AN agreement in writing for a leaſe, though no leaſe was ever tendered by the leſſor or demanded by the leſſee, is a good defence to an ejectment brought by the leſſor during the term.—On the trial of an ejectment for lands in S. a verdict was found for the plaintiff, ſubject to the opinion of the Court, on a ſpecial caſe, ſtating, that on the 13th of March, 1758, *W.* by an unſtamped agreement in writing, articled to grant a leaſe to the defendant for twenty-one years from Lady-day, 1758, at the yearly rent of 220l. That the defendant had been in poſſeſſion of the premiſes ever ſince, and paid the rent according to the agreement; but that no leaſe was ever granted by the leſſor of the plaintiff, or demanded by the defendant; and that on the 13th of September, 1775, notice in writing was given to him, to quit at Lady-day, 1776. After arguing this caſe, the Court ſaid, the firſt point is, Whether this is a leaſe? Suppoſing it to be a leaſe, What would it avail the revenue? if the court of law ſays it is a leaſe, and therefore ought to be ſtamped; and a court of equity ſays it is an agreement, and ſhall be read in evidence as ſuch, which it could not be if it were a leaſe, and void within the ſtamp acts. But it is an agreement for a leaſe for twenty-one years, and the defendant has been in poſſeſſion eighteen of them. Then the leſſor of the plaintiff gives notice to quit, and brings an ejectment. He has agreed for a valuable conſideration not to give notice, and ſhall he then give notice? There might be circumſtances perhaps which might let him in to maintain an ejectment; for inſtance, if he had tendered a leaſe, and the defendant had refuſed to execute it, whereby the plaintiff had incurred a loſs; but here there is no ſuch circumſtance, and if the Court were to ſay that this ejectment ought to prevail, it would merely be for the ſake of giving the court of chancery an opportunity to undo all again. For if the leſſor of the plaintiff ſhould recover at law, equity would immediately ſet it right, and he would be obliged to pay the coſts of both ſuits; therefore let the *poſtea* be delivered to the defendant.

A paper

A paper containing words of preſent contract with *an agreement* that *the leſſee ſhall take poſſeſſion immediately*, and *that a leaſe ſhall be executed in futuro*, operates only as an agreement for a leaſe, and not as a leaſe itſelf. In an ejectment, the leſſor of the plaintiff claimed under a demiſe made to him by Lord *Abingdon*, by deed dated in 1784, where the truſt of the term was declared to be for the benefit of creditors. The defendant claimed under a leaſe, or an agreement for a leaſe, dated in 1779, which was prior in point of time to the demiſe under which the leſſor of the plaintiff claimed. The agreement, when produced in evidence, appeared to be written on paper unſtamped, and not under ſeal. It imported to be articles of agreement between Lord *Abingdon* and the defendant's father, by which Lord *Abingdon*, in conſideration of a ſum of money to be paid by *Way*, ſold him the goods at his houſe at Rycot; and the ſubſequent part of the agreement was as follows: "And further, the ſaid Earl of *Abingdon* doth hereby agree to let, and the ſaid *Richard Way* agrees to rent and take, for the term of ſeven, fourteen, or twenty-one years, in caſe the ſaid Earl ſhould ſo long live, at and for the rent of 1400l. a-year, to be paid half-yearly (the ſaid Earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary), all his eſtate, &c. at Rycot. It is agreed, the ſaid *Richard Way* ſhall enter upon all the ſaid premiſes immediately, but not commence payment of rent until Lady-day next. It is further agreed, that leaſes, with the uſual covenants, ſhall be made and executed by the parties, on or before Michaelmas next." On the trial of the cauſe, this agreement was produced as a leaſe, but it not being ſtamped, the counſel for the plaintiff contended, that it could not be read in evidence; and the judge being of that opinion, the plaintiff had a verdict. The defendant afterwards moved for a new trial, upon the ground, that though, in common parlance, this might be termed a leaſe, yet it was in law only evidence of a parol demiſe, becauſe it was not under ſeal; and that being only matter of evidence, it need not be ſtamped. After argument, THE COURT were clearly of opinion, that this agreement did not amount to a leaſe; there being an expreſs ſtipulation in it, that leaſes ſhould be drawn before Michaelmas. Therefore it was plainly not the intention of the parties, that the agreement ſhould operate as a leaſe; but only that it ſhould give the defendant a right to the immediate poſſeſſion, till a leaſe could be drawn. Had it been a leaſe, and as ſuch it was offered in evidence, we think the determination was right, that it ought to be ſtamped; for as to the argument, that the word *leaſe* is inſerted in the ſtamp-act, among other inſtruments which are all ſpecialties, and that therefore it ſhall not be intended that the legiſlature

Goodtitle *ex dem.* of Eſtwich *v.* Way, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 735.

meant to include leaſes not by deed, we do not think any ſuch intention can be inferred. The only object of the legiſlature, was to raiſe a revenue from certain things enumerated, and there is no reaſon why one of the things ſhould be charged rather than another; it is a matter of mere poſitive inſtitution, and as it falls within the words, there is nothing in the nature of the thing to take it out of them. But if we thought that this had been a ſurprize upon the defendant, and that by granting a new trial, we could enable him to make uſe of this paper as an equitable agreement, and to ſet it up as a valid objection to preclude the plaintiff from bringing his ejectment, perhaps we ſhould not refuſe it. The ground on which the defendant reſts his title is this; it is ſaid, that the leſſor of the plaintiff only repreſents Lord *Abingdon*, it being a voluntary conveyance, and is to be conſidered as a truſtee for the defendant, and as ſuch, he ſhall not bring an ejectment againſt his own *ceſtue que truſt*; but if we were to decide that, it would be going a great deal farther than has ever yet been done. The only caſes where this principle has been adopted, are, where the leſſor of the plaintiff has been clearly and unequivocally a truſtee for the defendant, ſo that it would have been of courſe for the court of chancery to have decreed a conveyance to him. It is not neceſſary for us to ſay what a court of equity might do in the preſent caſe, but thus much we may ſay, that it is not a mere voluntary conveyance to the leſſor of the plaintiff; for it is made to him as a truſtee for the benefit of creditors, and it is the ſame as if a mortgage had been made to any individual creditor, and he had brought the ejectment. In that caſe it might perhaps be contended, that as each party had an equitable claim upon Lord *Abingdon*, whoever firſt got the legal title, ought not to be diveſted of it by a court of equity; but we do not mean to give any opinion as to this. It is enough for us to ſay, that this being, at leaſt, a doubtful equity ſet up by the defendant againſt a legal title, this Court, or a judge at *niſi prius*, ought not to interpoſe; and therefore it would be nugatory to ſend it down to a new trial.

Doe *ex dem.* of Coore *v.* Clare, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 739.

An agreement reciting that *A.* in caſe he ſhould be entitled to certain premiſes on the death of *B.* would immediately demiſe the ſame to *C.* declaring, that *he did thereby agree to demiſe and let the ſame*, with a ſubſequent covenant to procure a licence to let from the Lord, operates as an agreement for a leaſe, and not as an abſolute demiſe.—In an ejectment for certain copyhold premiſes at Hendon, the leſſor of the plaintiff proved payment of rent by the defendant, and the notice to quit, and there reſted the caſe. But the defendant produced a paper-writing, written upon an agreement ſtamp, under the hand and ſeal of *Thomas Tidd*, of

of whom the leſſor of the plaintiff purchaſed, whereby it was agreed, between *Thomas Tidd* of the one part, and *T. Clare* (the defendant) of the other part (after reciting that *M. S.* widow, was ſeized, for life; and the ſaid *Thomas Tidd* had agreed with *Clare*, that in caſe he ſhould be ſeiſed of, or entitled unto, the ſaid meſſuage, &c. on the death of the ſaid *M. S.* he would immediately on her death demiſe and let the ſame to the ſaid *Clare*, on the terms and conditions thereafter mentioned), It was by the ſaid *Thomas Tidd* agreed to demiſe and let unto the ſaid *T. Clare* (the defendant) all, &c. to hold the ſame premiſes to *Clare*, from and immediately after the death of the ſaid *M. S.* for twenty-one years, at and under the yearly rent of 12l. 12s. &c. And *Clare*, thereby covenanted to take the ſaid premiſes for the time above-mentioned, and to pay the ſaid rent in manner aforeſaid; and that he, the ſaid *Clare*, before the expiration of the ſaid term of twenty-one years, would lay out 150l. in repairs, &c. &c. And the ſaid *Thomas Tidd* thereby agreed, that on the death of the ſaid *M. S.* and on his becoming entitled to the premiſes, would procure a licence to let the premiſes, and that the ſaid *Clare* (the defendant) ſhould peaceably enjoy, &c. Lord *Kenyon*, Ch. J. who tried the cauſe, was of opinion, that this inſtrument amounted to a leaſe; there being words of preſent demiſe contained in it; and therefore nonſuited the plaintiff. But, upon a motion for a new trial, his Lordſhip ſaid, that having conſulted with the other judges, he was clearly convinced that he was miſtaken in the opinion which he had held at the trial; and that they were all of opinion, that the inſtrument in queſtion was an executory agreement only, and not a leaſe, for two reaſons: 1ſt, For that if this was held to be a leaſe, a forfeiture would be incurred, which would be contrary to the intent of the parties, who have cautiouſly guarded againſt it by the inſertion of a covenant, that a licence to leaſe ſhould be procured from the lord. And, 2dly, That the ſtamp is conformable to the nature of an agreement for a leaſe, and not adapted to an abſolute leaſe. A new trial was therefore granted; and the cauſe being tried again, a verdict was found for the plaintiff.

Words in an agreement, that "A. *ſhall hold and enjoy*, &c." if not accompanied by reſtraining words, operate as words of preſent demiſe.—This was an ejectment tried before Lord *Kenyon*, Ch. J. at Appleby, wherein a verdict was taken for the plaintiff, with liberty to enter a nonſuit, if the Court ſhould be of opinion that the inſtrument, upon which the leſſor of the plaintiff claimed title, was only an agreement for a leaſe, and not an actual leaſe. The articles were as follow: "March 4th, 1783, articles of agreement between *T. S.* and *D. Jackſon*, entered into in regard to his fulling-mills, dryſalting-mills, and other conveniences

Roe *ex dem.* of Jackſon *v.* Aſhburner and others, aſſignees of T. S. a bankrupt, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 163.

for carrying on ſaid buſineſs or trades, that the ſaid mills, &c. *he ſhall enjoy*, and *I engage to give him a leaſe in* for thirty-one years, from Whitſuntide, 1784, at the clear yearly rent of 110l. to be paid by two equal payments at Martinmas and Whitſuntide following." A rule *niſi* having been obtained for entering a nonſuit, cauſe was ſhewn againſt it: and the queſtion was, Whether this agreement operated as a preſent demiſe, or was only executory? By the Court, It is of great importance to the public that ſome certain rule ſhould be laid down, and that the queſtion ſhould not be floating, Whether a particular agreement ſhould be conſidered as a leaſe, or merely as an agreement for a leaſe; and this muſt depend on the intention of the parties, as it is to be collected from the whole of the agreement. Here the words are, "*he ſhall enjoy, and I engage to give him a leaſe*, &c." And the ſingle queſtion is, *What was the intention of the parties uſing thoſe expreſſions?* was it, that this agreement ſhould confer the legal intereſt; or was it not in their contemplation that there ſhould be another inſtrument to give that legal intereſt? The latter words clearly ſhew that it was the intention of the parties that there ſhould be ſome further aſſurance. It was in *fieri* at that time; and if a bill had been filed in a court of equity for a ſpecific performance of the agreement, that court would not have turned the plaintiff round, and told him that he already had a legal and executed contract, but would have decreed a leaſe of the premiſes according to the agreement. If the former words in this contract had not been reſtrained by the engagement to give a leaſe in future, they would have operated as a perfect leaſe: but as the parties agreed, the one to give, and the other to receive, a future leaſe, I cannot conceive that this was intended to be a preſent leaſe. Where the words are, *de preſenti*, "I demiſe, &c." or an agreement, that "the party ſhall hold and enjoy," and the party is immediately put into poſſeſſion, the landlord ſhall not afterwards turn him out of poſſeſſion, and ſay that it was not a preſent demiſe; for the permitting the party to enter is ſtrong evidence to ſhew that the landlord intended to give a preſent intereſt. But where the words themſelves do not neceſſarily imply it, and where poſſeſſion is not given, and there is no other act to manifeſt ſuch an intention, then it is merely an executory contract. Now here the words themſelves import an executory agreement; for the words, "ſhall enjoy," are followed by "I engage to give him a leaſe;" therefore the true expoſition of the agreement, and of the intention of the parties ſeems to be, that this ſhould not operate as a preſent demiſe, but that there ſhould be a leaſe in future. Judgment of nonſuit entered.

It

If a tenant holds under an agreement for a leaſe at a yearly rent, whereby it is ſtipulated that the agreement ſhall continue for the life of the leſſor, and that a clauſe ſhall be inſerted in the leaſe, giving the leſſee's ſon power to take the houſe for himſelf when he comes of age: the ſon muſt make his election in a reaſonable time after he comes of age.—The plaintiff being entitled to an eſtate for life in the premiſes in queſtion, entered into the following agreement with the defendant: "March 3d, 1778, agreed this day with Mr. *Leaper Smith*, to let my houſe in the Wardwick, Derby, at the yearly rent of thirty guineas, he paying taxes; the above agreement to continue during my life, ſuppoſing it occupied by himſelf, or a tenant agreeable to me. *A clauſe to be added in the leaſe, to give my ſon a power to take the houſe for himſelf when he comes of age.*" At that time the plaintiff, *Mary Bromfield*, was under coverture, but it was admitted, that ſhe had the ſole management of her eſtate. By a leaſe, dated the 2d of January, 1770, *Mary Bromfield*, then *Mary Fox*, widow, had demiſed the premiſes in queſtion to one *John Tomlinſon*, for a term of ninety-nine years, from the 5th of April then next, if both the leſſor and leſſee ſhould ſo long live; in which leaſe there was a clauſe, that if *Samuel Fox*, the ſon of the ſaid *Mary*, when he arrived at twenty-one, ſhould be deſirous to live in the premiſes, then the leaſe ſhould be void. *Tomlinſon* died on the 4th of April, 1776, and on his death his daughter *Conſtance* continued tenant till the month of October, 1777, when ſhe died; but previous to her death, the plaintiff, *Mary*, had given her notice to quit at the next enſuing Lady-day. The premiſes continued in the poſſeſſion of her executor, who paid rent for the ſame to the plaintiff, *Mary*, up to the 5th of April, 1778; but about a fortnight or three weeks before that time, he delivered up the poſſeſſion to the defendant, in order to accommodate him, without any communication in that reſpect with the plaintiff, *Mary*. The defendant continued in poſſeſſion of the premiſes, as tenant to the plaintiff, *Mary*, under the agreement of the 3d of March, 1778. In the month of March, 1786, *Samuel Fox*, her ſon, attained twenty-one, and by a letter, dated the 2d of March, 1787, addreſſed to his mother, he requeſted her to give the defendant notice, the next Lady-day, to quit the houſe at Michaelmas following, wiſhing to reſide there himſelf; in purſuance of which requeſt, the plaintiff, *Mary*, on the 16th of March, 1787, gave the defendant notice to quit at Michaelmas then next, ſtating, that her ſon, being of age, had ſignified his deſire to have the houſe; but the defendant not complying with this notice, an ejectment was brought againſt him. And upon the trial, the plaintiff had a verdict; but ſubject to the opinion of the Court on a caſe reſerved, containing the foregoing facts.

Doe *ex dem.* of Bromfield and wife *v.* Smith, Ea. Ter. 28 Geo. 3 B.R. 2 T.R. Rep. 4 6.

And the queſtion was, *Whether the plaintiff was entitled to recover? Per Cur.* The only material queſtion is, Whether the plaintiff's ſon had ſignified his intention of reſiding in the houſe within a reaſonable time after he came of age? We are of opinion he did not; for it was nearly a year before he made his election. We do not mean to ſay, that he was bound to elect the day after he came of age: but he ſhould have done ſo in a reaſonable time, otherwiſe one party would be at liberty to avoid the agreement at any time, while the other would remain bound by it. If a year be not too much, why not a year and a half? if within a week or a fortnight, that would be reaſonable; but, without drawing the preciſe line what ſhall be reaſonable time, it is enough to ſay, that the notice in this caſe was not given in a reaſonable time. Therefore the *poſtea* was ordered to the defendant.

Hotham and two others. *v.* Eaſt-India Company, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 271.

If one covenant with another to do a certain act in conſideration of a reward, and the other prevent the ſtipulated thing from being literally performed, and accept of an equivalent, he may be ſued for the reward, and the reaſon of his non-compliance with the literal terms of the covenant may be averred.—The ſhip *York*, of which two of the plaintiffs were part-owners, and the third captain, had been freighted by a charter-party between them and the Eaſt-India Company, on a voyage from London to India, and back again. On her return home, ſhe met with a violent ſtorm off Margate, on 1ſt Jan. 1779, where ſhe was ſtranded, and ſunk under water; by this misfortune, a great part of her cargo, conſiſting of ſalt-petre was loſt; the principal part of the cargo that remained, which conſiſted chiefly of pepper, was greatly damaged by the ſea-water; but was got out of the ſhip, by perſons ſent down by the Company, and brought to London in other veſſels; where a particular proceſs was employed, at a great expence to the Company, to reſtore it in ſome degree, and render it marketable. The ſhip, after being in a great meaſure unloaded, was with much difficulty raiſed out of the water, and arrived in the port of London, with a ſmall part of the cargo ſtill remaining on board. The plaintiffs inſiſted, that ſhe had arrived at her port of diſcharge, and had performed her voyage within the meaning of the charter-party; and that, notwithſtanding the misfortune which had happened, and the loſs of part, and the damage done to the reſt of the cargo, they were entitled to be paid the freight of the goods ſaved, and the demurrage. The defendants, on the other hand, contended, 1ſt, That in the events which had happened, they were diſcharged from the payment of any freight or demurrage. 2dly, That if they were liable for any freight or demurrage, yet that, by certain clauſes in the charter-party, they were entitled to deduct

therefrom

therefrom the value of the goods loſt, the loſs upon thoſe which were ſaved in a damaged ſtate, and the expences which they had been put to in getting thoſe damaged goods to London, and rendering them marketable. A common action of covenant was at firſt brought upon the charter-party; to which the defendants pleaded; but afterwards both parties conſented to try the queſtion in diſpute between them, on the four following feigned iſſues: 1ſt, Whether the plaintiffs, were or were not entitled to any, and what, freight or demurrage, in reſpect of the ſhip and voyage in the charter-party mentioned? 2dly, Whether the plaintiffs were liable to pay or allow to the defendants, any ſum or ſums of money, in reſpect of the goods and merchandizes which had been ſhipped on board the ſaid ſhip, and which had been loſt, or not delivered to the defendants on her arrival in England? 3dly, Whether the plaintiffs were liable to pay or allow, &c. in reſpect of a certain quantity of pepper which had been ſhipped, &c. and which had been prejudiced, wet, and damnified, before the arrival of the ſhip at London? 4thly, Whether the plaintiffs ought to pay, or make ſatisfaction, to the defendants, for the expences they were at in ſaving, and bringing to London, certain goods and merchandizes which were taken out of the ſhip when ſhe was ſtranded, or otherwiſe concerning the ſaid goods? The defence on the firſt of theſe iſſues was founded on the two following clauſes in the charter-party: 1ſt, "As touching the freight to be paid or allowed by the Company, it is agreed, and the Company covenant with the ſaid part-owners, that the Company ſhall, *in caſe, and upon condition, that the ſhip performs her voyage, and arrives at London in ſafety*, and the ſaid part-owners and maſters do perform the covenants on their part, and not otherwiſe, pay the freight herein mentioned." 2dly, "It is agreed, that in caſe the ſhip does not arrive in ſafety in the river Thames, and there make a right delivery of the whole and entire cargo and lading on board the ſaid ſhip, as aforeſaid, the Company ſhall not be liable to pay any of *the ſums of money hereinbefore agreed to be paid for freight and demurrage.*" The following clauſe was the foundation of the defence on the 2d iſſue. "And if any of the homeward-bound cargo ſhall be *loſt, or undelivered into the ſaid Company's warehouſes* at the ſaid ſhip's arrival in England (except that no ſuch payment ſhall be made if there happens an utter inevitable loſs of ſhip and cargo, nor ſhall any other payment be made for ſuch goods as ſhall neceſſarily periſh, or be caſt into the ſea, for the preſervation of the ſhip and cargo, than by an average to be borne by ſhip, freight, demurrage, and cargo), the part-owners and maſters ſhall pay to the Company the prime coſt of the goods, and 30l. for every 100l. on ſuch prime coſt."—On the 3d iſſue, the defendants relied

on the following clauſes: "But if any of the homeward-bound cargo, when delivered into the Company's warehouſes in England, *ſhall be found to be prejudiced, wet, or damnified, by any occaſion or accident whatſoever*, it ſhall be lawful for the Company to refuſe ſuch goods, and in ſuch caſe the part-owners and maſter ſhall take them, and allow to the Company the ſums which they are invoiced at, with charges, cuſtoms, and duties; and in ſuch caſe the Company ſhall pay no charges or freight for the ſaid goods ſo prejudiced, wet, or damnified, unleſs in caſes of damaged pepper, which the part-owners and maſter are to allow the Company for, at the current price of ſound pepper in London, and the Company are to pay the freight and charges on ſuch pepper, as if it were not damnified. But the part-owners ſhall not be charged with any ſum of money, in reſpect of goods damaged on board the ſaid ſhip, but ſuch as ſhall, by the condition and appearance of the "package thereof, or by ſome other reaſonable proof, appear to be *ſhip-damage*; any thing herein contained to the contrary thereof in any wiſe notwithſtanding." Then comes a proviſion for paying demurrage to the owners, if the ſhip ſhould be diſpatched ſafe from the Malabar coaſt, and ſhould not make the paſſage in a limited time; and this proviſo adds, "and the owners ſhall not be reſponſible for any *damage* that may happen to the homeward-bound cargo, *occaſioned by ſuch late diſpatch.*" On the trial of theſe iſſues, the jury found for the plaintiffs on the three firſt, and for the defendants on the laſt.—The defendants, however, thought proper to move for a new trial on all of them; and after the caſe had been fully argued, THE COURT ſaid, They had no doubt, but that if the delivery at Margate was, in the contemplation of the parties, ſubſtituted for a delivery at London, it might have been averred in an action of covenant; becauſe there can be no material fact in a cauſe, which may not be put upon record, or given in evidence on the general iſſue. The Company were not liable to any imputation; the part they took, when the calamity happened, was what humanity and juſtice required, and could be of no prejudice to either ſide. The charter-party is an old inſtrument, informal, and by the introduction of different clauſes, at different times, inaccurate, and ſometimes contradictory; but like all mercantile contracts, it ought to have a liberal interpretation. *In conſtruing agreements, there is no difference between a court of law and a court of equity*; a court of equity cannot make an agreement for the parties, it can only explain what their true meaning was; and that is alſo the duty of a court of law. The jury were told at the trial, that the inſtrument muſt have a liberal conſtruction, according to the true intention; and that conſtruction was left to them,

them, more than in common caſes ought to be done; becauſe the province of conſtruing written inſtruments belongs to the Court. On the point of ſhip-damage, the learned judge who tried the cauſe had conſiderable doubts, which he ſtated fully to the jury. The Company have now thought fit to bring the caſe before the Court, but upon hearing the argument, we are clear that the verdict was right on all the iſſues. As to the firſt, *the Company, by receiving part of the cargo, have waived all objections concerning the delivery.* The principal queſtion is, *Whether the owners are to pay for the damage occaſioned by the ſtorm, which was the act of God?* and this muſt be determined by the intention of the parties, and the nature of the contract. It is a charter of freight, the owners let their ſhips to hire, and there never was an idea that they inſured the cargo againſt the perils of the ſea. The Company ſtand their own inſurers. Words muſt be conſtrued according to the ſubject-matter. What are the obligations upon the owners, which ariſe out of the fair conſtruction of this charter-party? Why, that they ſhall be anſwerable for damage incurred by their own fault, or that of their ſervants, from defects in the ſhip, or improper ſtowage, ſuch as mixing commodities together which hurt one another, &c. But if they were liable for damages occaſioned by ſtorms, they would become inſurers, not freighters; many of the difficulties which have been raiſed, are occaſioned by the multiplicity of unneceſſary words, introduced with a view to be more explicit; an effect which often ariſes from the ſame cauſe in acts of parliament. It ſeems the queſtion had occurred in the year 1759, and a clauſe mentioning *ſhip-damage* was introduced, in order to fix the riſques for which the owners were to be anſwerable; and that clauſe rides over all the former part of the charter-party. As to the other point, of *the goods loſt*, the whole is one entire contract, and muſt be underſtood in a manner conſiſtent with itſelf; for it never could be intended, that the owners ſhould be protected from the leſſer loſs, and remain anſwerable for the greater.

Maſon v. Hewat and another, Mic. Ter. 20 Geo. 3. B. R. 1 *Doug.* 296.

An agreement to accept a bill on certain conditions is diſcharged, if the conditions are not complied with.—This was an action brought againſt the defendants, who were partners, as the acceptors of ſix bills of exchange, to the amount of 3200l. The facts of the caſe were theſe; the defendant *R. H.* happening to be in the iſland of Dominica, on the 17th of April, 1778, wrote the following letter to his partner *T. H.* in London: "As our friends, *Vance*, *Caldwell* and *Vance* (who were merchants in Dominica) have made purchaſe of about 100 hogſheads of prize tobacco, and purpoſe ſhipping them, or as many of them as they can get, by this convoy, I have agreed, that on their giving you orders for

for inſurance on any part of the ſame, and ſending bills of lading conſigned to you in London, what bills of exchange they draw thereon, at the rate of 80l. per hogſhead, from ninety days to ſix months' ſight, as ſhall be determined, will be duly accepted and paid by you, and doubt not your punctual adherence thereto." On the 1ſt of May following, *Vance, Caldwell* and *Vance*, wrote to the defendants, ordering inſurance upon 40 hogſheads of tobacco, 3600l. without taking any notice of having drawn any bills. This letter was received on the 6th or 7th of July, and in conſequence thereof, *T. H.* got the ſum mentioned inſured for a premium of 303l. On the ſame firſt of May, *Vance, Caldwell* and *Vance*, wrote another letter to *T. H.* appriſing him, that they had drawn ſix bills of exchange for 3200l. in conſequence of *R. H*'s letter, payable to *Robert Vance*, and indorſed by him to the plaintiff, drawn on 40 hogſheads of tobacco. This letter was received on the 10th of July: on the 11th the bills arrived; and were preſented for acceptance, together with *R. H*'s letter of the 17th of April. *T. H.* refuſed to accept them, and after a negociation of two or three days, a memorandum was ſigned by the plaintiff, which after ſtating the bills, proceeded in theſe words: "Whereas 40 hogſheads of tobacco have been conſigned to Meſſrs. *T.* and *R. Hunt*, on account of the above bills, and they being apprehenſive that the net proceeds thereof may not be ſufficient for that purpoſe, have refuſed to accept the ſaid bills; we therefore accept the bill of lading of the ſaid forty hogſheads of tobacco, and the policy of inſurance for 3600l. to cover the ſame in caſe of loſs, being valued in the ſame policy at 90l. per hogſhead, both which we now acknowledge the receipt of, and that we will apply the net proceeds, when in caſh, to the credit of Mr. *Robert Vance*, as far as the ſaid proceeds will go in part payment of the above bills. *K. M.* for ſelf and late Co." The tobacco afterwards arriving, was received and ſold by the plaintiff, and produced only about 1400l. But the occaſion of the difference between this ſum and the valued price, in *R. H*'s letter, did not appear. Upon the trial of the cauſe, it was inſiſted, on the part of the plaintiff, that *R. H*'s letter of the 17th of April, was a virtual acceptance of the bills, and that nothing had happened to diſcharge that acceptance; that therefore the plaintiff, as the holder of the bills, was entitled to receive the difference between their amount, and the amount of the price for which the tobacco was ſold. On the other hand it was contended, that the letter did not amount to ſuch a virtual acceptance; but if it did, that the memorandum had cancelled it. The verdict was for the defendants, whereupon the plaintiff moved for a new trial; and after argument, *Per Cur.* The

defence

defence at the trial was, that the tobacco was not of the ſtipulated value, and that the *Hunts* never meant to be in advance for the drawers; and there is no doubt, but an agreement to accept may amount to an acceptance, and it may be couched in ſuch words, as to put a third perſon in a better condition than the drawer. For if one man, in order to give credit to another, makes an abſolute promiſe to accept his bill, the drawer, or any other perſon, may ſhew ſuch promiſe upon the exchange, to get credit; and a third perſon, who ſhould advance his money upon it, would have nothing to do with the equitable circumſtances which might ſubſiſt between the drawer and the acceptor. But *an agreement to accept, is ſtill but an agreement; and if it is conditional and a third perſon takes the bill, knowing of the conditions annexed to the agreement, he takes it ſubject to ſuch conditions.* Here were many things ſpecified as the conditions of this acceptance; the inſurance, the bills of lading, the conſignment, a certain number of hogſheads to be delivered, and of a certain value to be rated by the hogſhead. On the face of the agreement, it ſeems that the meaning of the parties was, that the tobacco to be conſigned ſhould be worth 80l. per hogſhead. *Prize* tobacco muſt, at that time, have meant American tobacco; and it is well known, that there is a great difference between the value of American tobacco, and what comes from the French iſlands. In this caſe, the difference is immenſe; for the produce of the tobacco conſigned, was only about 1400l. It is plain, that the *Hunts* never meant to be in advance; and *ſo great a difference in the value is ſuch a fraud, as will entitle the defendants to relief againſt the agreement.* But as to this, the reſt of the Court have doubted; chiefly becauſe there is no evidence to ſhew how the decreaſe in the value aroſe, whether from the inferiority of the quality, or the fluctuation of the market; if it aroſe from the buying up refuſe tobacco from the French Weſt-Indies, the fraud would be manifeſt. But the reſt of the Court are extremely clear, that the ſecond inſtrument made an end of the whole, and the grounds and reaſons are unanſwerable. As to that part of the caſe it ſtands thus: the *Hunts* ſay, "we are not bound;" it is an impoſition, the tobacco is of an inferior value, for the letter repreſents it as worth 80l. per hogſhead, the inſurance makes it 90l. per hogſhead; and it turns out not to be worth 40l. per hogſhead. If *Maſon* had meant to ſay, "you are liable, and ſhall pay the bills," what would his conduct have been? He would have left the policy of inſurance, and the bills of lading in their hands, and ſued them upon the acceptance. The temptation to accept was the commiſſion on the conſignment, and they were to have the ſecurity of the goods, and the

the inſurance; but the plaintiff undoes all this, and ſays, "then I will take all from you, ſecurity, commiſſion, &c." This was ſaying, "I will ſtand in your place, but not ſo as to be anſwerable for more than the produce of the tobacco." It is impoſſible that the defendants could mean to accept, without any benefit or ſecurity. We are all therefore clearly of opinion, that this made an end of the agreement.

Ayres v. Wilſon, Ea. Ter. 20 Geo. 3. B.R. 3 *Doug.* 384.

If the owners of different ſhips agree to indemnify each other to a certain amount, if any of their ſhips ſhall be loſt, and one of them ſells his ſhip, which is afterwards loſt, the others are not liable, unleſs the vendor has ſold (together with the ſhip) his intereſt in the agreement of indemnity.—In an action of debt on bond, the condition appeared to be, that the defendant and ſeveral other perſons, being owners, or part-owners, of different ſhips in the coal trade, had entered into an agreement, by which they promiſed and agreed, each with the other, and the heirs, executors, and adminiſtrators of each other (without adding *aſſigns*), that if at any time within three years, any of theſe different ſhips, being employed in the coal-trade, ſhould be taken, ſunk, burnt, or deſtroyed by an enemy, the other co-obligors ſhould, the better to enable the owner of ſuch ſhip to ſuſtain the loſs, pay the ſum of 500l. to ſuch owner *(without adding, and his aſſigns)*, ſuch co-obligors contributing thereto in equal ſhares. The condition therefore was, that the obligors, under the penalty of 500l. to be paid to *A.* as a general truſtee for all, ſhould perform and keep the agreement. The defendant then pleaded, that *D.* one of the co-obligors, and ſole owner of one of the ſhips, called the N. had ſold and aſſigned his ſhip, and all his right, title, and intereſt therein, after the date of the bond, to *W.* That none of the other ſhips had been taken, ſunk, burnt, or deſtroyed; that the defendant had performed the agreement with the owners of the other ſhips; that from the time of the date of the bond, until the ſale of *D*'s ſhip, and while *D.* had any intereſt in her, ſhe had not been taken, ſunk, burnt, or deſtroyed; and that during all that time, the defendant had performed the agreement with *D.* To this plea the plaintiff demurred generally; and, after argument, THE COURT ſaid, There was no difficulty as to the form of the action, becauſe the bond was made to a truſtee. But if the agreement was tranſferred, we have not the whole caſe upon the record. If the ſhip was ſold without an aſſignment of this agreement, *D.* had the value independant of the agreement; and therefore it remained a mere wager with reſpect to him. If *D.* really aſſigned the agreement, and was damnified by the aſſignee, calling upon him for the benefit of it, the plaintiff ought to have

have replied the fact. The Court therefore gave him leave to withdraw the demurrer, and reply, on the payment of coſts.

In an action on the caſe upon articles, ſomewhat ſimilar to the agreement in the laſt caſe, the defendant pleaded, that the plaintiff had parted with his ſhip. To this plea the plaintiff replied, that he had agreed with the purchaſer to pay him 500l. if the ſhip was loſt within three months, and therefore was intereſted. The defendant demurred to this replication; but the Court gave judgment for the plaintiff, becauſe he continued intereſted, in conſequence of his agreement with the purchaſer. Reed v. Cole, Tr. Ter. 4 Geo. 3. B.R. 1 *Doug.* 385. (n. 17.)

By an *expreſs agreement*, the obligee of a bond to ſecure an annuity, *may waive the forfeiture* for non-payment on the day, ſo as to be entitled to recover againſt the obligor; although the obligor has been diſcharged under an inſolvent debtors' act, between the time of the forfeiture, and the commencement of the action. This was an action on a bond.—Plea that the plaintiff ought not to have any execution *againſt the perſon, or perſonal eſtate, of the defendant*, except money *in the funds, or money lent upon real ſecurity only*, becauſe the debt was contracted or due before the 22d of January, 1776; mentioned in a certain inſolvent-act, and that he was in cuſtody before the 1ſt of January, and afterwards diſcharged, according to the above act, on 29th *July*, 1776.—By the *replication* it appeared, that the bond was for the payment of an annuity of 30l. *per annum*, by the defendant and another obligor, in quarterly payments, on 11th January, 11th April, 11th July, and 11th October: that on 11th *July*, 1776, 7l. 10s. for one quarterly payment, and ſo of other ſubſequent quarterly payments, on 11th October, 1776, 11th January, 1777, and 11th April, 1777, became due; *by reaſon whereof the bond became forfeited*, and ſo concluded with a verification. After this replication, there was *an entry of judgment* on the record, for want of a plea in bar to the action, but with ſtay of execution until the plea depending between the parties was determined.—Rejoinder, that before 22 *January*, 1776, 7l. 10s. for a quarterly annuity became due, whereby the bond was forfeited, and the debt accrued before 22d January, 1776. The ſurrejoinder admitted, that the 7l. 10s. was due before 11th January, 1776, but that the plaintiff at the inſtance of the defendant, *agreed* to give him day of payment till 18th April following, and that he did, at the inſtance of the defendant, *waive and relinquiſh any forfeiture of the bond*; and that the defendant by reaſon of the premiſes, *was acquitted and diſcharged from ſuch forfeiture.*—Rebutter, by which (proteſting that the ſurrejoinder was inſufficient, and that the defendant never requeſted the plaintiff to give ſuch day of payment) the defendant ſays, that the Webſter v. Banniſter, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 393.

7l.

7l. 10s. in the ſurrejoinder mentioned was not paid to the plaintiff, &c. Upon this *iſſue* was joined; the cauſe was tried, and there was a verdict for the plaintiff: afterwards judgment was moved to be arreſted, on the ground that the bond being once forfeited, the debt became abſolute, and could not be again made contingent by any waiver of the forfeiture, on the condition of payment at a future day; at leaſt it continued abſolute till the compliance with the condition, which was not till after the inſolvency; therefore the fact of the compliance with the condition after the inſolvency was immaterial, and the plaintiff ſhould have demurred to the rebutter, inſtead of joining iſſue on an immaterial fact: that the Court ought therefore to avoid a repleader.—*Per Cur.* It is a rule never to grant a repleader when the iſſue is found againſt the party tendering it.—Rule diſcharged. Afterwards the defendant being taken in execution, it was moved that he might be diſcharged out of cuſtody, on the ground, that though the defendant by imprudently taking iſſue on an improper fact, had failed in his defence to the execution againſt his perſon, yet he was clearly entitled to be diſcharged under the inſolvent-act: on the other hand, it was ſtated that it appeared at the trial, that a note had been given to the plaintiff for the payment both of the quarter due 11th January, 1776, and of that which was to become due on the next quarter-day, and that the plaintiff by taking this note, muſt be conſidered *as having agreed to give further day of payment.* Lord *Manſfield*, CH. J. ſaid, he thought the note would have been evidence of ſuch an agreement, if iſſue had been joined on that fact, and that there was no doubt but the party might waive the forfeiture, and accept what he was equitably entitled to. Rule diſcharged.

Abernethy *v.* Landale, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 539.

If an officer or ſailor, in conſideration of certain wages, and of certain ſhares of all prizes which may be taken by a letter of marque, in the courſe of a cruiſe, enters on board, and ſubſcribes certain articles, by which, among other things, it is agreed, between the captain and them, together with ſeveral other perſons, as the officers and crew of the ſhip, that they ſhall repair on board, and proceed in the ſhip, and duly ſerve in their ſeveral capacities and ſtations, in her then intended voyage from London to the coaſt of Africa; and at and from thence to ſuch place or places in America, as the maſter for the time being ſhall direct, and from thence back to the port of London, or ſome other her diſcharging-port in Great Britain; and that the wages, or monthly pay, to grow due to the officers, ſailors, and others belonging to the ſhip, for their ſervices on board during that voyage, ſhall be paid to and accepted by them in manner following, viz. one-half part thereof at the port of delivery

of the negroes in America, and the remaining part thereof, and alſo the wages which ſhould afterwards become payable, within thirty days next after the ſhip's arrival at her port of diſcharge in Great Britain: in this caſe, if the ſhip is taken before ſhe compleats her voyage, the officers and crew are not entitled to any part of their wages.—This was an action brought by the plaintiff, who had entered on board the defendant's letter-of-marque as a ſecond-lieutenant, and ſubſcribed articles of agreement to the above effect; the facts were theſe: the ſhip ſailed from London on 25th May, 1779, and afterwards took a veſſel, of which the plaintiff was appointed prize-maſter; he carried her into Liſbon, where he remained till January following, in the care of this prize and her cargo, and until the ſame were diſpoſed of by the agents of the owners of the letter of marque, and he afterwards took his paſſage to England, and arrived on the 15th of February. The letter-of-marque, on the third of September, was taken by two Spaniſh men-of-war, in her paſſage to the coaſt of Africa, after the time limited for the cruize had expired, and before her arrival at any port of delivery or diſcharge. The plaintiff therefore demanded of the defendant his wages, from the day that the ſhip ſailed, to that of his return to England, and upon refuſal brought his action; on the trial he obtained a verdict, ſubject to the opinion of the Court, upon the caſe above ſtated. After argument, and time taken to conſider, THE COURT were of opinion, that as a ſailor on board a ſhip on a trading voyage, the plaintiff was entitled to nothing; for freight is the mother of wages, and the ſafety of the ſhip is the mother of freight. But the plaintiff's counſel endeavoured to ſupport his caſe on another ground, and contended, that he was entitled to a ſum equal to his wages, upon the *quantum meruit* for his care of the prize; the queſtion then was, Whether he could now make any demand in the nature of wages, from the time that he had the care of the prize? *Per Cur.* The ſhip ſet out in a double capacity, ſhe was to perform her trading voyage, and to carry negroes from Africa to America; but before that, ſhe was to cruize for three months as a privateer. All demand on account of the trading voyage is gone, and in her character as a privateer, the crew were entitled to no wages; for they all run equal riſques, and took their chance of their reſpective ſhares in prizes; therefore the *poſtea* muſt be delivered to the defendant.

An agreement in writing to put in good bail for a perſon arreſted on meſne proceſs, at the return of the writ, to ſurrender the body, or pay debt and coſts, made by a third perſon with the bailiff of the ſheriff in conſideration of his diſcharging the party arreſted, is void.—*R. S.* being arreſted for

Rogers v. Reeves, Mic. Ter. 27 Geo. 3. B R. 1 *Ter. Rep.* 418.

for 35l. at the ſuit of *J. T.* the defendant, a friend of his, gave a written undertaking to the ſheriff's officer (the plaintiff) either to put in good bail, or ſurrender the body, or pay the debt and coſts, before the return of the writ; and upon the faith of this undertaking *R. S* was liberated. But the terms of it not being complied with, the officer (the preſent plaintiff) was compelled, by force of an attachment iſſued againſt the ſheriff, to ſatisfy the plaintiff in the action, his debt and coſts amounting to 44l. The officer therefore brought an action againſt the defendant, upon his undertaking; and the queſtion was, Whether he was entitled to recover in ſuch action? After argument, THE COURT held, That this undertaking was void, conſidered in every point of view. The caſes reſpecting executions of *fieri facias*, or perſons in execution on *capias ad ſatisfaciendum*, do not affect this queſtion; becauſe the ſtatute ſpeaks only of perſons arreſted on *meſne proceſs*. The ſtatute of 23 *Hen.* 6, requires the bond to be given to the ſheriff, as *ſuch*, for the appearance of the party, and for no other purpoſe; and if there be any other condition expreſſed in the bond, it is void. This undertaking therefore is bad on both grounds, for it is not given to the ſheriff himſelf, and it is for ſomething independent of the defendant's appearance. The ſtatute does not authorize *ſheriffs' bailiffs* to take obligations for the appearance of perſons arreſted; it expreſsly mentions the bailiff of a franchiſe, and means only thoſe officers who have the return of proceſs; for where the proceſs is directed to the ſheriff, the indemnity muſt be to him. Then as to undertakings by attornies, it is true that this court will not ſuperſede an act of parliament by any regulations of their own, concerning the officers of the court; but that is not the caſe with reſpect to the practice againſt attornies. The ſtatute ſpeaks only of obligations given to the ſheriff, and does not extend to ſuch as are given to the party. In *Sid.* 132, and 1 *Lev.* 98, the promiſe to the bailiff was good, becauſe it was made on the part of the plaintiff. And in *Hall* v. *Carter*. 2 *Mod.* 304, it is ſaid, that though the ſheriff cannot take a bond in any other form than that preſcribed by the ſtatute, yet the party himſelf may. The diſtinction therefore is between thoſe caſes, where the undertaking is given to the plaintiff in the cauſe, and where it is made to the ſheriff; for in the latter caſe, the form of the ſtatute muſt be ſtrictly purſued. Where an application is made againſt an attorney upon his undertaking, it is made *by the plaintiff* to compel the performance of a contract entered into with him; and on that ground it is valid. The rule of the Court therefore ſtands perfectly clear of the regulations of the act of parliament. The *poſtea* was ordered to the defendant.

Where

Where a leaſe comes to the hands of the original leſſor by an agreement entered into between him and the aſſignee of the original leſſee, " that the leſſor ſhould have the premiſes as mentioned in the leaſe, and ſhould pay a particular ſum over and above the rent annually, towards the good-will already paid by ſuch aſſignee;" ſuch agreement operates as a ſurrender of the whole term. The plaintiff being poſſeſſed of certain premiſes for a long term of years, by indenture of leaſe, dated the 25th March, 1783, demiſed the ſame to *Robert Swin*, from the date of the leaſe, for the term of eight years, at the yearly rent of 31l. 10s. payable quarterly. Under this leaſe *Swin* entered, and took poſſeſſion; and by indenture, dated the 12th of April, 1785, in conſideration of 145l. 13s. he aſſigned the premiſes to *W. Swin*, for the remainder of the term; who afterwards, by indenture, dated the 6th of July, 1785, aſſigned the ſame over to *Sellon*. Under this aſſignment *Sellon* entered, and took poſſeſſion; and was afterwards applied to by the plaintiff, the original leſſor, to take the premiſes; whereupon the following agreement was entered into between *Sellon* and *Ann Smith*, as agent for her huſband, the plaintiff: viz. " Agreement between Mr. *Smith* and Mr. *Sellon*, for the *Jolly Sailors* at *Rotherhithe*; Mr. *Smith* to have the houſe on the terms as mentioned in the leaſe, and to pay 8l. 10s. over and above the rent annually, towards the good-will already paid by Mr. *Sellon*." Under this agreement, the plaintiff took poſſeſſion of the premiſes; and on the 14th of January, 1786, *Sellon* diſtrained upon his goods, for a quarter's rent. In an action of replevin brought by *Smith*, the plaintiff, the queſtion was, Whether the defendant, as bailiff to *Sellon*, had a right to diſtrain for any and what rent? After argument, THE COURT declared their opinion, that the agreement between *Sellon* and the plaintiff, was intended to be a ſurrender of the whole term. The leaſe came into the hands of *Sellon*, by aſſignment, and the plaintiff wiſhed to have it again. There was no colour to ſay, that the plaintiff only wanted it for a particular period of the term, for when the agreement ſays he ſhall have it on the terms of the original leaſe, it means for the whole term. Then as to the 8l. 10s. that was the conſideration on which the ſurrender was made, to be paid towards the good-will. *Sellon* had paid a ſum of money in groſs, in order to get the aſſignment of the leaſe, and inſtead of taking back that ſum which he had paid, he agreed to receive it back again by annual payments. Now, as it is not expreſſed upon the face of the agreement, from what time the payment of the 8l. 10s. was to commence, it muſt be taken to mean from the time when the agreement was made. In doubtful caſes, where the parties expreſs themſelves inaccurately, the Court will expound their con-

Smith *v.* Mapplebec'k, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 441.

tracts according to their intention; and it is a maxim in law, ſo to judge of contracts, as to prevent a multiplicity of actions. Therefore this muſt be taken to be a ſurrender, in order to prevent two actions inſtead of one: for if *Sellon* was to recover againſt the plaintiff, the latter might recover upon the leaſe againſt the former, which would be abſurd; and it is on this ground that the courts have conſtrued expreſs words of covenant into a releaſe. As, ſuppoſing the obligee of a bond covenanted, that he would not ſue upon it, the Court ſay, that ſhall operate as a releaſe; for if it operated only as a covenant, it would produce two actions. So here, it being clear that the plaintiff was to have the leaſe back again, it operates as a ſurrender, and *Sellon* cannot recover any more than the 8l. 10s. which is to be paid annually, as a ſum in groſs; and therefore he is entitled to an action of *aſſumpſit* to recover that ſum.

Fletcher *v.* Dyche, Tr. Ter. 27 Geo. 3. 2 *Ter. Reſ.* 32.

If two perſons agree to perform certain work in a limited time, or to pay a ſtipulated weekly ſum for ſuch time afterwards, as it ſhould remain unfiniſhed, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly ſum, and the work is not finiſhed in the time, ſuch weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be ſet off by the obligee in an action brought againſt him by the obligor, who executed. To an action of *aſſumpſit* for work and labour, and for goods ſold and delivered, &c. the defendant pleaded a ſet-off, ſtating, that the plaintiff by his bond, became bound to the defendant in 236l. and the condition, after reciting an agreement to this effect, was, that they, the plaintiff and one *J. D.* ſhould, within ſix weeks, perform in a good and workman-like manner, certain ſmith's and ironmonger's work, &c. and ſhould find and provide the materials, &c. and that if they ſhould make default in ſo doing, within the time limited, they ſhould pay to the defendant, his executors, &c. the ſum of 10l. for every week, from the time that the ſaid work ought to be done, until the ſame ſhould be completely finiſhed. The plea then ſtated, that the ſaid *J. D.* and the plaintiff did not perform the work for four weeks after the expiration of the time agreed upon; whereby the plaintiff became liable to pay to the defendant 40l. being 10l. for each of the ſaid four weeks. To this plea of ſet-off, the plaintiff demurred generally; and the caſe was fully argued. By the Court, Theſe ſums ſet off, are in the nature of liquidated damages, and are ſuch a kind of penalty, if they may be called by that name, as a court of equity would not relieve againſt. The object of the parties in naming this weekly ſum, was to prevent any altercation with reſpect to the *quantum* of the damages which

the

the defendant might ſuſtain, by reaſon of the non-performance of the contract. It would have been difficult for a jury to have aſcertained what damages the defendant had really ſuffered by the breach of the agreement, and therefore it was proper for the contracting parties to aſcertain it themſelves; ſo that this is a caſe of ſtipulated damages, and is not to be conſidered as a penalty. When there is a penalty in the bond, it is ſtrange that the ſum mentioned in the condition ſhould be called a penalty; there cannot be an equitable and a legal penalty. In the caſe of *Lowe* v. *Peers*, 4 *Burr.* 2225 (1) where a ſtipulated ſum was claimed for the breach of a marriage-contract, Lord *Mansfield* ſaid, "Where the preciſe ſum is fixed and agreed upon between the parties, that very ſum is the aſcertained damage, and the jury are confined to it." The plaintiff's counſel then objected to this ſet-off, becauſe there was no mutuality; but that depends on the queſtion, Whether the debt is due from the plaintiff and another perſon, or from the plaintiff alone? If the former, the debt cannot be ſet off; but it appears, that the bond was executed by the plaintiff alone. No debt can ariſe upon the bond from the other party, who did not execute; therefore it is the plaintiff only who can be ſued upon the bond, ſo that there is a mutuality. But the Court afterwards gave the plaintiff leave to amend, on the payment of coſts.

A broker, when he bought goods for his principal, agreed for one-half *per cent.* to indemnify him from any loſs on the reſale; and it was held, that this undertaking was diſcharged, when the principal had a fair opportunity of ſelling to advantage, but neglected it, though he was afterwards obliged to ſell at a loſs.—The plaintiff, through the medium of the defendant, his broker, made two purchaſes of cotton, and the defendant engaged for one-half *per cent.* to indemnify the plaintiff from any loſs on the reſale of them. The price of cotton gradually roſe for about three weeks after this purchaſe, but the plaintiff did not avail himſelf of that advantage, although he was in the habit of attending the market; but he kept the cotton ſome weeks longer, when he ſold it at a conſiderable loſs; and then brought an action againſt the defendant upon his contract of indemnity, to recover the difference. At the trial, before Lord *Kenyon*, the plaintiff gave parol evidence of the contract, and for further proof, called upon the defendant to produce his book; on inſpecting which it appeared, that the defendant had entered

Curry v. *Edenſor*, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 524.

(1) See p. 386, ſupra.

a minute of the contract, at the bottom of which had been written the letter "G." which was the private mark of the defendant, and was explained by his clerk to mean *guarantee*. It was then objected on the part of the defendant, 1ſt, That this entry having been produced as written evidence of the contract, ought to have been ſtamped, by virtue of the ſtatute 23 *Geo.* 3, c. 58, which requires a ſtamp on every piece of paper upon which any agreement ſhall be written, whether the ſame ſhall be only evidence of the contract, or obligatory on the parties from its being a written inſtrument. 2dly, That the defendant was not liable at all, under the circumſtances of the caſe: the contract of indemnity having been ſatisfied by the ſubſequent riſe of cotton in the public market, of which the plaintiff ought to have availed himſelf. And to that opinion Lord *Kenyon*, Ch. J. inclined, in ſumming up the evidence to the jury; but they found their verdict for the plaintiff, to the amount of the loſs ſuſtained by him on the reſale. And theſe points being reſerved for the conſideration of the Court, a rule was obtained to ſhew cauſe, why a non-ſuit ſhould not be entered, on the ground of the firſt objection; or a new trial awarded on the ſecond. *Per Cur.* (after the caſe had been argued) This is not ſuch an agreement as is required to be ſtamped. For it was made at the time of the original contract for the ſale of theſe goods, and *related to the ſale of them*. The plaintiff being a ſpeculator in cotton, was not ſatisfied with the moderate profits which he might have gained, but waited for a ſtill higher riſe in the market; and having waited too long, he now wiſhes to be indemnified at the expence of the defendant. But on the fair conſtruction of the contract, the defendant, under the circumſtances which have happened, is diſcharged; for the fair import of the contract is, that the defendant ſhould guarantee to the plaintiff, that he ſhould be enabled to make a profit of the cotton; and there was evidence to ſhew, that the plaintiff might have made conſiderable profits, if he had choſen to avail himſelf of the opportunity; and having loſt that opportunity, he cannot now have recourſe to the defendant. If the agreement had been, that the defendant was bound to give the plaintiff information, reſpecting the time when theſe goods could be reſold to the greateſt advantage, there would have been ſome ground for the plaintiff's argument; but that was not neceſſary; and indeed it appears, that the plaintiff muſt have been fully appriſed of the gradual riſe of the market, as he was in the habit of attending it. If this were not ſufficient to ſatisfy the contract of indemnity, no other line could be drawn.—Rule for a new trial made abſolute.

At

Kirkman & *al.* aſſignees of Walker, *v.* Shawcroſs, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 14.

At a meeting of the dyers, dreſſers, whiſters, printers, and calenderers of Mancheſter and the neighbourhood, held at Mancheſter in April, 1788, certain reſolutions were adopted in a writing, ſigned, ſealed, and delivered, amongſt others, by the defendant, ſtating, "that whereas a doubt had ariſen whether dyers, dreſſers, bleachers, whiſters, printers, or calenderers, had a right to detain goods delivered to them, not only till payment were made for the work and labour performed upon the particular goods detained, but alſo for work and labour of the ſame kind performed upon goods already delivered out of the poſſeſſion of ſuch dyer, &c. they, the under-mentioned perſons, being either dyers, dreſſers, bleachers, &c. thereby gave public notice that they would never thenceforward take into their poſſeſſion any goods to be dyed, dreſſed, bleached, &c. unleſs under expreſs condition that the goods ſo delivered to them for the purpoſe of being bleached, &c. ſhould not only be ſubject to the debt due for the work and labour performed upon them, but alſo for the general balance due from the perſons employing them for work and labour of the ſame kind, performed upon goods which they had already delivered out of their poſſeſſion;" and it ended with a deſire to all perſons meaning to employ them to take notice of the ſame. The above reſolutions were adverti ſed in the Mancheſter newſpapers. Advertiſements were ſeen and read by the bankrupt. In an action of trover, brought by the plaintiffs as aſſignees of the bankrupt, for a quantity of yarn, the queſtion ſubmitted to the Court on a ſpecial caſe reſerved at *niſi prius* was, Whether the defendant had a lien or right to detain the yarn in queſtion for what remained due to him for his work and labour upon the yarn delivered to the bankrupt before the bankruptcy? By the Court, This agreement was promulgated all round the neighbouring country; and it came to the knowledge of the bankrupt. Then the bankrupt knowing it, muſt be taken to have ſent his goods to the defendant on the terms ſpecified in this agreement, and his aſſignees muſt be bound by it. But it has been contended that, though any one individual may impoſe ſuch terms on his cuſtomers as are mentioned in this general agreement, it is not competent for a claſs of men to do it. But that is a diſtinction without a difference; there is no reaſon why a body of perſons ſhould not make ſuch an agreement as (it is admitted) the defendant himſelf might have made. In every caſe that has occurred, and in which the queſtion of liens has ariſen, it has been the univerſal wiſh of the courts at all times to extend the lien as far as poſſible. But we are now deſired to abrogate an agreement which the parties themſelves have made, and which the courts have ſaid that juſtice requires; and it is ſaid that, unleſs we do ſo, the inn-keepers will enter into ſimilar reſolutions. But their caſe is widely differ-

ent from the preſent; for they are bound by law to receive gueſts who come to their inns, and are alſo bound to protect the property of thoſe gueſts. They have no option either to receive or reject gueſts; therefore it was a material circumſtance in the preſent caſe that theſe perſons had an option either to work or not as they pleaſed. The caſe of the inn-keepers does not bear any reſemblance to the preſent; for as they cannot refuſe to receive gueſts, ſo neither can they impoſe unreaſonable terms on them. The caſe of carriers has alſo been mentioned: but that is not like this. They have no right to ſay they will not receive any goods but on their own terms; for there is an act of parliament (1) giving power to the juſtices at the quarter-ſeſſions to regulate the price of the carriage of goods. But, without adverting to the ſtatute, when a carrier has given notice that he would not be anſwerable for goods of a particular denomination unleſs he received a certain premium, and that notice has come to the knowledge of a party ſuing, the courts have conſidered it as an agreement binding on both parties. In moſt of the caſes where it has been determined that the party had no lien, the difficulty aroſe from the general law not creating a lien in that inſtance, or from the want of an agreement that the party ſhould have a lien: but in this caſe there is an expreſs agreement between the parties that the defendant ſhould have a lien for his general balance; that agreement, ſo far from being illegal, is founded on juſtice, and therefore it is binding on the plaintiffs.

Kaye v. Bolton, Hil. Ter. 35 Geo. 3. B.R. 6 T. R. 134

An agreement by a friend of a bankrupt to pay all his creditors their full debts, in conſideration that they will not proceed any further under the commiſſion, is good in law.

Feile v. Randall, Hil. Ter 35 Geo. 3. B.R. 6 Ter. Rep. 146.

By a deed of compoſition between a trader and his creditors, it was agreed, that the trader ſhould give them his bills, accepted by a friend, for 15s. in the pound, payable in certain portions at fixed periods, and his own promiſſory notes for the remaining 5s. and that the creditors ſhould be at liberty to take his own notes only for their full demands if they pleaſed: one of the creditors who ſigned the deed took bills from the debtor, accepted by his friend, for the whole 15s. in the pound, payable at the ſame reſpective times as the bills agreed to be given by the deed of compoſition. The payment of theſe bills was reſiſted upon the ground, that it was a ſecurity beyond that agreed for, and greater than the other creditors (2). But the tranſaction was adjudged fair, for, *Per Cur.* The plaintiff received no more than the reſt of the creditors; and it is no fraud upon them that another per-

(1) Vide 3 *W.* & *M.* c. 12, and 21 *Geo.* 2, c. 28.
(2) See the caſes in p. 247, ſupra.

ſon had agreed to join his ſecurity to the debtor's for the payment of the ſame ſum that all the other creditors were to receive.

If *A. B. C.* and *D.* enter into an agreement to purchaſe goods in the name of *A.* only, and to take aliquot ſhares of the purchaſe, but it does not appear that they are *jointly to reſell* the goods, on failure of *A.* the oſtenſible buyer, *B. C. and D. are not anſwerable to the ſeller as partners.* An action was brought by the plaintiffs, who were the owners of a Greenland ſhip, againſt the defendants, upon an agreement to purchaſe a cargo of oil. The declaration ſtated, that on the 29th of Auguſt, 1786, the plaintiffs ſold the cargo to the defendants, at the rate of 20l. per ton, to be received as ſoon as it was boiled and ready. That, by way of collateral ſecurity, two bills of exchange were depoſited in the hands of the plaintiffs, one of which was accepted by the defendants, *Eyre*, *Atkinſon*, and *Walton*. That the ſale being ſo made, and it being expected that the defendants would not take away the oil purſuant to the terms of the ſale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co. that the plaintiffs ſhould keep the oil in their poſſeſſion, till the 1ſt of January following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorize the broker to reſell it at the beſt price he could get; and if upon ſuch reſale, the oil ſhould not produce 20l. per ton, with all charges, the plaintiffs were to deduct the difference of the price, out of the bills placed in their hands as a collateral ſecurity. The declaration then ſtated, that the defendants neither paid for the oil, or took it away, and therefore the plaintiffs authoriſed the broker to reſell it. That the deficiencies upon the reſale amounted to 400l. beſides brokerage, &c. 100l. and that the bill of exchange accepted by the defendants was preſented to them for payment, and refuſed. Before this action was brought, *Eyre* and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of Auguſt, 1786, the defendants, *Eyre* for himſelf and partners, who were *Atkinſon* and *Walton*, general merchants, *Hatterſley* for himſelf and *Stephens*, who were oil merchants, and *Pugh* for himſelf and Son, who were alſo oil merchants, agreed to purchaſe jointly as much oil as they could procure, on a proſpect that the price of that commodity would riſe; that *Eyre* ſhould be the oſtenſible buyer, and the others ſhare in his purchaſe, at the ſame price which he might give. *Hatterſley* and Co. were to have one-fourth, *Pugh* one-fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ſhips, and other traders, beſides the plaintiffs, in the name of *Eyre* and Co. That *Hatterſley* and *Pugh*

Coope and others v. Eyre and others, Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 37.

occaſionally came forwards, and gave directions as to the delivery of the oils, and otherwiſe interfered in the tranſaction; and alſo made many declarations, that they were all jointly intereſted in the different purchaſes, and that there was a general concern between them. On the part of the defendants it was inſiſted, that the contract of ſale was made between the plaintiffs and *Eyre* and Co. only; and that the agreement entered into between themſelves, was only a ſub-contract, and did not conſtitute a partnerſhip; and the learned judge who tried the cauſe being of the ſame opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the Court for a new trial, on the ground of miſdirection: and after the caſe had been fully argued, THE COURT refuſed to grant a new trial; being of opinion, that the verdict was proper. For as this was an action on a contract of ſale, the vendor can have no remedy againſt any perſon with whom he has not contracted, unleſs there be a partnerſhip, in which caſe all the partners are liable as one individual. It was juſtly obſerved, that a ſecret partnerſhip can be no conſideration to the vendor, though for reaſons of policy and general expedience, the law is poſitive with reſpect to the ſecret partner, that when diſcovered he ſhall be liable to the whole extent. In many parts of Europe limited partnerſhips are allowed, provided they be entered on a regiſter; but the law of England is otherwiſe, the rule being, that if a partner ſhares in advantages, he alſo ſhares in all diſadvantages. In order to conſtitute a partnerſhip, a communion of profit and loſs is eſſential; and the ſhares muſt be joint, though it is not neceſſary that they ſhould be equal. If the parties be jointly concerned in the purchaſe, they muſt alſo be jointly concerned in the future ſale: otherwiſe they are not partners. In the preſent caſe, *Eyre* was a mere ſpeculator, and the other defendants were to ſhare in the purchaſe, but were not jointly intereſted in any ſubſequent diſpoſition of the property. Though they may by other purchaſes have concluded themſelves as to ſome particular vendors, yet in the tranſaction in queſtion, there was not that communion between them, which is neceſſary to make them partners; their agreement was a ſub-contract, which may be executory; as it was to ſhare in a purchaſe to be made. The ſeller looked to no other ſecurity than *Eyre* and Co. to them the credit was given, and they only were liable.

Jackſon v. Vernon, Hil. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 114.

A. the owner of a ſhip, executes an abſolute bill of ſale of it to *B.* and by another deed of the ſame date aſſigns other property to *B.* which deed of aſſignment (reciting that the bill of ſale was for the better *ſecuring a ſum of money* lent by *B.* to *A.* and alſo reciting a bond and warrant of attorney

attorney given by *A.* to *B.* to ſecure the ſame ſum) declares, that theſe ſeveral deeds and inſtruments were made to enable *B.* by ſale of all the things comprized in them, to raiſe the ſum lent without the concurrence of *A.* at any time before the money ſhould be paid off; but in the ſame deed there is a covenant, that upon payment of the money, *B.* ſhall reconvey to *A.*, but ſo as not to prevent *B.* from *ſelling, &c. at any time before the full payment, &c.*: under theſe conveyances *B.* is not abſolute owner of the ſhip, but only *mortgagee*, and is *not liable for neceſſaries provided for the ſhip, before he takes poſſeſſion.* In an action for goods ſold and delivered, a verdict was found for the plaintiff, ſubject to the opinion of the Court, upon the following caſe.—The plaintiff, who was a rope-maker, on 7th Feb. 1787, and on 22d July, and 1ſt of Auguſt, 1788, ſupplied the ſhip *Three Siſters* with cordage and ſtores, by the order of one *Palmer*, who was the owner of her, but without the knowledge of the defendant. On the 6th Feb. 1787, *Palmer* gave a bond to the defendant, conditioned for the payment of 1500l. with a warrant of attorney to confeſs judgment thereon, which was accordingly entered up as of Hilary term, 1787. On the ſame day, *Palmer* executed an abſolute bill of ſale of the ſhip to the defendant, in conſideration of 1500l. and alſo a deed of aſſignment of various articles of perſonal property, and particularly of a policy of inſurance on the ſhip; and it was by that deed covenanted, that the ſaid ſeveral deeds and inſtruments were ſo executed by *Palmer*, for the purpoſe of enabling the defendant, his heirs, executors, or adminiſtrators, either by public ſale, or private contract, to ſell and diſpoſe of the ſeveral matters and things therein reſpectively compriſed, and thereby to raiſe and pay the ſaid ſum of 1500l. ſo lent and advanced, and the intereſt thereof, without any further or other concurrence of *Palmer*, his heirs, &c. at any time before the ſame ſhould be paid off and diſcharged by him; and in this deed there was a covenant from the defendant, that in caſe *Palmer* ſhould pay off and diſcharge the 1500l. and intereſt, before the ſaid ſeveral matters and things ſhould be ſold or diſpoſed of for the purpoſes aforeſaid, that then, and in ſuch caſe, the defendant would reconvey and reaſſign the ſaid ſeveral matters and things, in ſuch manner as *Palmer* ſhould reaſonably require; and it was thereby alſo declared and agreed, that nothing therein contained ſhould prevent the defendant from ſelling and abſolutely diſpoſing of all and every the ſaid premiſes, matters, and things therein before mentioned, at any time previous to the full payment of the ſaid 1500l. and intereſt. On the 30th July, 1788, *Palmer* aſſigned the freight of the ſhip to the defendant. On 7th Auguſt following, the defendant took poſſeſſion of the ſhip, and received the freight; and

and on 22d of the ſame month, he ſold the ſhip, and gave an indemnity to the purchaſer, againſt all demands upon her prior to that date. THE QUESTION FOR THE OPINION OF THE COURT was, *Whether the defendant was liable to pay for the cordage and ſtores furniſhed by the plaintiff, ſubſequent to the bill of ſale and aſſignment of 6th February*, 1787? After the caſe had been argued, the Court ſaid, The only queſtion was, *Whether the conveyance to the defendant was abſolute, or only by way of ſecurity?* No one who reads theſe deeds, can have any doubt of its being a mere mortgage for a loan of money; here is a bond for 3000l. conditioned for the payment of 1500l. lent by the defendant to *Palmer*; a warrant of attorney, and judgment entered on it; then a conveyance of the ſhip, by a bill of ſale, in conſideration of the ſame ſum of 1500l.; and as a farther ſecurity, a deed of aſſignment, with a defeaſance annexed. In this deed of aſſignment, there is no covenant for a reconveyance, becauſe, as an additional ſecurity, the defendant ſtipulated for a power to ſell the ſhip at any time, without further leave from *Palmer*. It was underſtood by *Palmer*, to be merely a pledge for the money due, as he contracted for freight after the conveyance; for if the conveyance had been abſolute, he could not properly make a contract for freight. On 7th Auguſt the defendant took poſſeſſion, till which time *Palmer* was the poſſeſſor, ſubject to the defendant's claim, who was not liable till he had actual poſſeſſion. *The owners of a ſhip are liable for furniture and neceſſaries, becauſe they receive the immediate benefit of the freight*; and this is the reaſon why the contracts of the captain are binding upon them, he being their agent or ſervant; *but the caſes which eſtabliſhed this to be law, do not affect a mortgagee not in poſſeſſion, who cannot be conſidered as an owner, nor as ſuch entitled to the freight.* From the nature therefore of the tranſaction, and the circumſtances attending theſe deeds, the aſſignment of the ſhip to the defendant was in reality a mortgage; and there are many caſes in point, to ſhew that a mortgagee out of poſſeſſion, is not anſwerable for the contracts of the mortgagor.

Byers *v.* Dobey, Ea. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 236.

An agreement made by two partners to pay a certain ſum of money, to a third perſon, *equally* out of *their own private caſh*, is a joint contract, and they muſt be jointly ſued upon it. In an action of *aſſumpſit* for the uſe and occupation of a ſhop, and for money paid, laid out, and expended, &c. the defendant pleaded in abatement, that the promiſes, &c. if any, were made by him and one *George Bethell* jointly, and not by the defendant alone. On the trial of the cauſe, the material facts appeared to be, that by certain articles of partnerſhip, entered into in 1774, between *David Humphries* of the one part, and *Richard*

Byers,

Byers, the plaintiff's late huſband, *John Dobey*, the defendant, and *George Bethell*, of the other part; it was among other things agreed, that *Byers*, *Dobey*, and *Bethel* ſhould carry on the trade of a hoſier, in partnerſhip, for fourteen years, and purchaſe the ſtock in trade, utenſils, and fixtures, of *Humphries*. That *Humphries* ſhould grant *Byers* a leaſe of the houſe, &c. where the buſineſs was carried on, for twenty-one years, at the yearly rent of 50l. clear of all taxes, and payable quarterly, by and out of *the private caſh* of *Byers*; in which leaſe, a room ſhould be reſerved for the uſe of *Humphries* during his life, and after his death, for the uſe of *Byers*; that the buſineſs ſhould be carried on by *Byers*, *Dobey*, and *Bethell*, in the ſhop and other parts of the houſe, as it had before been done by *Humphries*; that *Byers* and his family ſhould live in the houſe; that, as a compenſation for the uſe of the ſhop and premiſes, *Byers* ſhould, during the partnerſhip, be paid equally by *Dobey* and *Bethel*, *out of their own private caſh*, 25l. yearly, by quarterly payments; and that they ſhould pay *Byers* a moiety of all taxes whatſoever, on account of the houſe and premiſes. That if either of the partners ſhould die and leave a widow, ſhe ſhould, if ſhe choſe it, be taken into the partnerſhip for the remainder of the term; that if *Byers* ſhould leave a widow, and ſhe ſhould continue in the buſineſs with the ſurviving partners, then ſhe ſhould hold the houſe upon the ſame terms and conditions, as he would have held it if he had lived. In 1778, *Byers* died; and the plaintiff, his widow, continued in the partnerſhip with the defendant and *Bethell*, until the expiration of it; and then ſhe brought this action to recover 12l. 10s. half the annual rent of 25l. for the uſe of the houſe, &c. together with the rent for part of a year, preceding the expiration of the partnerſhip, and half of one moiety of the taxes, as the defendant's ſhare under the articles. The jury found a verdict for the defendant; and upon an application for a new trial, the Court refuſed it; being of opinion, that the tranſaction was in its nature a joint undertaking, and that the words *private caſh* could only mean, that the rent ſhould not be paid out of the partnerſhip ſtock; but that the contract was joint between *Dobey* and *Bethel*, as relating to a third perſon.

Where goods are delivered under an agreement to take a ſpecific parcel of copper money in payment, a delivery of ſuch copper will be a good bar to an action for the value of the goods, though in fact it was counterfeit money. In an action upon the caſe for goods ſold and delivered, it appeared, that the plaintiff had agreed to ſell to the defendant, who lived at Mancheſter, a certain quantity of tobacco; the value of which, in addition to a former debt of 23l. due for ſome other tobacco, amounted to 50l. It was alſo agreed between

Alexander *v.* Owen, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 225.

between the parties, that the plaintiff ſhould take, in payment of the debt, a quantity of copper halfpence, which were made up in five-ſhilling papers, but each of them contained no more than five pennyworth of good halfpence; and it was further agreed, that if the amount of the copper ſhould exceed the value of the tobacco, ſome more tobacco ſhould be ſent, to balance the amount. Part of the tobacco was delivered; but the plaintiff refuſed to ſend the remainder, unleſs the defendant would pay for the whole in good money. Several ſamples of this copper were ſhewn to the plaintiff at the time of the agreement, who ſaid it would paſs very well at Liverpool, where he lived. The copper was accordingly ſent to the plaintiff on the 19th of July; who, on the 28th of that month, wrote a letter to the defendant, complaining of its badneſs, and refuſing to accept it. There was other correſpondence between the parties on the ſubject; but the copper was not actually returned till November. On the trial, the plaintiff was nonſuited; and upon a motion to ſet aſide the nonſuit, the queſtion was, Whether the delivery of the copper was a good payment? For if ſo, there was more than enough to balance the plaintiff's demand. The Court were of opinion, that the nonſuit, in this caſe, ought to ſtand; for it did not appear, that the parties entered into the contract, knowing it to be illegal. There is no doubt, but that an agreement to take counterfeit money, knowing it to be ſo, is void; but the fact did not come up to it in this caſe. The plaintiff did not agree to take counterfeit money in payment, but the agreement was to take ſuch copper money as was then ſhewn to him. Suppoſing, however, that the contract was illegal, the plaintiff would not ſtand in a better ſituation; he could never recover; for the argument of the plaintiff's counſel, in caſe an action had been brought by the defendant for the remainder of the tobacco, would have been equally applicable to the plaintiff. It cannot be ſaid that the ſale is good, and that the payment is bad; for if it is an illegal contract, it is equally bad for the whole. It would be great injuſtice to allow the plaintiff to recover, in this action, the whole value of the goods ſold, becauſe that would be permitting him to take advantage of a corrupt agreement, which is never allowed in caſes where a party applies to the Court to ſet aſide ſuch agreements. If a party applies to the Court to reſcind a contract, on the ground of its illegality, it muſt be done *in toto*, and he cannot derive any advantage under it. The parties are in *pari delicto*, and if one of them ſeeks relief, he muſt firſt do what is juſt; according to the principle eſtabliſhed on the other ſide of the Hall, that he who aſks equity muſt do

equity.

equity. This nonſuit, however, will not preclude the plaintiff from recovering the 23l. which was owing upon a former agreement, becauſe that debt aroſe from a fair and valid tranſaction; but that is no reaſon for ſetting aſide the nonſuit in this caſe.

Parol Agreements within the Statute of Frauds.

THE ſtatute of frauds will prevent a parol agreement to buy goods, without either earneſt or delivery, from giving the buyer any property in them. In an action of trover for ſheep, it appeared, that the plaintiff had agreed to buy the ſheep of the defendant at Lewes fair, and to take them away at a certain hour; that there was no money paid, nor any ſheep delivered; and that the plaintiff not coming at the appointed time, nor ſending to take away the ſheep, the defendant ſold them to another perſon. The jury, however, found a verdict for the plaintiff; but upon a motion to ſet it aſide, and enter a nonſuit, the Court held, that the ſtatute of frauds prevented any property from veſting in the plaintiff, ſo as to enable him to maintain trover; there being neither earneſt, delivery, or agreement in writing. Alexander *v.* Comber, Tr. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 20.

So a verbal agreement for the ſale of goods to be delivered at a future period, where there is neither earneſt paid, a note or memorandum in writing ſigned, nor any part of the goods delivered, is void, being within the ſtatute of frauds, though it is executory, and though it has been admitted by the party in an anſwer to a bill in chancery. Upon the trial of an action on the caſe, for the non-performance of a ſpecial agreement, the facts appeared to be, that the defendant, who was one of the proprietors of the Albion Mills, had entered into a verbal agreement, to ſell and deliver to the plaintiff three thouſand ſacks of flour, to be put in ſacks which the plaintiff was to ſend to the mill, and ſhipped on board veſſels to be by him provided, on an expreſs condition, that the flour ſhould be exported to foreign parts, from ſome port which the plaintiff was to open, and ſhould not *meet the defendant and the company again in the home market.* In order to carry this ſcheme of exportation into effect, the plaintiff ſent a large quantity of corn and flour to Shoreham in Suſſex, merely, by colluſion and a fictitious ſale, to reduce the market price to the level preſcribed by the act, 13 *Geo.* 3, c. 45, §. 5. But this intended trick being diſcovered by government, the exportation was prevented, for the price was then very high, and an apprehenſion of a ſcarcity in this country prevailed. As the plaintiff therefore could not legally comply with the condition contained in the contract, the Rondeau *v.* Wyatt, Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 63.

the defendant refuſed to deliver the flour. The plaintiff therefore filed a bill in the court of chancery againſt the defendant, praying a ſpecific performance of the agreement, a diſcovery of facts, and the names of the partners in the undertaking. To this bill, the defendant pleaded the ſtatute of frauds and perjuries; and averred, that there was no note or memorandum in writing, nor a delivery of any part of the flour to the plaintiff, &c. following the words of the ſtatute. He alſo put in an anſwer, *whereby he admitted the agreement.* The plea, after having been twice argued before Lord *Thurlow*, was overruled (1). Whereupon the preſent action was brought, in which the plaintiff obtained a verdict contrary to the opinion of Lord *Loughborough*, who tried the cauſe, and who thought that on the ground of public policy, but chiefly becauſe the contract ſeemed to him to be within the ſtatute of frauds, the plaintiff was not entitled to recover. A rule was afterwards granted to ſhew cauſe, why the verdict ſhould not be ſet aſide, and a nonſuit entered. After the caſe had been fully argued, and the Court had taken time to conſider, Lord *Loughborough* delivered the following judgment.—The only point to be decided is, that which ariſes on the ſtatute of frauds; and we who are now in court (2), think that the objection made on that ſtatute is well grounded. And therefore, that the plaintiff ought to be nonſuited. It was ſaid in the argument, 1ſt, That the ſtatute does not extend to caſes of executory contracts; and 2dly, That it was not applicable, where the agreement which was the ſubject of the action, ſtood confeſſed by the defendant's anſwer to a bill in equity; and that, in the preſent caſe, the agreement did appear on the face of the proceedings in chancery. To try the validity of the firſt objection, it will be neceſſary to advert to that clauſe, ſect. 17. of the ſtatute, on which the queſtion ariſes, and which directs, that "No contract for the ſale of any goods, "wares, and merchandizes, *for the price of* 10*l. ſterling or up*"*wards*, ſhall be allowed to be good, except the buyer "ſhall accept part of the goods ſo ſold, and actually re"ceive the ſame, or give ſomething in earneſt to bind the "bargain, or in part of payment, or that ſome note or "memorandum in writing of the ſaid bargain, be made and "ſigned by the parties to be charged by ſuch contract, or "their agents thereunto lawfully authorized." Now it is ſingular, that an idea could ever prevail, that this ſec-

(1) 3 *Brown*, 154.

(2) Mr. Juſtice *Wilſon* was abſent, but had previouſly declared himſelf to be of a different opinion.

tion

tion of the ſtatute was only applicable to caſes where the bargain was immediate, for it ſeems plain from the words made uſe of, that it was meant to regulate executory, as well as other contracts. The words are, "no contract for the ſale of any goods, &c." And indeed it ſeems that this proviſion of the ſtatute would not be of much uſe, unleſs it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confuſion will probably ariſe, which the ſtatute was deſigned to prevent. The caſe of *Simon* v. *Metivier*, *Bull*, N.P. 280. 3 *Burr*. 1921, was decided on the ground that the auctioneer was the agent as well for the defendant as the plaintiff, and therefore that the contract was ſufficiently reduced into writing. The caſe of *Towers* v. Sir *John Oſborne*, 1 *Stra*. 506, was plainly out of the ſtatute, not becauſe it was an executory contract, as it has been ſaid, but becauſe it was for work and labour to be done, and materials and other neceſſary things to be found, which is different from a mere contract of ſale, to which ſpecies of contract alone the ſtatute is applicable. In *Clayton* v. *Andrews*, 4 *Burr*. 2101, which was on an agreement to deliver corn at a future period, there was alſo ſome work to be performed; for it was neceſſary that the corn ſhould be threſhed before the delivery. This perhaps may ſeem to be a very nice diſtinction, but ſtill the work to be performed in threſhing, made, though in a ſmall degree, a part of the contract. Some of the caſes in the court of chancery, ſeem to have been founded on the nature of the proceedings in equity, where the Court will lay hold of ſome circumſtance of his own admiſſion, to compel a party to the performance of his agreement. But the ſame rule is not applicable to courts of law; for if a parol agreement were ſtated in a court of law, and there was a demurrer, which would admit the agreement, yet ſtill advantage might be taken of the ſtatute. The early caſes in *Prec. in Chan*. 208, *Croyſtan* v. *Banes*, and 374, *Symondſon* v. *Tweed*, do not ſeem fairly to admit any other conſtruction than this, namely, that the Court thought, that where a parol agreement was admitted by the defendant's anſwer, he might or might not take advantage of the ſtatute, at his option. I ſay the Court ſeem to have thought ſo, becauſe in fact no ſuch decree was made in thoſe caſes; which contain merely the extra-judicial opinions of the lord keeper, and the maſter of the rolls. It is ſaid in thoſe caſes, and has been adopted in the argument, that when the defendant confeſſes the agreement, there is no danger of perjury, which was the only thing the ſtatute intended to prevent. But this ſeems to be very bad reaſoning; for the calling upon a party to anſwer a parol agreement, certainly lays upon him a great temptation to commit

commit perjury. But though the preventing perjury was one, it was not the ſole, object of the ſtatute; another object was, to lay down a clear and poſitive rule to determine when the contract of ſale ſhould be complete. Accordingly, the ſtatute has made it neceſſary, that either the party buying ſhould accept and receive part of the goods ſold, or give ſomething in earneſt to bind the bargain; or that there ſhould be ſome note or memorandum in writing, ſigned by the parties to the contract. Something therefore direct and ſpecific is to be done, to ſhew that the agreement is complete, that there may be no room for doubt or heſitation. This was the intention of the ſtatute in all contracts of ſale above a certain value, in order to prevent confuſion and uncertainty in the tranſactions of mankind; and we think it wiſe to adhere to that rule. It is not neceſſary in a court of law, to enquire into the modes of proceeding by which courts of equity are guided; but it is obſervable, that the caſe of *Whaley* v. *Bagenal*, 6 *Brown's Caſ. in Parl.* 45. in the houſe of lords, coincides with the preſent determination of the court.

Cooper v. Elſton, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 14.

So where the defendant ſold to the plaintiff by ſample fifty quarters of wheat at four guineas per quarter; the wheat to be delivered by the defendant to the plaintiff at Gainſborough. Two days afterwards the defendant delivered to the plaintiff at Nottingham the ſample by which he had ſold the wheat to him; but ſuch ſample was no part of the fifty quarters to be delivered at Gainſborough. No money was paid by the plaintiff to the defendant on account of the wheat; nor was there any memorandum in writing ſigned by the parties. The defendant afterwards refuſed to deliver the wheat.—On the trial of an action brought for not delivering this wheat, the jury found a verdict for the plaintiff ſubject to the opinion of this Court. The caſe was argued very fully, AND PER CURIAM, After this queſtion has been afloat ſo long in the courts, we are glad that by the very able deciſion of the court of common pleas, in the caſe of *Rondeau* v. *Wyatt*, the conſtruction of this clauſe of the ſtatute of frauds is brought back to the manifeſt intention of the legiſlature in making that proviſion. To the authority of that caſe we entirely ſubſcribe, and it governs the preſent. The doctrine which was laid down in *Clayton* v. *Andrews*, as to executory contracts not being within the ſtatute, was taken from *Towers* v. *Oſborn*. We do not pretend to ſay, that thoſe caſes were not rightly decided upon their particular circumſtances. The latter was a mere contract for work and labour; the thing contracted for did not exiſt at the time. The former caſe, indeed, went ſomewhat further, but ſtill ſomething was required to be done; there

there was to be ſome alteration in the commodity in order to put it in the ſtate in which it was contracted to be delivered. But can this be called an executory contract for the ſale of the goods in queſtion? The thing ſold exiſted and was capable of being delivered, at the time of the contract of ſale. This caſe cannot be diſtinguiſhed from that of *Rondeau* v. *Wyatt*; and the grounds and principles of that deciſion are ſo amply detailed in the report, that it is unneceſſary to add any thing more. With reſpect to this coming within one of the exceptions of the ſtatute on account of the acceptance of the ſample, there is no pretence for it; for the caſe expreſsly ſtates, that the ſample was no part of the goods contracted to be delivered.

A promiſe to be anſwerable for another not being in writing, is void by the ſtatute of frauds, if it appear that credit was given to both. The plaintiff, a woollen-draper in London, employed one *Biffin*, to receive orders from his cuſtomers in the country; the defendant meeting with *Biffin* at Deal, deſired him to write to the plaintiff, requeſting him to ſupply the defendant's ſon, who traded to the Weſt-Indies, with whatever goods he might want, on his, the defendant's, credit; ſaying at the ſame time, *uſe my ſon well, charge him as low as poſſible, and I will be bound for the payment of the money, as far as* 800*l. or* 1000*l. Biffin* accordingly wrote to the plaintiff the following letter: "Mr. *Hayman*, of this town, ſays his ſon will call on you and leave orders, and he has promiſed me to ſee you paid, if it amounts to 1000*l.*; Mr. *William Pitches* was alſo preſent as a witneſs. N.B. If deal for twelve months' credit, and pay in ſix or eight months, expects diſcount in proportion." Soon afterwards, the ſon received goods from the plaintiff, to the amount of 800*l.* which were delivered to him in conſequence of the above order from the father. The ſon was debited in the plaintiff's books, and being applied to for payment, wrote to the plaintiff the following anſwer: "Your favour of the 27th paſt, has been forwarded to me from Oſtend, by my clerk, in anſwer to which, I can only ſay, that I underſtood your credit for the goods was twelve months, which was alſo mentioned by your rider to my father. *I ſhall at this rate make you remittances for the different parcels as they come due*, and remain, &c." The ſon afterwards became a bankrupt, and thereupon the plaintiff brought his action againſt the father, to recover the value of the goods. Upon the trial, the judge directed the jury to conſider, whether the plaintiff gave credit to the defendant *alone*, or to him *together with his ſon*. That in the former caſe they ſhould find a verdict for the plaintiff: in the latter for the defendant; being of opinion, that *if any credit was given to the ſon, the promiſe of the defendant not*

Anderſon *v.* Hayman, Hil. Ter. 29 Geo 3. C.B. 1 *Hen. Black.* 120.

being in writing, was void by the ſtatute of frauds. Accordingly the jury found a verdict for the defendant; and upon a motion for a new trial, the Court refuſed it; being clearly of opinion, that this promiſe not being in writing, was void by the ſtatute; it appearing from the evidence of the ſon's letter, that the credit was given to him, as well as to the defendant.

Williams *v.* Leper, Ea. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1886.

A broker about to ſell the goods of an inſolvent, promiſed the landlord to pay him his rent, if he would not diſtrain; it was held that this promiſe was not a collateral promiſe, but an original undertaking. The plaintiff was leſſor to one *Taylor*, who owed him 45l. for rent, *Taylor* aſſigned over all his effects for the benefit of his other creditors, who appointed the defendant as their broker to ſell the effects: he adverti ſed a ſale, and on the morning of it, the plaintiff came to make a diſtreſs; whereupon the defendant promiſed, that if he would deſiſt from diſtraining, that he would pay him the whole rent. For this rent the action was brought, and the defendant relied on the ſtatute of frauds as an undertaking, for the debt of another, and no memorandum in writing. BUT it was adjudged, that this was not a collateral promiſe to pay the debt of another, but an original undertaking, and therefore, not within the ſtatute of frauds; for the plaintiff was in poſſeſſion of the goods, having entered with intent to diſtrain them; and when the defendant made this promiſe, *in order to diſcharge the goods of this diſtreſs*, the diſtreſs muſt be conſidered as actually made; the plaintiff had a lien on the goods in the hands of the defendant, and they were the fund charged; therefore, a promiſe to pay out of this fund, was an original undertaking by the defendant himſelf.

1 *Hen. Black.* 20.

But in the laſt caſe, *Wilſon*, J. obſerved, that where a ſale is not immediate, it is not within the ſtatute of frauds, ſuch as a contract to purchaſe a carriage when it is built, and the like.

Clayton *v.* Andrews, Tr. Ter. 7 Geo. 3. B.R. 2 *Black. Rep.* 4 *Burr.* 2101.

Thus where the defendant agreed to deliver one load and an half of wheat to the plaintiff, within three weeks or a month from the ſaid agreement, at the rate of twelve guineas a load, to be paid on delivery, which wheat was then unthraſhed: no part of the ſaid wheat ſo ſold was delivered, nor any money paid by way of earneſt for the ſame, nor any memorandum thereof made in writing. Upon the trial of an action of aſſumpſit, for the non-performance of this contract, a ſpecial caſe was reſerved, and the queſtion for the conſideration of the Court was, Whether this agreement was within the ſtatute of frauds? *Per Cur.* The ſtatute relates only to *executed* contracts, and the caſe of *Towers* v. *Oſborn*, which has always been conſidered as an authority in queſtions of this kind, is directly in point: there

there the defendant beſpoke a chariot, and when it was made refuſed to take it; and in an action for the value, it was objected, that they ſhould prove ſomething given in earneſt, or a note in writing, ſince there was no delivery of any part of the goods. But the chief juſtice ruled it, not to be a caſe within the ſtatute of frauds, which relates only to contracts for the actual ſale of goods, where the buyer is *immediately* anſwerable, without time given him by ſpecial agreement, and the ſeller is to deliver the goods immediately.

So, ſales by auction ſeem not to be within the ſtatute of frauds. This was an action on the caſe brought againſt the defendant, who had bought certain drugs to the value of 110l. at an auction; and which, having afterwards ſunk in price, were not taken away according to the conditions of ſale, but put up again and reſold: it appeared in evidence, that the auctioneer, when he knocked down the lots to the higheſt bidder, put down the price, and the buyer's name in writing in the uſual manner, and the defendant went the next day, and ſaw the goods weighed. There was a verdict for the plaintiff, and the defendant moved for a new trial; and the objection now made was, that *this contract, not being in writing, was void by the ſtatute of frauds.* But the Court were all clearly of opinion, that the auctioneer muſt be conſidered as agent for the buyer after knocking down the hammer, as well as for the ſeller; and all the requiſites required by the ſtatute, had in this caſe been well complied with; for that *his ſetting down in writing*, the name of the buyer, the price, &c. was ſufficient to take it out of the ſtatute; and that the buyer's coming the next day, and ſeeing the goods weighed, was an additional circumſtance that deſerved attention. They alſo inclined to think, upon the general point, without expreſsly determining the queſtion, *that buying and ſelling at auctions was* NOT *within the ſtatute of frauds*; for per *Wilmot*, J. in which another of the judges concurred, I incline to think that the act was meant to extend only to miſchiefs, created by private and clandeſtine ſales, not to ſales by auction openly tranſacted before 500 people; and by Lord *Mansfield*, CH. J. the object of the legiſlature in that ſtatute was a wiſe one, and what the legiſlature meant, is the rule both at law and equity; for in this caſe, both are the ſame. The key to the conſtruction of the act is the intent of the legiſlature; and, therefore, many caſes, though ſeemingly within the letter, have been let out of it: more inſtances have, indeed, occurred in courts of equity than of law; but the rule is in both the ſame. For inſtance, when a man admits the contract to have been made, it is out of the ſtatute, for here there can be no perjury. Again; no advantage ſhall be taken of the

Simon v. Motivos, Tr. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1921. 1 *Black.* 599.

1 *Black.* 600, 601.

ſtatute, to protect the fraud of another. Therefore if the contract is *executed* it is never ſet aſide. So when Sir *Thomas Oſborne* beſpoke a chariot, that being in its nature not deliverable immediately, it was held not within the ſtatute, becauſe not capable of all the requiſites of the ſtatute.

1 *Black.* 602.

Where an agreement depends upon a contingency, and it does not appear but the contingency will happen within the year; nor does it appear from the agreement that it is to be performed after the year; there a note in writing *is not neceſſary*, becauſe the contingency may happen within the year, and ſo the agreement be performed within that time: but where it appears from the whole tenour of the agreement, that it is to be performed *after the year*, there an agreement in writing is required under the ſtatute: thus where by parol the defendant's teſtator promiſed the plaintiff, that if ſhe would come to live with him, as houſekeeper, that he would give her 8l. *per ann.* and leave her by his will 16l. a year: ſhe went and lived with him till his death, when he having failed to make for her the proviſion promiſed, ſhe brought her action againſt the executor, when it was ruled on the defendant's pleading the ſtatute that as this depended on a contingency (as the teſtator might have died within the year) no note in writing was required, and the plaintiff recovered the value of the annuity.

Fenton v. Embleſs, executors of May, Hil. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1278, 1 *Black.* 353.

In an action for goods ſold and delivered, the plaintiff proved a *parol* order and a *parol* promiſe, from the defendant, in theſe words, *I will pay you if* Smith *will not*; the undertaking was before the delivery of the goods; but *Smith* was entered as the debtor in the plaintiff's books: there was a verdict for the defendant, and a rule having been obtained, calling upon the defendant to ſhew cauſe why there ſhould not be a new trial; it was argued upon the ground, that this was not a collateral promiſe, but an original undertaking. *Per Cur.* Where the undertaking is *before delivery*, and there is a direction to deliver the goods, and *I will ſee them paid for*, it is not within the ſtatute of frauds; but the promiſe by the defendant in this caſe, to pay *if Smith* did not, is a collateral undertaking within the ſtatute of frauds.—Rule diſcharged.

Jones v. Cooper, Mic. Ter 15 Geo. 3. B.R. *Coop.* 227.

But where the defendant applied to the plaintiff, to ſerve one *Coulthard*, of Pomfret, with groceries; the plaintiff ſaid he did not know *Coulthard*, nor any perſon in that part of the world; upon which the defendant replied, "*You know me, and I will ſee you paid*;" the plaintiff ſaid then, he would ſerve him, and the defendant repeated the ſame words; *Coulthard* ordered goods which were ſent, he was made debtor in the plaintiff's books, and they applied to him for payment; which not being paid, this action was brought againſt

Matſon v. Wharam, Mic. Ter. 2 Geo. 3. B.R. 2 *Ter. Rep.* 80.

againſt the defendant on his undertaking: the defendant relied on the ſtatute of frauds; and for the plaintiff, the above diſtinction in *Jones* v. *Cooper*, was relied on; viz. that where the promiſe to pay for goods delivered to a third perſon, is made before the delivery, that it ſhall be deemed an original undertaking, and a note in writing not neceſſary. But the Court overruled that diſtinction, and held, that if the party receiving the goods was at all liable, that a note in writing was neceſſary. *Poſtea* to the defendant.

Chater v. Beckett, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 201.

The declaration in this caſe ſtated, that the plaintiff had ſued out a commiſſion of bankruptcy, and taken other proceedings at law, againſt one *Harris*; and that in conſideration that the plaintiff, *at the inſtance of the defendant*, would ſtay all further proceedings, and would accept of certain bills of exchange drawn or accepted by the defendant for a certain part, to wit, 10s. in the pound of his debt as a ſatisfaction for the whole, *the defendant undertook and promiſed to give the plaintiff ſuch bills for the ſame, and to pay all the expences which the plaintiff had been put to:* that the plaintiff ſtayed all proceedings againſt *Harris*, and accepted ſuch bills, &c. *yet that the defendant had not paid the ſaid expences, or any part thereof.* There were other ſimilar counts; and alſo the general counts for money paid, and for money had and received. At the trial it was ſtated, that the plaintiff drew bills on the defendant for the 10s. in the pound, which the latter accepted and paid: but *the defendant refuſing to pay the plaintiff's expences*, amounting to 20l. 13s. the plaintiff paid them to the attorney, and brought this action to recover the ſame from the defendant on his undertaking. But this undertaking not being in writing, Lord *Kenyon* was of opinion, that the caſe came within the ſtatute of frauds, and nonſuited the plaintiff. *Per Curiam.* In this caſe *Harris* was indebted to the plaintiff, and the defendant undertook to pay part of that debt, and to pay certain other expences. The promiſe therefore was certainly void in part by the ſtatute; and the agreement being entire, the plaintiff cannot now ſeparate it, and recover on one part of the agreement, the other being void. And if that agreement be void, there is an end of the caſe; for where there is an expreſs promiſe, another promiſe cannot be implied. Then it is urged that the plaintiff may recover on the general count: but in order to ſupport that count there ſhould be evidence of the plaintiff having paid a ſum of money that the defendant was bound to pay; whereas here the plaintiff was originally liable to pay theſe expences to his own attorney; and when he paid them, he only paid his own debt; therefore this cannot be conſidered as money paid to the uſe of the defendant. Rule diſcharged.

Kenteν. Temple, Mic Ter. 38 Geo. 3. C.B 1 *Pull & Boſan.* 158.

In this caſe, the plaintiff was a taylor and ſlopſeller at Portſmouth, and the defendant the firſt lieutenant of the *Boyne:* when that ſhip came into port, the defendant applied to a third perſon to recommend a ſlopſeller, who might ſupply the crew with new clothes; ſaying, "He will run no riſk, I will ſee him paid." The plaintiff being accordingly recommended, the defendant called upon him, and uſed theſe words, "I will ſee you paid at the pay-table; are you ſatisfied?" the plaintiff anſwered, "Perfectly ſo." The crew were ſupplied with the clothes, and ſoon after the *Boyne* was burnt, and the crew diſperſed into different ſhips: on that occaſion the plaintiff having expreſſed ſome uneaſineſs, was told by the defendant, "Captain *Grey* (the captain of the *Boyne*) and I will ſee you paid." After this the crew were paid off, and the defendant ſtood at the pay-table: and the defendant having taken ſome money out of the hat of the firſt man that was paid, gave it to the plaintiff; the next man refuſed to part with his pay, and was immediately put in irons: the defendant then aſked the commiſſioner to ſtop the pay of the crew, who anſwered that it could not be done.—On the trial of an action brought againſt the defendant for the amount of the clothes delivered, there was a verdict for the plaintiff for 576l. 7s. 8d.; and on a motion for a new trial, on the ground of the defendant's undertaking being within the ſtatute of frauds. THE COURT ſaid, that ſo large a ſum recovered againſt a lieutenant in the navy, went a great way in ſatisfying their minds, that it never could have been in the contemplation of the defendant to make himſelf liable, or of *the ſlopſeller* to *furniſh the goods on his credit*, to ſo large an amount. From the nature of the caſe, it is apparent the men were to pay in the firſt inſtance: the defendant's words were, "I will ſee you paid at the pay-table; are you ſatisfied?" and the anſwer then was, "Perfectly ſo:" the meaning of which was, that however unwilling the men might be to pay themſelves, the officer would take care that they ſhould pay. The queſtion is, Whether the ſlopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant; who, if we are to judge of him by others in the ſame ſituation, was not likely to be able to raiſe ſo large a ſum? This is a proper caſe to be ſent to a new trial.—Rule for new trial abſolute.

Aliens.

IT has been decided, that an action is maintainable by an alien enemy upon a ranſom bill.—An alien *enemy*, who was captain of a French privateer, took an Engliſh ſhip, upon the high ſeas, in time of open war, which was afterwards ranſomed for 300 piſtoles, and the mate was given as an hoſtage, who afterwards died in priſon. The ranſom bill was ſigned by both captains, and alſo by the hoſtage; and thereby the Engliſh captain obliged himſelf, and his owners, to pay the French captain 300 piſtoles, within two months. The money not being paid, the French captain brought his action againſt the Engliſh captain to recover it; and after the argument of a ſpecial caſe, founded on theſe facts, the Court were of opinion, that the action was maintainable; notwithſtanding the death of the hoſtage, and the plaintiff's being an alien *enemy*.

Ricord *v.* Bettenham, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1734. 1 *Black.* 563.

Alſo where an enemy's ſhip which had ranſomed a Britiſh veſſel, was retaken with the hoſtage and ranſom bill on board, but which bill was ſecreted and not delivered up to the recaptor: it was held, that the firſt captor might recover upon the ranſom bill.—In an action of aſſumpſit upon a ranſom bill, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court, on the following caſe. That the ſhip *Dolly* was captured by the *Princeſſe Robecq* privateer, commanded by the plaintiff, on the 6th of June, 1780, upon the high ſeas, in her voyage from Lynn to Liverpool, laden with corn; that the *Dolly* and her cargo were then the property of the defendant; that the plaintiff was then a natural born ſubject of the French king, from whom the privateer had a commiſſion; and that *Thomas Finchet*, the maſter of the *Dolly*, and the defendant were then natural born ſubjects of the king of Great Britain; that at the time of the capture, a ranſom bill was ſigned at ſea, between the plaintiff and *Finchet*, and *John Butler*, the mate of the *Dolly*, who was then given to the plaintiff as an hoſtage; which being tranſlated from the French into the Engliſh language, is as follows: "Regiſtered the preſent ranſom bill at the admiralty office, Boulogne, the 25th October, 1779, and delivered in double to Capt. *Robert Cornu*, commanding the cutter the *Princeſſe de Robecq*, privateer of this port, by me, underwritten chief regiſter. Signed *Merlin Boulogne*. We the underwritten *Robert Cornu* of Boulogne, com-

Cornu *v.* Blackburne, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 640.

commander of the ſhip the *Princeſſe de Robecq* privateer, of Boulogne, and *Thomas Finchett* of Liverpool, maſter of the ſhip *Dolly* of Liverpool, have agreed as followeth: viz. That I, *Robert Cornu*, commander of the ſaid privateer, acknowledge to have ranſomed the ſaid ſhip, the *Dolly* of Liverpool, belonging to *John Blackburne*, burgher of Liverpool, burthen 105 tuns, on the 6th of June, in the year 1780, at the heighth of Edinburgh, going from Lynn to Liverpool in England, under Engliſh colours, and paſſport of ſaid England, loaded with wheat, for the account of *John Blackburne*, burgher of Liverpool; which veſſel I have agreed to ranſom for the ſum of 1300l. ſterling, to be paid to Mr. *Hauſſoullier*, fitter of the ſaid privateer, at Dunkirk, in conſideration of which I have ſet the ſaid veſſel at liberty, to go to the port of Liverpool, where ſhe is to be arrived in the time and ſpace of three months, after the expiration of which, this preſent agreement ſhall not clear her from being taken by any other privateers. For ſecurity of which ranſom, I have received for hoſtage on board of the ſaid ſhip, *John Butler*, couſin to the captain of the ſaid veſſel, deſiring all friends and allies to let ſafely and freely proceed the ſaid veſſel to the port of Liverpool, without any let or moleſtation, during the ſaid time or courſe of her voyage; and I, *Thomas Finchett*, as well in my name, as in that of the ſaid *John Blackburne*, owner of the ſaid ſhip and merchandizes, have voluntarily ſubmitted to the payment of the ſaid ranſom, viz. 1300l. ſterling; for ſurety whereof, I have delivered up the ſaid *John Butler*, of Liverpool, for hoſtage, promiſing not to go againſt the conditions of this preſent contract; whereof each of us have a copy by us, which we have ſigned, with the ſaid hoſtage. Signed on board the ſaid ſhip, the 6th of June, in the year 1780. And it is further expreſsly covenanted and agreed, that I, the ſaid *Thomas Finchett*, do bind and oblige myſelf, and engage my veſſel and cargo, to pay or cauſe to be paid to the owners of the ſaid privateer, the full amount of the ſaid ranſom, ſhould the ſaid hoſtage come to die, or to deſert; or that the ſaid privateer ſhould periſh, or be taken with the hoſtage on board, *without which condition, the captain of the ſaid privateer would not have conſented to the above ranſom*, which *in all caſes whatſoever*, ſhall be well and truly paid. (Signed). *Robert Cornu, Thomas Finchett, John Butler.*" That the value of the *Dolly*, and her cargo then on board, amounted to the ſum of 1300l. contained in the ranſom bill; that the ſaid ſhip, after her capture and ranſom, was ſet at liberty, and arrived ſafe at her deſtined port of Liverpool; that on the 16th of June, 1780, the *Princeſſe de Robecq* was taken by two frigates, belonging to the king of Great Britain,

with *Butler* the hoſtage on board, and carried as a prize into an Engliſh port; *that at the time of the capture of the privateer, the ranſom bill was on board, but was not delivered up to the captors, nor was the ſame ever poſſeſſed by them.* That at the time of the capture of the *Dolly*, and at the time of the capture of the privateer, there was an open war between the king of Great Britain and the French king. After this caſe had been fully argued, the Court were clearly of opinion in favour of the plaintiff; and Lord *Mansfield* ſaid, it is found policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract which ariſes out of a ſtate of hoſtility, and is to be governed by the law of nations, and the eternal rules of juſtice. The additional clauſe is particularly adapted to this caſe. There is no pretext to impeach it, on the ground of fraud or extortion. The bill was regiſtered before the French ſhip ſailed, with this clauſe in it, nor does any inference ariſe from its inſertion, that the general law was underſtood to be otherwiſe; for it is alſo ſtipulated, that the death of the hoſtage ſhall not vacate the contract; which ſtipulation, the parties muſt be preſumed to have known to be unneceſſary, becauſe the deciſion in *Ricord* v. *Bettenham*, was notorious over all Europe. Learned lawyers were written to on that occaſion, both in France and Holland; and Mr. Juſtice *Blackſtone* ſhewed me ſeveral letters he had received from abroad, on the ſubject: the preſent caſe therefore is clear on two grounds: 1ſt, The ſpecial clauſe is deciſive; and 2dly, Independent of that clauſe, there never has been any capture of the ranſom bill.

But in a ſubſequent caſe on a ranſom bill, the main queſtion argued, was the ſame as in the laſt caſe of *Cornu* v. *Blackburne*; and beſides the former point (viz. that the actual or virtual recapture of the ranſom bill, annihilates the contract, or rather transfers the right from the original captor to the recaptor) it was contended, that queſtions on ranſom bills which ariſe out of *matter of prize*, are to be decided by the *jus belli*, and therefore are not triable in this court, but belong excluſively to the court of prize. Lord *Mansfield*, CH. J. delivered his opinion in favour of the plaintiff; but *Willes*, J. and *Buller*, J. thinking the courts of common law had no juriſdiction, and that that objection might be taken although not particularly pleaded; and *Aſhhurſt*, J. expreſſing doubts on that point, judgment was given for the plaintiff *pro formâ*, in order to give an opportunity of bringing a writ of error: this was afterwards done, and in Mic. Ter. 25 *Geo.* 3. by the unanimous opinion of all the judges of the common pleas and the exchequer, who concurred in holding, that an alien enemy cannot, by the municipal law of this country, ſue for the recovery of a right claimed to be

Anthon v. Fiſher, Ea. Ter. 22 Geo. 3. & Mic. Ter. 23 Geo. 3. B.R. 2 *Doug.* 648. 649 (n. 1.) (n. †132.)

be acquired by him in actual war. The judgment given in the court of king's bench was reverſed (1).

Brandon v. Neſbitt, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 23.

So, where an action was brought on a policy of inſurance on goods on board an American ſhip, at and from London to Bayonne; there was an averment in the declaration, that the policy was effected for the benefit and on the account of certain perſons (naming them), who were intereſted in the goods; and another averment that the ſhip was captured as prize. The defendant pleaded, that "the perſons intereſted were aliens born in foreign parts, to wit at Bayonne in France, out of the allegiance of the king of Great Britain, and within the allegiance of a foreign ſovereign, to wit, the French king;" that before the ſhip ſailed a public and open war commenced, and was carried on between our king and the perſons exerciſing the powers of government in France; and that the perſons intereſted were inhabiting and commorant in France under the government of the perſons exerciſing the powers of government in France, and that they are enemies of our king and adhering to the king's enemies, &c. There was another plea, in which it was alleged that the perſons were living in France and enemies, (without ſaying that they were enemies born), and that the goods were ſent from London after the commencement of the war, for the purpoſe of being landed and delivered in France in the courſe of trade to the king's enemies, &c. The replication to the firſt plea ſtated that the perſons intereſted in the inſurance were before the commencement of the war, and at the commencement of the ſuit, indebted to the plaintiff in divers ſums of money, exceeding the reſpective intereſts of thoſe perſons in the goods inſured, ſpecifying what ſums were due to the plaintiff from each of thoſe perſons reſpectively: the replication to the ſecond plea ſtated, that the exportation of the goods inſured, which conſiſted of muſlins and the like, was not prohibited by any law at the time of the policy, and that they were put on board the ſhip before the commencement of the war. To theſe two replications there was a general demurrer and joinder in demurrer. After argument, THE COURT were of opinion, That judgment muſt be given for the defendant, on this ground: that an action will not lie either by or in favour of an alien enemy. That the caſe of *Anthon* v. *Fiſher*, which was decided in this Court, and whoſe judgment was afterwards confirmed in the exchequer chamber, proceeded on the ſame

(1) By ſtat. 22 *Geo.* 3. § 25, it is prohibited to any of his majeſty's ſubjects to ranſom, or to enter into any contract for ranſoming any ſhip or goods captured by an enemy, under the penalty of 500l. and all ſuch contracts are declared void.

principle

principle. That they had not found a ſingle caſe, in which the action had been ſupported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettingham*, that the action by an enemy on a ranſom bill might be maintained, the action was not brought until peace was reſtored, which gets rid of the objection.

So alſo, where an action was brought upon a policy of inſurance on goods on board an American ſhip at and from London to Dunkirk, the firſt count of the declaration ſtated, that the plaintiff cauſed the inſurance to be made for the benefit of certain perſons trading under the firm of *Arrouet, Meſſot*, and Co. and that he, the plaintiff, being a perſon reſiding in Great Britain, had cauſed the policy to be effected as agent as well in his own name, as in the names of every other perſon to whom the ſame might appertain; that *the inſurance was declared by the policy to be on goods warranted French property:* that *Arrouet* and Co. were and continued to be intereſted in the goods on board, which were ſtated to be hardware; and that the ſhip and goods were afterwards captured in the courſe of the voyage, by a ſloop of war belonging to the king, and carried away as prize. It farther ſtated, that the goods at the time of the loading on board the ſhip and of the capture were French property, and that the ſhip was an American ſhip, the property of American ſubjects. There were other common counts; to all which the general iſſue was pleaded. At the trial, a ſpecial verdict was found, ſtating the particulars of the caſe; and the chief objection taken was, that *the inſurance upon enemies goods is illegal*; and it was endeavoured to diſtinguiſh this caſe from that of *Brandon* v. *Neſbitt*, becauſe in that caſe there was a plea of alien enemy, which the Court were bound to decide upon: BUT the Court were (after argument) clearly of opinion that this caſe could not be diſtinguiſhed from the principle on which that of *Brandon* v. *Neſbitt* was determined. And there was judgment for the defendant.

Briſtow v. Towers, Mic. Ter. 35 Geo 3 B.R. 6 *Ter. Rep.* 35.

But a native of a foreign ſtate, in amity with this country, taken in an act of hoſtility on board an enemy's fleet, and brought to England as a priſoner at war, is not diſabled from ſuing while in confinement, on a contract entered into with a ſubject of this country while a priſoner at war.—In this caſe, it appeared in evidence on the trial, that the plaintiff, being a native of Oldenburgh, in Germany, was taken priſoner at the Cape of Good Hope, he then ſerving as a ſailor in the Dutch fleet under Admiral *Lucas*; that he was ſent from the Cape to St. Helena, in a Britiſh frigate, as a priſoner of war; and was then put on board the *Caledonia*, a Britiſh merchantman, then in great want of hands, by order of the governor of the place; that during the voyage from St.

Sparenburgh v. Bannatyne, Mic. Ter. 36 Geo. 3. C.B. 1 *Pul. & Beſan.* 163.

St. Helena to England he was treated like the reſt of the crew, and did his duty to the ſatisfaction of the captain, the defendant in the action; that on his arrival here, he was delivered over to the commiſſary with the other priſoners taken on board the Dutch fleet, and was at the time of the action brought in cuſtody as a priſoner of war. A verdict being given for the plaintiff for 24l. a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial had, was afterwards, after ſome heſitation, granted by the Court. On ſhewing cauſe againſt this rule, the queſtion was, Whether, on the evidence produced, the plaintiff was to be conſidered as an alien enemy at the time when the writ iſſued? and if ſo, by neceſſary conſequence this action could not be maintained. The caſe was fully argued: and PER CUR. The defence has no foundation in conſcience, in juſtice, or in public policy: an enemy under the king's protection may ſue and be ſued. A priſoner of war is, to certain purpoſes, under the king's protection; and there are many caſes where he can maintain an action: ſuppoſe an officer of high rank on his parole is poſſeſſed of a ring or a jewel of great value, on which he wants to raiſe money, and that a tradeſman is ſo diſhoneſt as to receive it from him, and refuſe either to advance the money or return the pledge; ſurely the Court would ſay that he might recover his ring or his jewel from the tradeſman: but the preſent plaintiff was a neutral born, and became alien enemy only with reſpect to what he was doing under a local or temporary allegiance to a power at war with us; when the allegiance determined, the character determined: he could have no fixed character of alien enemy, who owed no fixed allegiance to our enemy; it being only in reſpect of his being in a ſtate of actual hoſtility, that he was even for a time an enemy at all: as a priſoner of war, he does not differ from any other individual who is in cuſtody for an offence which he has committed, and for which he is anſwerable: The pleas (1) ſtate, that the plaintiff was adhering to the king's enemies: they muſt be proved in all their points; but a priſoner at war is not adhering to the king's enemies; for he is here under protection from the king. If he conſpires againſt the life of the king, it is high treaſon; if he is killed, it is murder; he does not therefore ſtand in the ſame ſituation as when in a ſtate of actual hoſtility. It has been ſaid, that a priſoner at war cannot contract; his caſe would be hard indeed if that were true: officers on their parole, muſt ſubſiſt like other men of their own rank; but according to ſuch doctrine, they muſt ſtarve;

(1) The pleadings were ſpecial.

for

for they could gain no credit if deprived of the power of ſuing for their own debts. It has alſo been urged, that if the plaintiff was under a protection, that circumſtance ought to have been pleaded; and this is true of a formal protection under the great ſeal, but there may be a protection ariſing from ſituation, which need not be pleaded. If a priſoner of war is in confinement, he is protected as to his perſon; if he is on his parole, he requires further protection than what relates merely to his perſon. The contract in queſtion was made by the permiſſion of the king's officer, and therefore by the licence of the king, under whoſe authority the officer may be preſumed to have acted: and the man, whether he was under a ſafe conduct or not, did his duty faithfully, and was duly approved of by the officer of the *Caledonia:* he now only aſks for a moderate reward, and is paid with a plea of alien enemy. This is one of the hardeſt, one of the moſt impolitic, nay, immoral, defences that ever was ſet up in a court of juſtice; and we ought to lean againſt it: as to the ground of policy which has been taken in argument for the defendant, namely, that a benefit would reſult to the enemy from the plaintiff's recovering, it is a policy perhaps doubtful, certainly remote, and which we do not hold to be ſatisfactory. The true ground upon which the plea of alien enemy has been allowed is, that a man profeſſing himſelf hoſtile to this country, and in a ſtate of war with it, cannot be heard if he ſue for the benefit and protection of our laws in the courts of this country: we do not allow even our own ſubjects to demand the benefit of the law in our courts, if they refuſe to ſubmit to the law and the juriſdiction of our courts: ſuch is the caſe of an outlaw: but modern civilization has introduced great qualifications to ſoften the rigours of war; and allows a degree of intercourſe with enemies, and particularly with priſoners of war, which can hardly be carried on without the aſſiſtance of our courts of juſtice: it is not therefore good policy to encourage thoſe ſtrict notions, which are inſiſted on contrary to morality and public convenience.—Rule diſcharged.

The ſon of an alien father and Engliſh mother, born out of the king's allegiance, cannot inherit to his mother in this country. Upon the trial of an ejectment, a ſpecial verdict was found, containing the following facts. That *Lewis Henry Scipio de Grimoard de Beauvoir*, commonly called Count *Duroure*, is the only lawful iſſue of *Henrietta*, Counteſs *Duroure*, formerly *Henrietta Knight*, ſpinſter, who being a natural born ſubject of this kingdom, and within the ligeance of the king, in October, 1761, quitted the kingdom, and in May following, being at Bruſſels, in the Auſtrian Netherlands, married *Lewis Alexander de Beauvoir*, Doe *ex dem.* Duroure *v.* Jones, Tr. Ter. 31 Geo. 3. B.R. 4 *Term Rep.* 300

voir, Count *Duroure*, the father of *Henry Scipio*. *Lewis Alexander* was a natural born ſubject of the kingdom of France, and at the time of the marriage was within the ligeance, and in the military ſervice of the French king, who was then at war with the king of Great Britain. Before the above marriage took place, the Hon. *Hollis St. John*, being ſeiſed in fee of the eſtates in queſtion, by will deviſed them to his ſiſter *Henrietta Knight* for life, remainder to his niece the Counteſs *Duroure*, then *Henrietta Knight*, for life, remainder to the heirs male of her body; and for want of ſuch iſſue, to his (the deviſor's) own right heirs for ever. The verdict then ſtated the deaths of the deviſor, and of his ſiſter; the entry and ſeiſin of the mother of the leſſor of the plaintiff, and her death in 1763, leaving *Lewis Alexander*, her huſband, who is ſtill living, and *Henry Scipio*, her ſon, her ſurviving. That the leſſor of the plaintiff was born at Marſeilles, on the 26th of February, 1763; and that his mother was reſident there until and at the time of his birth, with and by the conſent and approbation of her huſband, who then and from the time of his marriage, was a ſubject to, and within the ligeance of the French king, and not within the ligeance of the king of Great Britain. That preliminary articles of peace between the ſaid kingdoms, were ſigned in November, 1762, and ſuch peace was finally ratified and confirmed in February, 1763, and continued to ſubſiſt until after the proclamation thereof at London and Weſtminſter, in March, in that year. That after the death of the Counteſs *Duroure*, the Right Hon. *F.* late Viſcount *Bolingbroke*, as heir at law to the deviſor, *Hollis St. John*, claiming title to the premiſes in queſtion, entered and became ſeiſed thereof; and afterwards in March, 1773, conveyed the ſame for a valuable conſideration to the defendant in fee; by virtue whereof he entered, and became ſeiſed. That in Trinty term, 1775, *a fine ſur conuſance de droit come ceo, &c.* was levied of the ſame, between *C. Langlois*, plaintiff, and the defendant deforciant; and the laſt proclamation of that fine was in Eaſter term, 1776. The leſſor of the plaintiff, when the fine was levied and proclaimed, was an infant, but attained the age of 21 on the 26th of February, 1784; he was then at large in England, and continued ſo to be until the 17th of December, 1784, when he was arreſted, and impriſoned for debt, and was kept and detained in priſon continually from that time, until the 16th of September, 1789; and on the 17th day of that month, he, claiming title to the premiſes in queſtion, made an actual and perſonal entry thereon in due form of law, to avoid the fine, and ejected the defendant; and on the argument of this ſpecial verdict, two queſtions were made: 1ſt,

On

On the ſtatute 25 *Edw.* 3. ſt. 2. Whether the leſſor of the plaintiff was entitled to recover, notwithſtanding his father was an alien? 2dly, Whether he was bound by the fine, being an infant at the time it was levied, and having been in priſon ſhortly after he came of age, ſo that five years had not elapſed ſince he came of age, free from the diſability of impriſonment? As to the firſt queſtion (which is the only one proper to be ſtated here, as the diſcuſſion of the other will appear hereafter) the Court ſaid, that it was of great importance to be known who are deemed natural born ſubjects, on account of the various rights to which they are entitled. The character of a natural born ſubject, anterior to any of the ſtatutes, was incidental to birth only; and whatever was the ſituation of his parents, the being born within the ligeance of the king, conſtituted a natural born ſubject. The firſt ſtatute which was paſſed on this ſubject, and which was mentioned in the argument, is that of 25 *Edw.* 3, by which it was enacted, "that all children inheritors, which from henceforth ſhall be born without the ligeance of the king, *whoſe fathers and mothers* at the time of their birth be and ſhall be at the faith and ligeance of the king of England, ſhall have and enjoy the ſame benefits and advantages to have and bear the inheritance within the ſame ligeance, as the other inheritors aforeſaid in time to come." And notwithſtanding what had been ſaid by the plaintiff's counſel, the Court could not conceive that the legiſlature in paſſing that act meant to ſtop ſhort, in conferring the right of inheritance merely on ſuch children, but that they intended to confer on them all the rights of natural born ſubjects. If the Court were now called upon, for the firſt time, to put a conſtruction upon the words of this ſtatute, they ſhould not think that they ought to be extended further than the natural import of the words; but that, in order to be entitled to the privileges and benefits of that act, the children muſt be born of natural born ſubjects, both father *and* mother, within the faith and ligeance of the king. But it was ſaid, that paſſages are to be found in ſeveral books of authority, to prove that *and* is to be taken diſjunctively, and that the words of the ſtatute are ſatisfied, if *either* the father *or* mother be a natural born ſubject; and that if the father be a natural born ſubject, the iſſue may inherit to him; and *vice verſa*, in the caſe of the mother. This, however, is not explicitly ſtated any where but in 1 *Bac. Abr.* 77. which refers in the margin, to ſeveral authorities, but which authorities, taken together, do not fairly make out the propoſition; and even if they did, the opinion of Lord *Hale*, in *Collingwood* v. *Pace*, 1 *Ventris* 422. would have ſhaken, and indeed overturned them; for that opinion has always been

been deemed of great authority. But the Court are not driven to the neceſſity of oppoſing the opinion of Lord *Hale* to the other caſes, and of deciding upon either; becauſe, conſidering the ſeries of acts of parliament which been paſſed ſince that time, 7 *Ann.* c. 5. 10 *Ann.* c. 5. and 4 *Geo.* 2, c. 21. we are in poſſeſſion of a parliamentary expoſition of this law. The firſt of thoſe acts was of very extenſive conſequence, becauſe it extended the benefits of naturalization to all foreign proteſtants; but this having created ſome ferment in the kingdom, was, in part, repealed by 10 *Ann.* c. 5. reſerving, however, that part of the act which reſpects the children of natural born ſubjects, born out of the king's ligeance; and it was ſuppoſed, that the privileges of naturalization were extended, by theſe two acts, to children born out of the king's ligeance, if *either* the father or mother was a natural born ſubject. This matter came again before the legiſlature, for their conſideration, when they paſſed the 4 *Geo.* 2. c. 21. which, without the authority of any decided caſe, has cloſed the queſtion, as a parliamentary declaration of the law. That ſtatute, after reciting that doubts had ariſen upon the conſtruction of 7 *Ann.* declares and enacts, "that all children born out of the ligeance of the crown of Great Britain, whoſe *fathers* are natural born ſubjects, ſhall be declared to be natural born ſubjects, &c." The conſideration of this ſubject was again taken up by parliament in 13 *Geo.* 3, c. 21. which extends the ſame privileges to grand-children, but ſtill confines them to the paternal line. Therefore, upon the whole, without conſidering what would be the conſtruction of the ſtat. 25 *Edw.* 3. taken by itſelf, or reſorting to the authority of *Collingwood* v. *Pace*, as contradicting, if it does contradict, the other caſes cited, but principally relying on the legiſlative expoſition of the law, the Court had no doubt, but that the leſſor of the plaintiff, who was born in foreign parts, and of a foreign father, did not derive inheritable blood in this kingdom. Therefore judgment was given for the defendant.

Ambaſſadors.

THE privilege of foreign miniſters and their domeſtic ſervants depends upon the law of nations; the act of parliament of 7 *Ann.* c. 12, is declaratory of it; all that is new in this act is the clauſe ſec. 4, which gives a ſummary juriſdiction for the puniſhment of the infractors of this law: The act of parliament was made upon occaſion of the *Czar*'s ambaſſador being arreſted: if proper application had been immediately made for his diſcharge from the arreſt, the matter might, and doubtleſs would, have been ſet right; inſtead of that, bail was put in before any complaint was made. An information was filed by the then attorney-general, againſt the perſons who were thus concerned, as *infractors of the law of nations*; and they were found guilty, but never brought up to judgment. The *Czar* took the matter up highly: no puniſhment would have been thought by him an adequate reparation: ſuch a ſentence as the court could have given, he might have thought a freſh inſult. Another expedient was fallen upon, and agreed to: *this act of parliament paſſed*, as an apology and humiliation from the whole nation. It was ſent to the *Czar* finely illuminated by an ambaſſador extraordinary, who made excuſes in a ſolemn oration: a great deal relative to this tranſaction and negociation appears in the annals of that time; and from a correſpondence of the ſecretary of ſtate then printed: But the act was not occaſioned by any doubt, "whether the law of nations, particularly the part relative to public miniſters, was not part of the law of England, and the infraction criminal; nor intended to vary one iota from it." In a caſe before Lord *Talbot* in the court of chancery, 16th July, 1736, *Buvot* v. *Barbut*, upon a motion to diſcharge the defendant, who was in execution for not performing a decree, "becauſe he was agent of commerce, commiſſioned by the king of Pruſſia, and received here as ſuch;" the matter was very elaborately argued at the bar, and a ſolemn deliberate opinion given by the court. In this caſe, theſe queſtions aroſe, and were diſcuſſed; whether a miniſter could by any act or acts waive his privilege?—whether being a trader, was any objection againſt allowing privilege to a miniſter perſonally (1)?—whether an agent of

Triquet and others *v.* Bath. And Peach, and another *v.* Bath, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1478. 1 *Black.* 471.

(1) Decided in the negative. *Cas. Temp. Talb.* 281.

commerce, or even a conſul, was entitled to the privileges of a public miniſter (1)?—And the rule of deciſion was, that *the law of nations in its full extent was part of the law of England*;—that the act of parliament was declaratory, and occaſioned by a particular incident;—that the law of nations was to be collected from the practice of different nations, and the authority of writers; and accordingly the authority of *Grotius*, *Barbeyrac*, *Binkershoek*, *Wiquefort*, and others, there being no Engliſh writer of eminence upon the ſubject, was taken and relied on.

Heathfield *v.* Chilton, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2016.

And Lord *Mansfield*, in another caſe, held the ſame doctrine. His lordſhip ſaid, the privileges of public miniſters and their retinue depend upon the law of nations; which is part of the common law of England; and the act of parliament of 7 *Ann.* c. 12, did not intend to alter, nor can alter, the law of nations: neither is there any one proviſion in that act which is not warranted by the law of nations.

But the law of nations (which will be carried as far in England as any where) though it be liberal, yet it does not ſcreen perſons who are not *bona fide* ſervants to public miniſters, but only make uſe of that pretence, in order to prevent their being liable to pay their juſt debts.

And the law of nations does not take in conſuls, or agents of commerce; though received as ſuch by the courts to which they are employed: neither does it appear certain whether the *miniſter*, from the prime biſhop of Leige, has privilege, for though he be called *miniſter*, yet miniſter alone is an equivocal term; and it is clear that he is not an ambaſſador, which is of the firſt rank, nor even an envoy, which is of the ſecond rank.

Lockwood *v.* Dr. Coyſgarne, Ea. Ter. 5 Geo. 3. B.R. 4 *Burr.* 2676.

The privilege of a foreign miniſter extends to his family and ſervants: and this privilege has been long ſettled, to extend to the ſervants who are natives of the country where he reſides, as well as to his foreign ſervants, whom he brings over with him: but by the law of nations a foreign miniſter cannot give a protection to a perſon who is not *bona fide* of his family.

Heathfield *v.* Chilton, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2017.

And the regiſtering the name of the ſervants of ambaſſadors in the ſecretary of ſtate's office, and tranſmitting it to the ſheriff's office, purſuant to the 5th ſection of the ſtatute, which provides, "that no perſon ſhall be proceeded againſt as having arreſted the ſervant of an ambaſſador or public miniſter, unleſs the name of ſuch ſervant be firſt regiſtered," relates only to the bailiff who arreſts, and is no condition

(2) This was decided in the negative. *Cas. Temp. Talb.* 201.

precedent

precedent to his being entitled to the privilege of a public miniſter's ſervant.

But to entitle to privilege, an actual *bona fide* ſervice muſt be proved.—On a rule to ſhew cauſe why the bill of Middleſex, in each of theſe cauſes, ſhould not be ſet aſide, and the bail-bond be cancelled: the only queſtion was, "Whether the defendant was *really* and *truly*, and *bona fide*, a domeſtic ſervant of the Bavarian miniſter?" or, Whether his ſervice was only colourable, and a mere ſham and pretence, calculated to protect him from the juſt demands of his creditors?" On the part of the defendant, it was ſworn, "that he was regularly appointed by the miniſter to be one of his Engliſh ſecretaries, at 30l. *per annum*, for board and lodging, &c.;" and he ſwore to *actual* attendance and *actual* ſervice at ſeveral times at the miniſter's houſe; and writing, copying, and carrying ſeveral letters and memorials; in ſhort, the defendant's affidavits were ſo framed, that every thing was ſworn that in abſolute ſtrictneſs could be required to bring him within the deſcription of a domeſtic ſervant to this miniſter. On the part of the plaintiffs, it appeared that the defendant was a mercer in Dublin about ſeven or eight years before; that he had afterwards been a commiſſary of ſtores abroad, and was then upon half-pay as ſuch, at 15s. per day; that he ſpoke only Engliſh; that he had never eat nor lodged in the miniſter's houſe; nor received any wages (but as to the wages, in fact none were due); it was alſo ſworn, that whilſt he carried on trade in Ireland, he bought goods in England and ſold them in Ireland. *Per Cur.* It is not to be expected that *every particular act* of the ſervice ſhould be particularly ſpecified; it is enough if an actual *bona fide* ſervice be proved; and if ſuch a ſervice be ſufficiently proved by affidavit, we muſt not, upon bare ſuſpicion only, ſuppoſe it to have been merely colourable and colluſive: and as to the point of his being a trader, his having been ſo in Ireland (and even that ſeven years before) will not bring him within the exception of the 5th clauſe of this act; which provides, "that no merchant or other trader whatſoever *within the deſcription of any of the ſtatutes of bankruptcy*, who hath or ſhall put himſelf into the ſervice of any ſuch ambaſſador or public miniſter, ſhall have or take any manner of benefit by that act; and as to the trading in this kingdom, there is only a ſingle inſtance, and that of buying only.

Triquet and others *v.* Bath. And Peach, and another *v.* Bath, Mic. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1478. 1 *Black. Rep.* 471.

And a defendant, in order to ſubſtantiate his claim to privilege, as a domeſtic to an ambaſſador, ought himſelf to ſhew the nature of the ſervice, and ſwear to the actual performance of it.

Fontainier *v.* Heyl, Tr. Ter. 5 Geo. 3. B R. 3 *Burr.* 1731.

And the rule laid down in theſe caſes is, that the proceſs of the law ſhall not take a perſon out of the ſervice of a public miniſter: but on the other hand, a public miniſter

Heathfield, *v.* Chilton, Hil. Ter. 7 Geo. 3. 4 *Burr.* 2015.

cannot take a perſon out of the cuſtody of the law; therefore, if a man has no ſuch privilege at the time of his being arreſted; no ſubſequent privilege can be given him, by being afterwards taken into the ſervice of a public miniſter: by this caſe, it did not appear that the defendant was in the ſervice of the miniſter at the time of the arreſt; and the Court, according to the above rule, held that he was not entitled to privilege.

Lockwood, *v.* Dr. Coyſgarne, Ea. Ter. 5 Geo. 3. B.R. 4 *Burr.* 1676.

So, where it appeared from the affidavits, that, "the defendant had been protected by the Morocco ambaſſador, upon whoſe departure from England, the plaintiff proceeded againſt the defendant, being then unprotected, and obtained judgment againſt him; the defendant brought a writ of error; and whilſt this was depending, he was hired to the Bavarian miniſter as his phyſician, at 40l. a-year ſalary: though Dr. *Redmond* then ſtood upon the liſt as the phyſician: the defendant ſwore that he had preſcribed to ſome of the miniſter's ſervants; and he alſo ſwore, that ſince his appointment he never preſcribed to any other perſons but the Count's ſervants. It appeared from the affidavits produced on the part of the plaintiff, that the defendant kept a coach and livery ſervants of his own; that he had formerly been a trader, but had left off: but it was not aſcertained where, or for how long time he had practiſed as a phyſician. Soon after he was hired to the Bavarian miniſter, the miniſter's own ſecretary ſent to the ſheriff of Surrey (who had an execution againſt the defendant), to acquaint him that the defendant *was protected* by the miniſter: the queſtion was, therefore, Whether this was a *bona fide* ſervice, or merely colourable? *Per Cur. Binkerſhoek de foro legatorum*, ſays, "that a *perſon in debt* cannot be taken into the ſervice of a foreign miniſter, in order to *protect him*:" and were it otherwiſe, it would give the foreign miniſter a power to diſpenſe with the private debts of the ſubjects of this country: now here was actually judgment againſt the defendant, only ſuſpended by writ of error; and the ſecretary's letter ſays, that *this man was protected* by the miniſter. But a foreign miniſter cannot *protect* by way of ſcreening a debtor from paying his juſt debts: he has no ſuch privilege; and it would be of very bad conſequence, if protections ſhould be ſet up to ſale, or made uſe of merely for the ſake of ſcreening people from paying their juſt debts. It is not uſual to retain phyſicians; *domeſtic* phyſicians are not the cuſtom of modern ages; though it was cuſtomary among the ancients. The profeſſion of a phyſician is honorary; and the retainer ſhould come from the ambaſſador; whereas this man offered himſelf; and it is plain enough that it was done with a view to this *protection*; but *an ambaſſador cannot protect*; it is the law that gives the protection; and yet here the ſecretary ſends notice to the theriff that the miniſter

has *protected* him; the view therefore is manifeſt: *it is not a bona fide ſervice, but a ſcheme to ſecure the defendant from the payment of his debts.*—Rule diſcharged, but without coſts; as it appeared that it was obtained at the inſtance, and at the coſts of the miniſter.

In this caſe the defendant being indebted to the plaintiff in 500l. paid him 250l. in part, and gave him a bond and judgment for the reſidue, with ſtay of execution for a certain time; which being elapſed, the plaintiff threatened to take out execution againſt him. Whereupon the defendant wrote a letter to the plaintiff, requeſting further time, and promiſing that he would pay him as ſoon as poſſible. The plaintiff having waited for his money a year longer, and not being paid, took out a writ, directed to the ſheriff of Middleſex, on which the defendant was arreſted and carried to the officer's houſe. Soon afterwards, the envoy from the elector of Bavaria, and from the elector palatine, ſent a meſſage to the officer, demanding the defendant's diſcharge, as being the baron's Engliſh ſecretary, and regiſtered as ſuch, in the proper offices. In conſequence of this meſſage, and on receiving a note of indemnity, the officer diſcharged the defendant out of cuſtody. Whereupon the plaintiff ſerved the ſheriff with a rule to return the writ. THE COURT being afterwards moved to diſcharge this rule, they granted a rule to ſhew cauſe; and on ſhewing cauſe, it appeared by affidavit, that *although the defendant might be ſecretary to the envoy, yet he was in fact the purſer of a king's ſhip, and that the duties of thoſe two offices were incompatible.* After hearing counſel on both ſides, the Court unanimouſly diſcharged the rule upon the ſheriff, and diſallowed the protection; ſaying, that though courts of law will protect the ambaſſadors or public miniſters of foreign princes or ſtates, and their ſervants, from being arreſted, it being the law of nations ſo to do, yet we muſt not confound the *right of protection*, with the *abuſe* of that *right*. The queſtion is, Whether this defendant is *bona fide* a ſervant of the ambaſſador? It is determined, that he need not be a *domeſtic* ſervant, although the words of the ſtatute, 7 *Ann.* c. 12, are *domeſtic ſervants*; for many houſes are not large enough to contain and lodge all the ſervants of ſome ambaſſadors. But we are of opinion, that the office of purſer, which the defendant has and enjoys, is incompatible with being ſecretary to an ambaſſadór; for no man can ſerve two maſters, and as the defendant is a ſervant of the king, he cannot therefore be a ſervant to the ambaſſador.

Darling *v.* Atkins, Mic. Ter. 10 Geo. 3. C.B. 3 *Wiſ.* 33.

Amendment.

Small *ex dem.* Baker *v.* Cole and Skinner, Ea. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1159.

A VERDICT cures a defect in ſetting out a title, though it cannot cure a defective title.—After a trial in ejectment, and a verdict for the plaintiff, the Court was moved in arreſt of judgment, for that the leaſe declared upon was on the face of it void. The pleadings were entitled of Hilary term, in the firſt year of king *Geo.* 3. and the leaſe was laid to be made *in the thirty-third year of the ſaid king*, which was alleged to be a fatal objection to the very title of the plaintiff, and that it could not be amended. The Court ſaid, to be ſure you cannot alter the title, if it be defective, but this is only a title defectively, or improperly ſet out, and there can be no doubt, but that a proper title was proved at the trial. If the demiſe had been laid in the thirty-third year of his late majeſty, undoubtedly in that caſe, the Court would have ſupplied the words "king *George* the Second." And this ſeems to be juſt ſuch a kind of defect as that would have been, it is not an uncertain deſcription, but only a title defectively ſet out, by the mere miſtake of the clerk, and being in ejectment, there is the more reaſon for our overruling this nice objection.

Doe *ex dem.* Hardman *v.* Pilkington and Ruſſel, Tr. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2447.

An amendment in ejectment may be made even in the time of the demiſe to prevent being barred.—In an ejectment made upon an entry, to avoid a fine, the demiſe was laid *before* the plaintiff had made the entry, inſtead of being laid *after* the entry. And upon a motion for leave to amend, THE COURT were clearly of opinion, that the demiſe being a mere matter of form, and not like a real title, and it being a clear miſtake of the plaintiff's attorney, the plaintiff ought to be at liberty to amend, on payment of coſts.

Rex *v.* John Wilkes, eſq. Hil. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2527.

In an information for a libel, the counſel for the crown, after the record had been made up, and the cauſe was ready for trial, thought it expedient to amend the record, by ſtriking out the word *purport*, and inſerting in its place the word *tenor*. Accordingly an application was made to Lord *Mansfield*, for a ſummons to ſhew cauſe, why ſuch amendment ſhould not be made; and a ſummons having been granted, his Lordſhip was attended at his own houſe, by the attornies and clerks in court on each ſide, and made an order, that the information ſhould be amended, by ſtriking out the word *purport*, in the ſeveral places where it was mentioned, and inſerting inſtead thereof the word *tenor*. This amendment became afterwards a ſubject of conſiderable debate. But the Court were ultimately of opinion, that

that it was right; and that as it was not objected to at the trial, the proper opportunity of taking the objection was loſt.

In an action brought againſt an executor, the judgment was entered, by miſtake, *de bonis propriis*; and upon a motion for leave to amend, by making it *de bonis teſtatoris, ſi, &c. & de bonis propriis ſi non, &c.* the Court were clearly of opinion, that the amendment ought to be made, it not being an error in point of law, but a mere miſtake of the clerk. Short v. Coffin, executor of B. Coffin, Ea. Ter. 11 Geo. 3. B R. 5 *Burr.* 2730.

But an amendment of the declaration after verdict will not be allowed. A writ of error having been brought upon a judgment recovered againſt the defendant, for money *lent* and advanced by the plaintiff to a third perſon, at the defendant's requeſt; it appeared by the original writ, that the count was for money *paid*. It was therefore moved, that the count might be amended by the writ, by ſtriking out the word *lent*, and inſerting the word *paid* inſtead of it. But the Court ſaid, we muſt preſume that the plaintiff proved money lent, for the verdict is for money lent to a third perſon, and no precedent can be ſhewn, where ſuch an amendment as this was ever made. The ſtatutes of amendment lead us to ſee what power we had at law to amend, and we had no power to amend, after the firſt term, when the record was made up, and the roll carried in; but ſince the ſtatutes, courts have gone a great way further, yet there is no ſtatute which goes ſo far as to empower us to make an amendment, which would alter the trial on the iſſue. The iſſue at the trial was, Whether the plaintiff *lent* a third perſon money at the defendant's requeſt, and you would now make the iſſue to be, Whether the plaintiff *paid* a third perſon money at the defendant's requeſt. This would be to alter and change the record, in a moſt ſubſtantial point; we are bound by the record and the verdict, and muſt take it to be true, that every part of the declaration was proved at the trial. The plaintiff has miſtaken his action, but if we were to allow this amendment, great inconvenience would enſue; for then we ſhould lay down a rule, that whenever the plaintiff had obtained a verdict, in a caſe where he had no legal cauſe of action, he might afterwards ſue out an original writ, wherein he had good and legal cauſe of action, and amend his record thereby; and ſo recover upon an iſſue which had never been tried. For theſe reaſons the amendment was refuſed. Marriot v. Liſter, Mic. Ter. 3 Geo. 3. C B. 2 *Wilſ.* 147.

It was moved after a verdict for the plaintiff at the aſſizes, that the judgment might be arreſted, upon an objection that the fourth and fifth counts were bad, becauſe it was alleged in both thoſe counts, that the ſaid *Charles (the defendant)* ſold, &c. to the ſaid *Charles (the defendant)*, but this being Richards v. Symonds, Mic. Ter. 10 Geo. 3. C.B. 3 *Wilſ.* 43.

after verdict, *the Court* rejected the words *to the ſaid Charles* in both the counts, as ſurpluſage; and held them both to be good and ſenſible without theſe words, and refuſed even to make a rule to ſhew cauſe (1).

Wheſton *v.* Packman, Hil. Ter. 10 Geo. 3. C.B. 3 *Wilſ.* 49.

The defendant was rightly named *John*, both in the writ and in the declaration delivered, but not entering his appearance in due time, the plaintiff's attorney entered an appearance for him, according to the ſtatute, by the name of *James*, inſtead of *John*. The Court was then moved, that the declaration might be ſet aſide, becauſe the defendant was not in court. But they held it to be a mere ſlip, and therefore ordered the proper officer to alter the entry of the appearance, and inſert the name *John* inſtead of *James*.

Bohoun *v.* Burton, Ea. Ter. 10 Geo. 3. C.B. 3 *Wilſ.* 58.

The Court was moved, that a fine of lands levied in the reign of queen *Ann*, might be amended by a deed of ſettlement, by altering the name of a pariſh in the fine, from *Coxley* to *Corley*; and upon reading the deed, and the indenture of the fine, and an affidavit that there was no ſuch pariſh as *Coxley* in the county where the lands lay, the Court ordered the fine to be amended, without making a rule upon any perſon to ſhew cauſe.

Henzell *v.* Lodge, Hil. Ter. 11 Geo. 3. C.B. 3 *Wilſ.* 154. 2 *Black.* 747.

The Court was moved on behalf of the tenant and vouchee, to amend a common recovery, by inſerting the word *Merſham*, being the name of a pariſh, among the pariſhes named in the recovery, next after the pariſh of Brabone. This motion was grounded on an affidavit made by the vouchee, that ſome ſmall part of the lands whereof the recovery was intended to be ſuffered, extended into, and lay in the pariſh of Merſham, in Kent. The affidavit further ſtated, that one *Robert Goddard* was tenant of an entire farm, under the yearly rent of 58l. the principal and moſt part thereof was in the pariſh of Aldington, in Kent; but that ſome part of it, *as he believed*, extended into the ſaid pariſh of Merſham; and that the whole of the farm was intended to be compriſed in the recovery, although the ſaid pariſh of Merſham was not mentioned, either in the recovery, or in the deed to lead the uſes of it. The Court, after taking a day's time to conſider, ordered the proceedings in the recovery to be amended, by inſerting the word *Merſham*.

Pearſon *v.* Pearſon, Mic. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 73.

The Court will not grant leave to amend a recovery, upon an affidavit only that the party meant to include all his eſtates in a particular county. But it muſt appear *on the face of the deed to lead the uſes*, that there is ſufficient ground for an amendment.

---

(1) See ſtat. 16 & 17 *Car.* 2, c. 8. whereby it is enacted, that judgment ſhall not be ſtayed *after verdict*, by reaſon of miſtaking the name of the plaintiff or defendant in the pleading.

In

In a *formedon*, the Court was moved for leave to diſcontinue, on payment of coſts; there being a miſtake in ſetting out the eſtate tail in the writ. Upon ſhewing cauſe it was alleged, that the defendant had been ſerved with an ejectment for the ſame lands by the plaintiff, and had been thereby put to certain coſts and charges, which he could not get, unleſs he ſhould now be allowed them. The Court ſaid, that as the plaintiff came to aſk a favour, he muſt pay the coſts, both in the ejectment, and the formedon; which he conſented to, on being permitted to amend all the proceedings in the formedon. A rule was therefore made by conſent, that the plaintiff ſhould be at liberty to amend accordingly. Scott *v.* Perry, Ea. Ter. 11 Geo. 3. C.B. 2 *Black.* 758.

The Court was moved to ſtay proceedings on a bill of Middleſex, which was in debt only, and not in treſpaſs, with an *ac etiam* in debt. Lord Mansfield at firſt refuſed a rule to ſhew cauſe, unleſs they would produce a precedent of a like rule within fifty years paſt. But the next day it was moved again; when it being alleged, that no precedent could be found of a bill of Middleſex in debt only, a rule to ſhew cauſe was granted; and upon ſhewing cauſe, the Court gave leave to amend the bill, by inſerting the plea of treſpaſs. Cox, *q. t. v.* Munday, Ea. Ter. 4 Geo. 3. B.R. 1 *Black.* 462.

The court of common pleas was moved to ſet aſide a *teſtatum ca. ſa.* and to diſcharge the defendant out of cuſtody, the writ being made returnable *before us at Weſtminſter*, which is the ſtyle of the court of king's bench, and not *before our juſtices*, which is the ſtyle of this court. At the ſame time the plaintiff moved to amend it, by the record of the writ on the roll, and all the preceding proceſs, which appeared to have been in the court of common pleas; and ſeveral caſes were cited, where ſuch amendments had been made. Upon the authority of theſe precedents, the Court directed the writ to be amended, on paying the coſts of both motions. Hunt *v.* Kendrick, Tr. Ter. 12 Geo. 3. C.B. 2 *Black.* 836.

In this caſe the *capias* was teſted the 11th of June, returnable on the *octave* of the Holy Trinity, which was the 13th of June. The Court was moved to ſet aſide the proceedings with coſts, for irregularity; becauſe there were not fifteen days between the teſte and return. But on the other ſide it was inſiſted, that this was error, not irregularity; the Court therefore ordered the matter to ſtand over for three days, when the defendant was to ſhew cauſe why the plaintiff ſhould not amend, on payment of coſts. On ſhewing cauſe it was inſiſted, that there was nothing to amend by. *Per Cur.* Although this court cannot amend an original writ, becauſe it iſſues out of the court of chancery, yet this court can amend all meſne proceſs, and alſo an attachment of privilege, which is in the nature of an original. Carty *v.* Aſhley, Tr. Ter. 13 Geo. 3. C.B. 3 *Wilſ.* 454. 2 *Black.* 918.

No

No error can be aſſigned in *meſne* proceſs: this is a mere miſtake of the officer, the filacer, and ought to be amended; for when a plaintiff beſpeaks a writ returnable at ſuch a day, he impliedly orders the officer to make the teſte regular; and by theſe implied inſtructions, the Court may now amend; therefore the rule for the amendment was made abſolute.

Parker *v.* Anſell, Tr. Ter. 13 Geo. 3. C.B. 2 *Black.* 920.

A new trial was granted in a fiſhery cauſe, wherein a general verdict was given for the defendant, though he had given no evidence on two or three pleas, upon which iſſues were taken, and though the plaintiff had given evidence to diſprove them. The defendant then moved the Court for leave to amend, by ſtriking out thoſe pleas; but the Court was of opinion, that the motion was not only unprecedented, but ill founded; the intent of new trials is to ſubmit the *ſame* queſtions to the conſideration of another jury, but this would be to *vary* the queſtions, and perhaps, in the very point on which the plaintiff chiefly relies; therefore the motion was refuſed.

Sayer *v.* Pocock, Hil. Ter. 16 Geo. 3. B.R. *Cowp.* 407.

A rule was granted to ſhew cauſe, why the record ſhould not be amended after verdict, by adding at the end of the replication, the words *and the defendant does ſo likewiſe*, inſtead of, &c. A prior motion had been made for a rule to ſhew cauſe, why the judgment ſhould not be arreſted, upon the ground of there being in fact no iſſue joined, in conſequence of the above defect. Lord *Mansfield* ſaid, one is aſhamed and grieved that ſuch objections remain, they have nothing to do with the juſtice of the caſe, but only ſerve to entangle, without being of the leaſt aid in preventing irregularity; without conſidering therefore, whether it is within the ſtatutes of jeofails or not, it is beſt to amend, in order to avoid a writ of error; and there are three grounds which ſatisfy me, that the matter in this caſe is amendable. 1ſt, That it is an omiſſion of the clerk; 2dly, I will in this caſe adopt the reaſoning of Lord *Coke*, and conſtrue, &c. to mean every neceſſary matter which ought to be expreſſed; 3dly, By amending, the Court only makes that right, which the defendant himſelf underſtood to be ſo, by his going down to trial. The other judges concurring, the rule to amend was made abſolute, and the rule for arreſting the judgment was diſcharged.

Vereſt *v.* Raſael, Ea. Ter. 16 Geo. 3. B.R. *Cowp.* 425.

Where an action of treſpaſs and falſe impriſonment was brought againſt two perſons jointly, but judgment was given againſt one of them only, the other being found not guilty. And afterwards, a writ of error was brought upon this judgment, in the names of both the defendants, by miſtake; the Court was moved for leave to amend the writ of error, on an affidavit made by the officer, who ſwore that it was his miſtake, and that the inſtructions left with him, were to

make

make out a writ of error in the name of the other defendant only. On the other hand, there was a motion for quaſhing the writ of error, on the ground that it did not agree with the original record. *Per Cur.* The reaſon why it did not agree with the record, was owing to a blunder which the officer ſwears was made by his miſtake. The words of the ſtatute 5 *Geo.* 1. c. 13 are, "That all writs of error, wherein there ſhall be any *variance* from the original record, *or other defect*, ſhall be amended." Now here is a defect, and that defect owing to the miſtake of the officer; the words of the act are general, *other defects*; and therefore, if there were any doubt, they ought to be extended as far as poſſible, becauſe it is for the furtherance of juſtice. Rule for amending the writ of error abſolute, on payment of coſts; and the rule for quaſhing it diſcharged.

After judgment in ejectment, in the court of king's bench in Ireland, and affirmed in the court of king's bench in England, the declaration was amended, by enlarging the term; although the record had been remitted to the court of king's bench in Ireland. A writ of *ſuperſedeas* was alſo iſſued to the former *mittimus*, and a new writ of *mittimus* was awarded to the judges of that court, incloſing the tenor of the record ſo amended. The whole upon payment of coſts by the party applying.

Vicars v. Haydon, Tr. Ter. 18 Geo. 3. B R. *Cowp.* 841.

A clerical miſtake may be amended in the return to a *mandamus*, after the return has been filed. A *mandamus* having iſſued to reſtore *H. F.* to the office of a capital burgeſs of the borough of L. the corporation returned, that *C.* one of the capital burgeſſes, had exhibited certain articles of complaint againſt *F.* charging him with having been duly ſummoned, and neglected to attend a corporate meeting, for the election of a capital burgeſs; and the articles alſo charged him with non-reſidence, and neglect of duty. The return then ſtated, that *F.* having been ſerved with a copy of theſe articles, attended a meeting of the mayor and burgeſſes, and was heard in his defence; and that afterwards it was adjudged, that he was guilty of the non-reſidence, abſences, contempts, neglect, breaches of duty, and miſbehaviour, and other matters objected and charged againſt him, *in and by the 2d and 4th articles of the ſaid complaint.* And that thereupon they had reſolved to remove him from his office, and had removed him; and that he had not been elected ſince, ſo that they could not reſtore him. After this return had been filed, the defendants diſcovered, that they had in that part of it which ſtated the conviction ſet forth, that the proſecutor had been found guilty of the charges *in the 2d and 4th articles*, without having previouſly ſtated, that the complaint conſiſted of four articles; they therefore moved for leave to amend the return accordingly. And having

The King v. the Mayor and Burgeſſes of Lynn Regis, Ea. Ter. 19 Geo. 3. B R. 1 *Doug.* 134.

having obtained a rule to ſhew cauſe, THE COURT, after cauſe ſhewn, ſaid, It is very eſſential to the adminiſtration of juſtice, that ſlips or miſtakes of the pen ſhould not be fatal. This is clearly a mere blunder, and not a trick; and the amendment ſuggeſts itſelf upon inſpection. As the return ſtands at preſent, it is nonſenſe; and no caſe has been cited, where the Court has refuſed to amend ſuch a miſtake, although the return has been filed. Therefore the rule was made abſolute; the defendants undertaking, if an action for a falſe return ſhould be brought, to take ſhort notice of trial, and not to bring a writ of error, if there ſhould be judgment againſt them.

Eddowes, & *al.* *v.* Hopkins, & *al.* Ea Ter. 20 Geo. 3. B.R. 1 *Doug.* 375.

Where there is a general verdict on a declaration conſiſting of different counts, ſome of which are inconſiſtent, or bad in point of law, and evidence has only been given on the good or conſiſtent counts, the verdict may be amended by the judge's notes.—In an action of aſſumpſit brought againſt the defendants, as the executors of one *Harris*, the declaration contained ſeveral counts, ſome upon promiſes made by the teſtator, others on other promiſes made by the defendants themſelves. To the firſt ſet of counts, the defendants pleaded *plene adminiſtravit*; and to the others, the general iſſue. The jury on the trial, found for the plaintiffs, with 147l. damages, and a general verdict was entered by the officer. Afterwards, the Court was moved in arreſt of judgment, on the ground, that the verdict was general, and the counts inconſiſtent, and ſuch as required different judgments to be entered; viz. Judgment *de bonis teſtatoris*, on thoſe where the promiſes were laid to have been made by the teſtator, and *de bonis propriis* on the others. The plaintiffs alſo moved to have the *poſtea* amended by the judge's minutes, and a verdict entered for the plaintiffs on thoſe counts only, to which the evidence given at the trial applied, and for the defendants on the others. Both theſe motions came on together; and after argument, Lord *Manſfield* ſaid, it was impoſſible to believe there was ſuch an abſurdity in the law, as that a mere miſtake of the officer ſhould be without a remedy, and that neither the judge or jury could poſſibly have proceeded on what there was no evidence of before them; his lordſhip then mentioned a caſe of one *Gibſon*, who had been tried for robbing Mr. *Francis*, and convicted; and that a miſtake being diſcovered in the verdict, a conſultation with all the judges was held at his chambers, when the miſtake was corrected from minutes ſigned by the jury, and the priſoner executed. And *Buller*, J. ſaid, there was this diſtinction, that if there was only evidence at the trial upon ſuch of the counts as were good and conſiſtent, a general verdict might be amended from the notes of the judge, and entered only on thoſe counts; but that

that if there be any evidence which applies to the other bad or inconſiſtent counts (as, for inſtance, in an action for words, where ſome actionable words are laid, and ſome not actionable, and evidence given of both ſets of words, and a general verdict), there the *poſtea* can not be amended, becauſe it would be impoſſible for the judge to ſay, on which of the counts the jury had found the damages, or how they had apportioned them: that in ſuch a caſe, the only remedy is by awarding a *venire de novo* (1). Therefore in this caſe, the rule to arreſt the judgment was diſcharged, and the other made abſolute; but on the payment of coſts, including thoſe of the motion in arreſt of judgment.

But where ſome counts in the declaration (which was for words, were good and ſome bad in law, and general damages were given. The court were of opinion, that there ſhould not be a *venire de novo*, and that as the damages were entire, the judgment muſt be arreſted *in toto*: and *Lawrence*, J. ſaid, that the plaintiff ought not to be at liberty to amend by the judge's notes in this caſe, becauſe the evidence applied as well to the bad as to the good counts. Holt *v.* Scholefield, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 691.

In an ejectment to recover certain premiſes, where there was a verdict for the plaintiff againſt twenty-two of the defendants; the *poſtea* ſtated, that "as to the premiſes in the within-written declaration mentioned, except as to two cottages parcel thereof;" twenty-two of the defendants, naming them, were guilty, and ("as to the ſaid two cottages parcel of the premiſes, in the ſaid declaration mentioned") that the ſaid *N.* and *M.* the other two defendants, were not guilty: the defendants brought a writ of error, and after joinder in error, and a day appointed for argument, the defendant in error applied to the judge who tried the cauſe, to amend the *poſtea* by his notes, which he did, by directing that the words within the inverted commas as above, ſhould be ſtruck out. The defendant in error then applied to *Buller*, J. to amend the judgment-roll, and the tranſcript thereof as above, who made an order, that the defendant ſhould have leave to move for a new trial, and in caſe the Court ſhould refuſe to grant a new trial, then that the leſſors of the plaintiff ſhould be at liberty to amend the roll, on payment of coſts, agreeable to the *poſtea*. It was accordingly moved for a new trial (which was granted), and alſo to ſet aſide the order for the amendment, made by the judge who tried the cauſe, on two grounds: 1ſt, Becauſe it was an amendment by a judge of another court, and after the expiration of one term after the trial; 2dly, Becauſe the amendment was not warranted by the judge's notes. Doe *ex dem.* Church *v.* Perkins, and 23 other defendants, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 749.

(1) See title, VENIRE DE NOVO.

BUT

But the Court ſaid, there was no foundation for the firſt objection; for that, according to the practice of amending by the judge's notes, which was of infinite utility to the ſuitors, and was as ancient as the time of Charles the Firſt, the amendment might be made *at any time*: and that the ſecond objection might be conſidered when the rule for granting the new trial came before the Court, on the judge's report; and if, according to that report, the evidence did not correſpond with the amendment, the defendant might then have the benefit of that objection.

Green *v.* Rennet, Ea. Ter. 27 Geo. 3. B.R. 2 *Ter. Rep.* 782.

The court of king's bench was moved to amend a bill of Middleſex, which was filed as in the 24th year of *Geo.* 3. by making it according to the truth of the fact, as of Hilary term 25th *Geo.* 3. And the motion was granted accordingly; becauſe there was in this caſe ſomething to amend by, namely, the *precipe*, which is a circumſtance by which the Court have always been guided; and in the court of common pleas, fines and recoveries are amended every day, upon the principle that there is ſomething to amend by.

Laroche *v.* Waſbrough and Mailand, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 737.

Upon a judgment to recover againſt two defendants, a writ of error was brought in the exchequer chamber by one of them only, and the judgment having been affirmed, and coſts given of the writ of error, both the defendants were taken under a writ of execution for the whole ſum, including the coſts of the writ of error, as well as the original ſum recovered. In this caſe, the Court permitted the plaintiff to amend his writ of execution, as to the defendant, who did not join in the writ of error, by altering it to the original ſum recovered.

Rees, *v.* Morgan in error, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 349.

Where a defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, *without finding either the amount of the rent in arrear, or the value of the cattle diſtrained*, and judgment was entered for the damages aſſeſſed; the Court permitted the defendant to amend his judgment, and to enter a judgment, *pro retorno habendo*, after a writ of error had been brought.

Cowperthwaite, *v.* Owen, *& al.* in error, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 657.

If a *fi. fa.* be ſued out into one county, where it ſhould have been a *teſt. fi. fa.* without any original *fi. fa.* and the plaintiff afterwards ſues out an original *fi. fa.* the Court will permit him to amend the former, on payment of coſts.

Petrie *v.* Hannay, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 659.

In an action for money paid by the plaintiffs as executors, and alſo for money paid by their teſtator to the uſe of the defendant, there were two pleas; 1ſt, The general iſſue. 2dly, The ſtatute of limitations. A verdict having been found for the plaintiffs generally on the firſt iſſue, and no notice taken of the laſt, the defendant brought a writ of error in the houſe of lords upon two grounds; 1ſt, That no verdict

dict was given on the ſecond plea; and 2dly, That the two ſeparate demands could not be joined in one action. After a joinder in error, and a day appointed for argument in the Houſe, the plaintiffs obtained a rule of the court of king's bench to ſhew cauſe why they ſhould not be at liberty to amend according to the judge's notes, by adding a verdict for them on the ſecond plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their uſe. After argument, the Court ſaid, that ſuch amendments had been frequently permitted; the firſt was merely the ſlip of the clerk, in not entering up the verdict for the plaintiffs on the ſecond plea; and as to the ſecond, it was not error; for though an executor, when ſuing for a debt due to his teſtator, could not join a debt due *to himſelf, in* his *own right*, yet it was the conſtant practice to join in the ſame declaration ſeveral counts for money had and received, by the defendant to the uſe of the teſtator, and *to the uſe of the executor, as ſuch*, and therefore the rule was made abſolute.

The King v. Holland, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 457.

An information was filed by the attorney-general againſt the defendant, for certain offences committed in India, the trial whereof is particularly provided for by the ſtatutes 24 *Geo.* 3, c. 25 & 26 *Geo.* 3, c. 27. To this information the defendant demurred. The attorney-general then obtained a rule to ſhew cauſe, why the information ſhould not be amended in certain particulars. After cauſe had been ſhewn, the Court ſaid, that if amendment after amendment were to be applied for, to haraſs the defendant, perhaps they would refuſe to lend their aid any longer; but this was an application in the ordinary courſe of juſtice. The act of parliament on which theſe proceedings are founded, is indeed introductory of ſomething novel in the progreſs of them: but as far as this information has already proceeded, there is nothing to diſtinguiſh it from other informations. At preſent, the information has gone on in the common courſe, and therefore we may fairly try the propriety of this application by the common rules of practice on the like proceedings. Now amendments upon informations are ſo much a matter of courſe, that they are even made upon an application to the judges, at their chambers. With reſpect to the propoſed amendments altering the nature of the undertaking of the bail, the ſame objection would equally apply to amendments in all other informations. But it is ſaid, that they ought not to be allowed here, becauſe the legiſlature having precluded the defendant from moving in arreſt of judgment for any defect in the proceedings, and having only provided for the caſe of his demurrer being over-ruled, could not have intended that his demurrer ſhould be concluſive, if it prevailed. We cannot here examine the hardſhip of ſuch a proviſion; but let it always

always be remembered, that the defendant has alſo an extraordinary indulgence granted to him; for he is not concluded by a bad demurrer, but may afterwards be tried on the merits. However, at all events, it is right that the nature of the offence ſhould be made to appear clearly and legally upon the record, to the judges who are to try it, and therefore we are clearly of opinion, that this amendment is abſolutely of courſe.

The King *v.* the Mayor of Stafford, Ea. Ter. 32 Geo. 3. B R 4 *Ter. Rep.* 489.

A *mandamus* was granted to the defendants to admit a freeman, to which they made a return, which was traverſed; but the plaintiff not having proceeded to trial, according to the practice of the court, a judgment was entered as in the caſe of a nonſuit. A motion was then made to amend the *mandamus*, alleging, that the proſecutor had ſtated the cuſtom of the borough, relative to the admiſſion of burgeſſes, too narrow; BUT *the Court* ſaid, the officers inform us, that in the time of Lord Chief Juſtice *Lee*, ſuch an application was made and refuſed. And we think, that at all events, in ſuch a caſe as the preſent, where the return has been traverſed, we ought not to permit this amendment to be made. The parties may apply for another writ.

Skutt *v.* Woodward, executrix, Ea. Ter. 29 Geo. 3. C.B. 2 *Hen. Blak.* 238.

Where a defendant, who is an executor, ſtates, in a plea of a former judgment recovered againſt him, a leſs ſum than the judgment was really for; if it clearly appears that a greater ſum was recovered, the Court will permit the defendant to amend the record, by inſerting the real ſum in the plea: and this was done in the preſent caſe, although the application for ſuch amendment was not made, until near three years after the record had been regularly made up; and the court added that in ſuch a caſe they will allow the plaintiff to reply *per fraudem*.

Tomlinſon and another *v.* Blackſmith, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 132.

Where in an action of aſſumpſit upon a ſpecial promiſe; and alſo for goods ſold and delivered, &c. The declaration ſtated the firſt as for 730l. and the latter for 1200l. concluding to the plaintiffs damage of *one hundred pounds*, which was evidently a miſtake, the damage intended to be laid being *one thouſand pounds*: this miſtake, however, was not diſcovered until after the trial, and after the jury had found a verdict of 611l. 9s. 6d. which was entered upon all the counts except the firſt, on which a verdict was entered for the defendant. On a rule, calling on the defendant to ſhew cauſe why the plaintiffs ſhould not be at liberty to amend their declaration, by altering the damages laid from 100l. to 1000l. or why the verdict ſhould not be ſet aſide, and a new trial had, and then the plaintiffs be at liberty to make the ſame amendment. THE COURT ſaid, It would be going too far to make the amendment required, without ſending the cauſe to a new trial, as the defendant might have gone to trial, relying that no more than 100l. damages could be recovered againſt

againſt him. *Per Cur.* Rule abſolute for ſetting aſide verdict, and granting a new trial, and for making the amendment.

Where a *fi. fa.* is ſued out into a different county from that in which the venue is laid, and the party ſuing it, afterwards takes out a *fi. fa.* into the proper county, and gets a return of *nulla bona*; the Court, in order to warrant the *fi. fa.* which firſt iſſued, will permit it to be amended, by inſerting the return of *nulla bona*, and the *teſtatum* clauſe, although the ſecond writ be returnable ſeveral days before the judgment was ſigned; becauſe judgments relate to the firſt day of the term, except in the caſe of *bona fide* purchaſers for a valuable conſideration. Meyer v. Ring, Hil. Ter. 31 Geo. 3. C B. 1 *Hen. Black.* 541.

After a party has once amended on a demurrer, the Court will not give him leave to amend again on a ſecond demurrer. Kinder v. Paris, 2 *Hen. Black.* 561.

And the Court will grant leave to amend a ſpecial capias, in order that an application may be made to the maſter of the rolls to procure a new original.—In this caſe, the proceedings were by original; the plaintiff arreſted *Shaw*, who put in bail, and proceeded to outlawry againſt the other defendant by the name of *James Morgan Price*, his real name being *John*: on diſcovering his miſtake, it was moved (in order to hold the bail of *Shaw* ſtill liable, who could have no reaſon to complain of the amendment, becauſe the proceedings againſt him were regular), that the ſpecial capias might be amended, ſo that the plaintiff might procure a new original. THE COURT ſet aſide the proceedings in outlawry, and granted the plaintiff leave to amend, on paying all the coſts in the former action, as well as thoſe attending this application; and Lord *Kenyon*, CH. J. ſaid there was no doubt but that even an original might be amended on an application to the maſter of the rolls, though it could not be amended in B.R. and he mentioned an inſtance where an original had been ſupplied even in the caſe of a penal action brought on the game laws. Carr v. Shaw and Price, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 299.

A declaration in ejectment for lands in Devonſhire having been delivered, with notice to the tenants to appear in Michaelmas term, which was wrong, as the notice in a country ejectment, muſt, according to the practice, be to appear in an iſſuable term: the Court, on application, granted leave to the party to amend the notice, on an affidavit, ſtating, that the leſſor of the plaintiff could not bring another ejectment, on account of the ſtatute of limitations, the twenty years having expired after the declaration was delivered, and before the miſtake was diſcovered; and alſo that the leſſor of the plaintiff had been hitherto prevented by poverty from proceeding. Doe *ex dem.* Baſs *v.* Roe, Hil. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 469.

Dickinſon *v.* Plaiſted, Hil. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 474.

In an action on a promiſſory note that became due on the 5th of September, 1796, the plaintiff filed his bill againſt the defendant, an attorney, in Trinity vacation (2d November, 1796), but with a general memorandum of the preceding Trinity term: on a plea of judgment, recovered replication of *nul tiel* record, and demurrer to ſuch replication, judgment was given for the plaintiff in Michaelmas term, 1796, when the roll not being written out at length, was brought into court, containing only the general memorandum, and the names of the parties, on which the officer of the court marked the word *read*; it appeared to be the practice of the court, for the plaintiff's attorney, on obtaining judgment, to take away ſuch roll, and complete it afterwards at his leiſure. Afterwards, in Hil. 1797, the defendant brought a writ of error; and aſſigned for error, that the bill was filed before the cauſe of action accrued. After this, the plaintiff's attorney, under the advice of a gentleman at the bar, altered the roll, by inſerting a ſpecial memorandum of the day when the bill was actually filed, inſtead of the memorandum of Trinity term generally: upon which the defendant obtained a rule, calling on the plaintiff to ſhew cauſe why the roll ſhould not be amended, and made conformable to the iſſue joined; and why the plaintiff ſhould not pay the coſts of the rule. AND THE COURT were clearly of opinion, that the rule ought to be made abſolute; for though they would, on an application, have permitted the plaintiff to make the alteration propoſed, yet it was highly improper for the plaintiff himſelf to alter the roll, without their conſent. That the roll in this caſe, though not complete at the time when judgment was given on the demurrer, was conſidered as part of the judicial proceedings of the court; and that it was only for the convenience of the ſuitors that ſuch an imperfect roll was allowed to be brought in; for that when the Court pronounced judgment, it was on a ſuppoſition, that the whole record was then in court: that even though the defendant ſhould conſent, yet the Court were bound to interfere on the matter being diſcloſed, in order to prevent any alteration being made in the records of the court, without their permiſſion.

On a ſubſequent day, however, the plaintiff obtained another rule, calling on the defendant to ſhew cauſe why he, the plaintiff, ſhould not be at liberty to amend the bill filed, by inſerting a ſpecial memorandum: and why he ſhould not be at liberty to carry in a new roll, agreeable to ſuch amended bill, and to make the tranſcript conformable to ſuch new roll, which rule was made abſolute: for *Per Cur.* The rule is reaſonable; for though the plaintiff acted inadvertently at firſt, nothing improper was intended, it having been done under the advice of council: and the lateneſs of the application, is no objection, ſince nothing is more common

than an application to the court of chancery to grant an original, after the want of an original has been aſſigned for error.

Ancient Demeſne.

THE tenant pleaded *ancient demeſne*, without an affidavit, to verify the fact. *Per Cur.* An affidavit is neceſſary wherever you plead to the juriſdiction of the court; and for any thing that appears to us, the lands in queſtion may be *parcel of the manor* itſelf, which is ancient demeſne, and ſuch lands are pleadable at common law; but if they are lands *held of a manor*, which is ancient demeſne, then indeed they are not pleadable at common law. Peremptory rule to plead ordered. Hatch v Canron, *in formedon*, Ea Ter. 10 Geo 3. C B. 3 *Wilſ.* 51.

Annuities.

THE court in which any judgment is entered up as the ſecurity for an annuity, has an equitable juriſdiction and control over ſuch judgment; and, on application, will examine into the conſideration on which it was founded.—In July, 1780, *Robert Hare*, and *Francis* his ſon, in conſideration of 300l. paid by one *Haynes*, joined in a bond in the penalty of 600l. conditioned for the payment of an annuity of 50l. *per annum* to *Haynes*, his executors, &c. during the life of *Francis Hare*. The bond was drawn in the uſual form, *without mentioning in the condition any agreement to redeem the annuity*. There was a warrant of attorney given to confeſs judgment on the bond, and judgment was entered up accordingly; there was alſo another warrant of attorney given by *Francis*, to enable *Haynes* to receive the annuity out of an allowance of 200l. a-year made to him by his father. Some time afterwards *Haynes* died, and then *Francis Hare* applied to his executor, in order to *redeem the annuity*; and for that purpoſe, tendered the principal ſum, together with all the arrears of the annuity, and intereſt up to the time, amounting in the whole to 313l. 19s. This the exe- Haynes v. Hare, Tr. Ter 31 Geo. 3. C.B. 1 *Hen. Black.* 659.

cutor refuſed, alleging, that his teſtator had ſpecifically bequeathed the money ariſing from his annuities, and had given no power to his executors to redeem them; the executors therefore thought they could not ſafely conſent to the redemption of the annuity in queſtion, without the ſanction of a court, either of law or equity. A ſuit being depending in the court of chancery, touching *Haynes*'s will, *Robert* and *Francis Hare* preferred a petition in that cauſe, praying a redemption of the annuity. And this application was grounded on the depoſition of *Richard Harborne*, the attorney who tranſacted the buſineſs of the annuity; which ſtated, "That he was firſt applied to by *Hare*, in July, 1780, to raiſe 300l. which he was unable to procure, without better ſecurity than was offered. That *Hare* being informed of this, directed him to raiſe 300l. by way of annuity on his (*Hare*'s) life for ſix years' purchaſe, and ſaid that he would get his father to join in the annuity bond, and would himſelf give the purchaſer a power of attorney to receive the annuity, out of an allowance of 200l. *per annum*, which was made him by his father; but *that the annuity ſhould be granted on the expreſs conditions, that* Hare *ſhould at any time be at full liberty to pay off and diſcharge it, on giving fourteen days notice of his intention, and that on payment of* 300l. *and intereſt up to the day of the diſcharge, the bond and all papers relating to the annuity ſhould be given up to be cancelled.* That in conſequence of this direction, the deponent applied to *Haynes* to purchaſe the annuity, informing him at the ſame time of the *conditions* mentioned by *Hare*, to which *Haynes* agreed; that when the bond and warrants of attorney were executed, the *conditions were recapitulated, and again conſented to by* Haynes." This mode of application being thought improper, the petition was diſmiſſed; and therefore a bill was ſoon afterwards filed for the ſame purpoſe; but upon hearing, this was alſo diſmiſſed; becauſe the parol evidence of *Harborne* could not be received in contradiction to the annuity bond; however, the parties were recommended to apply to the Court in which the judgment had been entered. This was accordingly done, and a rule was granted for the executors of *Haynes* to ſhew cauſe, why upon payment of the 313l. 19s. the annuity ſhould not be vacated, the bond and warrants of attorney delivered up to be cancelled, and ſatisfaction entered on the record of the judgment. This rule was obtained on an affidavit made by *Harborne*, to the ſame effect as his depoſition above ſtated. After the caſe had been fully argued, and THE COURT had taken time to conſider, Lord *Loughborough*, Ch. J. delivered their opinion; and after ſtating the circumſtances of the caſe, and the affidavit of *Harborne*, his Lordſhip proceeded thus.—Under theſe circumſtances, the application was made to this Court, on the ground,

ground, that the ſecurity being a judgment entered on a warrant of attorney, it was in its nature made under the ſanction of the Court; that the Court had therefore a controul over it, would examine into the conſideration on which it was entered up, and not permit the party to avail himſelf of it, ſo as to receive more than in juſtice he is intitled to take. The caſe comes before the Court, as it fitly and properly ſhould, without any prejudice at all, from what has paſſed in the court of equity. For the application to the court of equity, was founded on circumſtances very different from what might appear to this Court ſufficient, on this ſpecies of application, for interpoſing by the authority, which it is neceſſary every court ſhould have, whoſe records are made matters of ſecurity, and enquiring into thoſe ſecurities which proceed on the aſſumption of a ſuit, which in fact was never brought. But when the Court is exerciſing its authority with reſpect to judgments entered, this principle is clear, that in judging of the tranſaction which is the foundation of the judgment, they will find themſelves governed by the ſame rules which the law has preſcribed, if the tranſaction itſelf, independent of the judgment, were before the Court in the form of an action. We have not a greater latitude by having an authority over the judgment entered up, than in the deciſion of the queſtion between the parties themſelves. To be ſure, there is a ſtrong inclination ariſing in favour of the redemption, in ſuch caſes, from circumſtances which are pretty generally underſtood. The ſmall value of the price paid for ſuch annuities, is, in general, governed by the probability, that when the party is in a ſituation to pay the money which has been fairly advanced, no obſtruction or difficulty will occur in being permitted to redeem, on ſuch terms as are here ſuggeſted. Another circumſtance is, that the redemption is, in general, extremely advantageous to the party from whom the annuity is redeemed; becauſe, if the price bears any proportion to the ſubject-matter, after the annuity has been paid a conſiderable time, it is leſs valuable than at the time of the original tranſaction, the life being ſo far ſpent. An idea has alſo prevailed, that the inſertion of an expreſs agreement to redeem might be dangerous to the ſecurity, and expoſe it to impeachment on the ſcore of uſury, by converting it in its appearance into a loan; and under theſe apprehenſions (whether well or ill founded it is not neceſſary now to conſider) covenants for that purpoſe have not been inſerted in the deeds. Notwithſtanding all theſe circumſtances, the Court feels itſelf in a ſituation, in the preſent caſe, in which it is impoſſible, conſiſtently with the rules which have been wiſely laid down, to permit the redemption and open the tranſaction. The perſon on whoſe part the judgment was entered up is dead. The only evi-

dence is the declaration of *Harborne* the attorney, that in all the general circumſtances of the tranſaction, down to the final execution of the deeds, between the parties, this condition for the redemption of the annuity was underſtood between them as perfectly agreed to. If *Haynes* were living, the Court, conſidering the affidavit of *Harborne* his attorney, who had entered up the judgment for him, would be under no difficulty to call upon *Haynes*. If he made an affidavit, and admitted the fact, there would be no difficulty to oblige him, as the plaintiff in the judgment, to comply with the terms of the agreement, or in other words, to ſet aſide the judgment, and compel him to accept the redemption. If *Haynes* denied it, and his affidavit denying the agreement aſſerted by the attorney, were before the Court, I rather apprehend that the Court would find itſelf in a ſituation in which it could not move at all; there would be affidavit againſt affidavit. In a ſituation of this kind, I think it would be difficult for the Court to put the matter in any courſe of trial, in which *Harborne*'s evidence would be ſuffered to over-balance *Haynes*'s denial. If *Haynes* declined to make an affidavit, the Court would give credit to *Harborne*. But *Haynes* is dead, and then the queſtion is, *Whether the Court can permit terms not inſerted in the deed which the parties have executed, to be added to the contract, of which this inſtrument is the full and explicit evidence?* This brings me to the queſtion which has been argued, *Whether on the teſtimony of a witneſs to a parol communication between the parties, a term can be added to the contract, which does not appear in the inſtrument by which that contract was eſtabliſhed?* Several caſes have been cited on this ſubject. The caſe of Lord *Portmore* v. *Morris* does not apply to this; for the evidence in that caſe, though extremely ſtrong, was the evidence of perſons not concerned for *Roſoman*; there *Stubbs* and *Withy* were both treating on behalf of Lord *Portmore*, and *Jenkins* likewiſe attended on his behalf; the attorney on the other ſide was *Exley*, and he poſitively denied what was as poſitively aſſerted in the depoſitions of the others. He gave an explicit contradiction to the paper in which *Stubbs* had entered a memorandum of the agreement. *Exley* was not examined as a witneſs, but being a truſtee of the annuity, he was made a defendant in the cauſe; and againſt the denial in his anſwer, it ſeemed difficult for the Court to have made any decree for the redemption, *Roſoman* being dead. But in the circumſtances of theſe two caſes, there is an eſſential difference; here there is the teſtimony of *Harborne*, the attorney for *Haynes*, as to the terms of redemption agreed upon between the parties. It is not neceſſary to cite any caſe to prove the propoſition, that parol evidence of a parol communication between the parties, ought not to be received to add

add a term, not inſerted in the ſpecific agreement which they have executed; and for this plain reaſon, that what paſſed between them in that communication, may have been altered and ſhifted in a variety of ways, but what they have ſigned and ſealed was finally ſettled. It would deſtroy all truſt, it would deſtroy all ſecurity, and lay it open, unleſs the parties are completely bound by what they have ſigned and ſealed. But it is ſaid, that admitting the general rule, the particular circumſtance of the teſtimony given by the attorney for the party, forms an exception. The Court would certainly feel itſelf under no difficulty, which way to act, if the party for whom *Harborne* was the attorney, was before the Court; but he being dead, and no diſcovery appearing to have been made by him, the circumſtance of the attorney for the party being a witneſs, to invalidate the ſecurity againſt the repreſentative of his employer, ſeems to be a ſtrong confirmation of the general rule. There is nothing ſo dangerous, as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the diſcloſure of the attorney in a matter in which he could meet with no contradiction. But this opinion is perfectly without prejudice to any application which may be made in the life-time of the party. I give no opinion how far the Court might ſanction ſuch a requiſition, on circumſtances of this kind being diſcloſed. I wiſh to be underſtood as confining myſelf particularly to the mode of application, and to the evidence by which it is ſupported in the preſent caſe. Rule diſcharged without coſts.

When there is a bond, *and alſo a deed of covenant to ſecure an annuity*, although the bond is forfeited before a diſcharge under the inſolvent-act, the party may be ſued upon the covenant for payments becoming due after the diſcharge.—In an action of covenant, the plaintiff declared, that the defendant, in conſideration of 240l. by indenture, dated the 7th of July, 1767, covenanted, that he would pay the plaintiff an annuity of 40l. a-year, during his life, by quarterly payments; and that 60l. of the annuity was then due and in arrear. This annuity was further ſecured by the defendant's bond, who having craved *oyer* of the deed and bond, pleaded, 1ſt, That they were both given for ſecuring one and the ſame annuity, and that the defendant had ſince been diſcharged under the inſolvent debtors act of 16 *Geo.* 3, c. 38. 2dly, That the indenture on which the plaintiff had brought his action, was dated and made, and all debts thereupon owing and accruing from the defendant to the plaintiff, were contracted and occaſioned before the 22d of *January*, 1776, the time mentioned in the act; and that therefore the plaintiff ought not to have any execution againſt the defendant,

Cotterell *v.* Hooke, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 97.

other than againſt his real eſtate, his money in the funds, or his money lent upon real ſecurity, according to the terms of the act. To each of theſe pleas the plaintiff demurred generally; and after argument, THE COURT ſaid, that the queſtion was, Whether, when there was a bond with a penalty and alſo a deed of covenant, and the plaintiff made no uſe of the penalty, he ſhould be barred of his remedy under the deed of covenant? That the caſe of a bankrupt, and an inſolvent debtor, was, as to this point, the ſame; that when a man has two remedies, he may elect; that if the plaintiff had made uſe of the penalty, the caſe would have been different; but that as he had not, he might proceed as often as he pleaſed, for breaches of the covenant; and therefore judgment was given for the plaintiff.

Marks *v.* Upton, Tr. 1 Geo. 37 Geo. 3. B.R. 7 *Ter. Rep.* 305.

And the like point was decided in this caſe, viz. that the inſolvent-act, 34 *Geo.* 3, c. 69, does not diſcharge the perſon of an inſolvent debtor, who is entitled to the benefit of that act from the payment of the arrears of an annuity becoming due after his diſcharge on a covenant made before the act.

Barwick *v.* Reade, Ea. Ter. 31 Geo. 3. C.B. 2 *Hen. Black.* 627.

The defendant, who was a lieutenant of marines, aſſigned his *full pay* to the plaintiff in truſt, to pay and ſatisfy himſelf an annuity of 20*l. per annum*, and then to pay over the ſurplus to the defendant. The annuity was alſo ſecured by a bond and judgment. On a rule to ſhew cauſe, why the deed of aſſignment, bond, and warrant, ſhould not be given up, upon the ground that the full pay of a military officer could not be legally aſſigned, THE COURT were clearly of opinion, that ſuch an aſſignment is illegal, it being contrary to the policy of the law, that a ſtipend given to one man for future ſervices, ſhould be transferred to another, who cannot perform them, and made the rule abſolute.

Hopkins *v.* Waller, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 463.

A memorial of a warrant of attorney to confeſs a judgment, in order to ſecure an annuity, muſt be regiſtered under the annuity-act. An annuity was granted in 1777, and the judgment on the bond was entered up before the annuity-act of the 17 *Geo.* 3, c. 26 paſſed, but not until after the firſt day of that ſeſſion of parliament. There was a memorial of the bond and judgment, but not of the warrant of attorney; and therefore, by reaſon of this defect, a rule was granted to ſhew cauſe, why the judgment ſhould not be ſet aſide. After the caſe had been fully argued, the Court ſaid, that if it had appeared that the warrant of attorney had been loſt, which was the ground chiefly relied on by the plaintiff's counſel, before the regiſtering of the memorial, it might have varied the caſe; but here that fact was not ſhewn, and therefore the warrant ought to have been regiſtered.

giſtered. The meaning of the legiſlature was, that *every* inſtrument by which an annuity is ſecured, ſhould be inſerted in the memorial. The words of the act are, *deed, bond, inſtrument, or other aſſurance*; and it is impoſſible to ſay, that a warrant of attorney does not fall within one of theſe deſcriptions. The warrant muſt have exiſted at firſt, and then it was incumbent on the plaintiff to inroll it; and though it may have been ſince loſt, yet that is no anſwer to this act of parliament. Therefore the rule was made abſolute.

So alſo, where an annuity was ſecured by a bond and *warrant of attorney* to confeſs judgment, which was entered up, and a memorial inrolled in the court of chancery, ſtating the bond and the judgment, but taking no notice of *the warrant of attorney*. A rule was granted to ſhew cauſe, why the judgment, and all ſubſequent proceedings, ſhould not be ſet aſide, on the ground, that the warrant of attorney was not ſtated in the memorial. After argument, the Court delayed giving their opinion, until the above caſe of *Hopkins* v. *Waller*, which was then depending in *B.R.* ſhould be decided. That caſe being afterwards decided, the court of common pleas fully concurred in that deciſion; and declared their opinion in the preſent caſe, that the objection made to the memorial was well founded, and not to be obviated (1). Rule abſolute.

Davidſon v. Lord Foley, Mic. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 12

But if a bond and warrant of attorney to confeſs a judgment, be given to ſecure an annuity, and the judgment be entered up before the memorial is regiſtered, the judgment need not be inſerted in the memorial.—The defendant having given the plaintiff a bond and warrant of attorney to confeſs a judgment, for ſecuring an annuity, the plaintiff entered up judgment, but did not inſert that judgment in the memorial. The defendant therefore obtained a rule to ſhew cauſe, why the judgment and the execution thereon ſhould not be ſet aſide; contending, that the judgment was an aſſurance which ought to have been regiſtered under the annuity-act. BUT the Court were of opinion, that this is not one of the aſſurances which the legiſlature intended ſhould be inrolled. The contract for the annuity was made, by giving the bond, and warrant of attorney, to enter up judgment. Thoſe were the ſecurities on which the party relied, and the act is complied with by regiſtering all the ſecurities given by the parties. This will ſufficiently anſwer the purpoſe of notoriety; for every perſon may ſee,

Sherſon v. Oxlade, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 824.

(1) The ſame point was decided by the court of chancery, upon a bill filed by the ſame parties. See 3 *Brown*, ch. ca. 598.

by

by referring to the memorial, that the plaintiff was at liberty to enter up judgment whenever he pleased. If the memorial had been made immediately after the execution of the bond and warrant of attorney, the judgment could not have been inserted in it. Then whether a matter shall or shall not be registered, cannot depend upon an act which is to be done afterwards. If, indeed, the only security had been a judgment actually entered up, perhaps it would have come within the provisions of the act; but the assurances of this annuity were the bond and warrant of attorney. Rule discharged.

Rosher v. Hurdis, Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 678.

And a bond given by a third person to secure the payment of an annuity must be registered under the annuity-act, as well as the deeds made by the grantor himself. In debt on bond, dated 19th December, 1793; the defendant craved oyer of the bond and condition, *the latter of which* (after reciting a certain indenture, whereby an annuity of 50l. was granted to the plaintiff during the lives of the grantors, and that the grantors had also given a bond and warrant of attorney) *was for the better securing of the annuity to the plaintiff*; he then pleaded that no memorial of the same writing obligatory, or of the indenture bond or warrant of attorney in the condition mentioned, was enrolled within twenty days of the execution; also that no memorial of the bond in question, "containing the names of all the witnesses" was inrolled, &c. To these two pleas there was a general demurrer. In support of the demurrer, it was observed, that this was only a collateral security given by a third person; and that the annuity-act would be satisfied by the registering of the deeds made by the grantor, and that the act did not extend to deeds by which an annuity is *secured* after the grant of it. BUT *per Cur.* This was an instrument to secure the payment of the annuity, and it should have been registered; in many cases the deed of the surety is the most effective security; if we were to determine that such an instrument as the one in question need not be registered, wherever fraud was intended, some nominal person would be brought forward as the ostensible party, and the real security would be concealed from the public eye.

Downes v. Parkhurst, Hil. Ter. 30 Geo. 3. C.B. cited 2 *Hen. Black.* 13.

And the memorial of every instrument, by which an annuity is secured, must contain the date of each instrument, otherwise the security will be void.—In this case the court of common pleas set aside a judgment to secure an annuity, because the date of the warrant of attorney was not stated in the memorial.

Ex parte Chester, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 694.

But where there are several deeds given to secure an annuity, and the memorial contains the date of some of them only, such defect in respect to those which have omitted

ted to ſtate the date, does not vitiate thoſe of which the date is truly recited therein. In this caſe, *Cheſter* granted an annuity to *A.* which was ſecured by a deed of aſſignment, a bond, and a warrant of attorney to confeſs judgment. No action was brought on the bond, nor was any judgment entered up under the warrant. A rule therefore was obtained to ſhew cauſe, why the deeds ſhould not be ſet aſide, becauſe the memorial did not contain the *date* of the warrant of attorney. On ſhewing cauſe, two objections were taken, 1ſt, That the Court had no juriſdiction at all in this caſe, becauſe the grantee had neither entered up judgment on the warrant, or inſtituted any other proceeding in the court. And, 2dly, That if the Court could take cognizance of the queſtion, yet only the warrant of attorney ought to be ſet aſide; for a defect in one deed, could not vitiate the others which were truly recited in the memorial. Of this opinion were the Court, obſerving, that the word *ſuch* in the annuity-act, confined the operation of that clauſe to the particular deed (1), which was not truly recited in the memorial. And in anſwer to the firſt objection, they ſaid, that the warrant of attorney gave them a juriſdiction, for that it was a proceeding in the court, and was of greater importance than the commencement of an action in the regular courſe; becauſe it enables the party to ſign judgment immediately, without any application to the Court (2).—Rule abſolute, as to the warrant of attorney.

The clauſe in the annuity-act, which requires the ſecurities to be inrolled *within twenty days of the execution*, means within twenty days excluſive of the day on which the deeds are executed.—Thus, where the annuity was granted on the 6th of June, and a proper memorial of it was enrolled; on the 26th of the ſame month, a rule was obtained to ſhew cauſe why the ſecurity and warrant of attorney ſhould not be ſet aſide, on the ground that the memorial was not regiſtered within the time preſcribed by the act: the words of the act are, that the inſtrument ſhall *within twenty days of the execution* be enrolled: and it was urged, that there was a diſtinction between the words, *from the day of the date*, and *from*

Ex parte, Fallon and wife, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 283

(1) *Sed vide* the above caſe of *Hopkins* v. *Waller*.

(2) The Court determined the ſame point in *Thurſhill* v. *Wallace*, Mic. Ter. 31 *Geo.* 3. B.R. which was alſo upon the annuity-act; and there they ſaid, that, independent of that act, it had been long ago ſettled upon much argument and deliberation, that the Court has a ſummary juriſdiction over every warrant of attorney to enter up judgment in the court, before any judgment has been actually entered up, and may, if they ſee proper, direct it to be cancelled, to prevent any improper uſe being made of it.—See alſo *Haynes* v. *Hare*, ſupra.

the

the execution: for when the time is computed *from the day of the date*, that excludes the day; but where it is *from the execution*, in that caſe, the day on which the deed is executed is one (1). *Sed per Cur.* It would be ſtraining the words to conſtrue the twenty days all incluſively: the act means twenty days excluſive of the day of execution.

Rumball *v.* Murray, Ea. Ter. 29 Geo 3. B.R. 3 *Ter Rep.* 298.

If the conſideration of an annuity be in notes, they muſt be ſet forth in the memorial.—In this caſe, a rule had been granted to ſhew cauſe, why the judgment entered on a bond, and warrant of attorney, given to ſecure an annuity, ſhould not be ſet aſide, and the ſecurities delivered up to be cancelled; *becauſe the conſideration was ſtated in the memorial to be* money, *whereas it was in* notes, *the one a banker's check, the other a promiſſory note.* After argument, the Court ſaid, that the annuity-act being a very remedial law, they ought to give effect to every word of it, in order to meet the miſchiefs intended to be remedied. The act directs, that in the memorial, *the conſideration*, or *conſiderations*, ſhall be inſerted. Now, what meaning can the latter words have, unleſs every thing which forms any part of the conſideration is to be particularly ſpecified? The conſtruction put at the bar, that *money* is mentioned in the act, as contra-diſtinguiſhed from *goods*, is right; and ſo far, *notes when paid*, are *money* within the meaning of the act. But ſtill the dates, and other particulars of theſe notes ſhould be ſet out, otherwiſe the Court cannot ſee whether a full conſideration for the annuity was or was not given; for if the notes were payable at a diſtant time, and no allowance made, the true conſideration would not appear on the memorial.—Rule abſolute.

Berry *v.* Bentley, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 690.

So, where the memorial ſtated that the conſideration-money, which was 700l. was paid by a promiſſory note, drawn by *Hammerſley*, and payable at *Hammerſley, Moreland*, and Co's, *which ſaid ſum ſo ſecured has been ſince paid*, without ſetting forth, whether the note was payable immediately, or at a diſtant day; THE COURT, Though it was ſtated in an affidavit, in anſwer to the rule, that it was a banker's check, payable immediately, SAID, that the memorial ſhould contain every thing neceſſary to ſhew that the tranſaction was fair, and that the conſideration had been paid, and that nothing could be ſupplied by affidavit.

Cox *v.* Wright, Ea. Ter. 22 Geo. 3. B.R. *Hunt's. Ann. ca.* 43.

So, where the memorial of an annuity granted previous to the annuity-act, contained the ſame conſiderations as the deeds did; and it appeared that that ſtatement did not correſpond with the conſideration actually paid (viz. the

(1) See *Pugh* v. the Duke of *Leeds*, *Cowp.* 714. and *Caſtle* v. *Burdit*, 3 Ter. Rep. 623.

conſider-

conſideration was 500l. whereas in fact only 350l. were really paid, the remaining 150l. being detained by the grantee for a year and an half accruing annuity), the court of king's bench held the memorial inſufficient, as it did not contain a true deſcription of the conſideration according to the act.

So where the memorial ſtated, that the conſideration was 600l. when the real conſideration was only 300l. in money, paid at the time, and the giving up of a former annuity of 50l. *per ann.* The Court ordered the inſtrument to be delivered up to be cancelled, and the execution on the judgment to be ſet aſide: for *Per Cur.* The annuity cannot be ſupported, for the whole conſideration is ſtated as ſo much money paid at the time by the grantee to the grantor. Waſburn v. Birch, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 472.

So alſo, where the memorial ſtated generally, "the annuity to have been granted in conſideration of 160l. paid by the plaintiff to the defendant;" but it appeared upon affidavit, that 99l. 14s. 6d. of the money had been previouſly lent by the plaintiff, for which the defendant gave ſeveral promiſſory notes; and that the plaintiff at the time of granting the annuity advanced only ſo much money as remained to complete 160l. allowing twelve guineas for the expences of the deeds, but gave up the notes. THE COURT held clearly, that the particulars of the conſideration were not ſufficiently ſpecified, the words of the ſtatute being, that "the conſideration ſhould be *fully and truly* ſet forth and deſcribed (1)." Kirkman v. Price, Hil. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 309.

But if the conſideration is paid in bank-notes, and the memorial ſtates it to have been paid in money, that has been held ſufficient.—An application was made to ſet aſide an annuity, on the ground, that the true conſideration was not ſet forth in the memorial, *part of it being in money, and the reſt in notes of the bank of England; whereas the whole conſideration was deſcribed in the memorial as* money. In this caſe the Court ſaid, that bank-notes are conſidered as money to many purpoſes, and it was ſo held by Lord *Mansfield*, in the caſe of *Miller* v. *Race*, 1 *Burr.* 452. That the annuity-act was paſſed for the purpoſe of guarding againſt *fictitious* conſiderations; but it could not be contended, that the payment in this caſe was within the miſchief which that ſtatute intended to remedy; and the Court has never yet determined, that a tender of bank-notes, is at all events, a good tender; yet if they have been offered, and no objection has been made on that account, the Court has conſidered it to be a good tender, and very properly ſo; becauſe bank-notes paſs in the world as caſh, although the queſtion has never yet been directly determined. Wright v. Read, Hil. Ter. 30 5 Geo. 3. B.R. 3 *Ter. Rep.* 554.

(1) See alſo the caſe of *Shove* v. *Webb*, in p. 233. ſupra.

Cousins v. Thompson, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 335.

So where a rule was obtained, calling on the plaintiff to ſhew cauſe why the ſecurities given to him by the defendant for an annuity of 200l. and why the judgment entered up on the warrant of attorney, ſhould not be ſet aſide. It appeared that the memorial regiſtered was, "of a bond dated 14th of November 1792, whereby the defendant became bound to the plaintiff in 2400l. and reciting that the plaintiff had contracted with the defendant for the purchaſe of an annuity of 200l. for the life of the defendant for the price of 1200l. the receipt and payment of which ſaid ſum is thereby acknowledged by the defendant, &c." conditioned to be void on payment of the annuity. In the memorial was alſo ſet out a warrant of attorney to enter up judgment on the bond. It appeared by the affidavits in ſupport of the rule that the ſum of 1200l. was paid by the plaintiff to the defendant in caſh and bank-notes. Two objections were made to the memorial; one that it did not ſet forth that any conſideration was paid, except by way of recital; the other that it did not ſhew how the conſideration was paid, no notice being therein taken of the bank notes. *The Court* were of opinion that there was no foundation for either of the objections. That the ſecond objection was anſwered by the caſe of *Wright* v. *Read*, which was clearly diſtinguiſhable from that of *Rumball* v. *Murray*, becauſe the notes ſpoken of in the latter caſe were not bank notes, which are conſidered as caſh, but the one a banker's check, and the other a promiſſory note, the particulars of which it was neceſſary to ſtate in the memorial to guard againſt the impoſition of giving notes payable at a diſtant day, inſtead of money paid at the inſtant. And that though in the two caſes cited in ſupport of the firſt objection, the conſideration was alleged in the memorial to have been paid, the court expreſsly gave it as their opinion that it was ſufficient if the conſideration of the annuity appeared on the memorial, whether it were there ſtated as a fact or only recited; that independently of the deciſions upon the ſubject, the reaſon of the act led to the ſame concluſion, for that the object of the act was merely to give full notice of the whole tranſaction to the public, which might be conveyed as well in one form as in another.—Rule diſcharged.

Hodges v. Money and Bailey, Hil. Ter. 32 Geo 3 B R. 4 *Ter. Rep.* 500.

And where there are ſeveral deeds ſecuring the ſame annuity, it is not neceſſary to ſtate the conſideration in each of them, as they are conſidered as only conſtituting one aſſurance: neither is it neceſſary that the conſideration of the annuity ſhould be averred in the memorial as a ſubſtantive fact; but it is ſufficient to ſatisfy the proviſions of the act to *ſet* it forth by way of recital.—In Michaelmas term, 1791, the defendant *M.* who had joined with *B.* in granting and ſecuring an annuity to the plaintiff *H.* obtained a rule to ſhew cauſe, why the

the judgment entered upon the bond and warrant of attorney given to ſecure the annuity, ſhould not be ſet aſide; and why thoſe, and all other ſecurities, ſhould not be delivered up to be cancelled, and all further proceedings ſtayed. On this occaſion three objections were taken; and the FIRST was, That there was no expreſs ſubſtantive averment in the memorial, that any conſideration was paid for the grant of this annuity. After argument, THE COURT diſpoſed of this firſt objection by ſaying, that the memorial contained ſufficient averment, that the conſideration was paid; although they agreed, that if it were merely ſtated by way of recital it would be ſufficient. The SECOND OBJECTION was, That the act requires, that *every* deed, &c. whereby an annuity is ſecured, ſhall be ſet forth in the memorial, and the conſideration or conſiderations of granting the ſame, otherwiſe *every* ſuch deed, &c. ſhall be void. Whereas in this caſe, the memorial did not ſtate the conſideration of the bond, or warrant of attorney, but only of the indenture. And THE COURT ſaid, in anſwer to this ſecond objection, that as the act of parliament only required that the memorial ſhould contain *the conſideration of granting the annuity*, it would be abſurd to repeat the ſame thing ſeveral times in the ſame memorial, although ſeveral deeds were given to ſecure the annuity, and each of them expreſſed the ſame conſideration. That ſuch a requiſition would be deſervedly ſubject to the objection of tautology, a complaint to which legal proceedings were already too much open. The THIRD OBJECTION was, that ſuppoſing the firſt clauſe of the act ſhould be ſatisfied, by ſtating the conſideration only once in the memorial, and not repeating it with reſpect to *every* inſtrument, &c. yet that at all events, the conſideration muſt be ſet forth in every inſtrument itſelf, by the expreſs requiſition of the third clauſe. But here the warrant of attorney did not contain the conſideration for granting the annuity. That in the caſe of *Hopkins* v. *Waller*, it was held to be an inſtrument for ſecuring the annuity, within the meaning of the act, which ought to be regiſtered in the memorial; and if ſo, it was equally neceſſary, by the third clauſe, that it ſhould contain the conſideration. As to this third objection, THE COURT ſaid there was no foundation for it; for that the bond, the warrant of attorney, and the judgment, taken together, conſtituted only one aſſurance; and that the act of parliament was ſatisfied, by inſerting the conſideration in any part of this one aſſurance, namely, the bond. That if an aſſurance of an annuity conſiſted of a leaſe and releaſe, or of a fine, and other deeds, it could not be neceſſary to inſert the conſideration of the annuity in the leaſe for a year, or in the fine;

but

but it would be ſufficient if it appeared in the aſſurance, whether conſtituted of one or of ſeveral deeds.—Therefore the rule was diſcharged.

Sowerby *v.* Harris, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 494.

So where a rule was granted to ſhew cauſe, why an annuity ſhould not be ſet aſide for a defect in the memorial, in not ſtating the conſideration of the annuity, as required by the act 17 *Geo.* 3, c. 26, ſect. 1. it appeared, that the memorial, as to this part of it, after ſtating the date of the deed, and the names of the parties, contained theſe words, viz. "Whereby *Harris*, in conſideration of 2100l. paid, *and which was in fact paid* to him by *Sowerby*, granted to the latter, an annuity of 300l. &c." This motion was made, and the opinion of the Court was given before it was diſcovered, that theſe words, *and which was in fact paid*, were contained in the memorial; ſo that the caſe was adjudged upon a ſuppoſition that theſe words were omitted. The fact was, that the 2100l. mentioned as the conſideration, was paid by a banker's check, which was afterwards paid by the banker to *Haris*'s attorney, who deducted thereout 650l. for a demand which he had upon *Harris*. After counſel had been heard, the Court ſaid, that the object of the act of parliament, in requiring the conſideration of the annuity to be ſtated in the memorial was, that the public ſhould have complete information of the real tranſaction between the parties. And that intelligence would be equally conveyed to the world, *whether it be averred as a poſitive fact, that the conſideration was paid, or only ſtated by way of recital.* In both caſes, the parties may attempt to commit the fraud of introducing a falſe fact into the memorial, but this is always open for examination. As the granting of this annuity appeared to be a fair tranſaction, the Court diſcharged the rule with coſts.

Creſpigny *v.* Wittenoon and another, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 790.

If an annuity be granted in conſideration of the grantee's giving up his buſineſs to the grantor, it need not be regiſtered.—Articles of agreement were entered into between *A. B.* and *C.* whereby, in conſideration of *A*'s relinquiſhing the buſineſs to *B.* and *C.* they covenanted to pay him the annual ſum of 400l. during his life. An action of covenant was brought on theſe articles, for the non-payment of the annuity. To this action the defendants pleaded, that the articles were executed after the paſſing of the annuity-act; that no memorial of them had been inrolled in the court of chancery, as that act requires; and that therefore the articles were null and void. To this plea the plaintiff demurred generally; and after argument, THE COURT ſaid, it is apparent from the preamble and the different clauſes of the act, that the legiſlature did not intend there ſhould be any memorial of an annuity like the preſent.

The

The preamble ſtates the miſchiefs of granting annuities for ſmall conſiderations by improvident perſons, and thoſe miſchiefs are guarded againſt by the ſeveral clauſes in the act, as far as human prudence can go. It is evident, that the act was intended as a check againſt hard bargains. The third clauſe expreſsly ſays, that the conſideration ſhall be paid in *money only*. The next ſection indeed ſays, that if any part of the conſideration be paid *in notes*, and theſe notes be not afterwards paid, the Court may order the deeds ſecuring the annuity to be cancelled. The Court, therefore, are bound by the poſitive words of the act, to declare that annuities, the conſideration of which was paid in notes, muſt be regiſtered purſuant to the act. But in both theſe caſes, the annuity is granted in conſideration of *ſomething paid* to the grantor, and no deciſion has extended the proviſions of the firſt clauſe beyond theſe two caſes. In the preſent caſe, either the annuity was abſolutely void, as not being granted for either of the conſiderations mentioned in the third and fourth ſections, and then no regiſtry of it could make it good; or it was ſuch an annuity as could not be regiſtered according to the act. But it is too much to ſay, that the annuity is void in itſelf; and neither the ſpirit, nor the words of the act require that it ſhould be regiſtered. As to the argument, *exceptio probat regulam*, it ſeems that the anxiety of ſome members of the Houſe, induced them to inſert the laſt clauſe, after the act was firſt drawn; but the firſt ſection could never have been extended to the caſes mentioned in the laſt, if they had not been excepted. By another clauſe too it is evident, that the act does not extend to this caſe. The ſeventh ſection prohibits brokers taking more than 10s. for every 100l. actually *paid*. Now it is impoſſible to ſuppoſe, that the legiſlature intended to prohibit a broker from receiving any premium for his trouble in negociating ſuch an annuity as the preſent; and yet his premium cannot be eſtimated according to the directions of that clauſe. Beſides, in caſes where money has been paid as the conſideration, the Courts, when they vacate the annuity deeds, order the money to be reſtored; but the buſineſs, the relinquiſhment of which was the conſideration of granting this annuity, we cannot order to be reſtored.—Judgment was therefore given for the plaintiff.

So, where by articles of agreement, dated in January, 1785, between the plaintiff and the defendant *Lewis*, the former, who was then matter of an academy at Deptford, agreed to relinquiſh his ſituation in favour of the latter, to grant him a leaſe of the houſe, to aſſign him part of the houſehold furniture and fixtures at the appraiſed value, and (if it ſhould not be convenient to *Lewis* to raiſe money ſufficient for the value of the goods, &c.) to advance him 300l. on the latter finding ſecurity for the repayment with intereſt; in

Hutton v. Lewis, Clerk, and others, Tr. Ter. 34 Geo. 3. B R. 5 *Ter. Rep.* 639.

conſideration of which, the defendant *Lewis* agreed to allow and pay to the plaintiff, his executors, &c. during the lives of the plaintiff and his wife, after the rate of one guinea *per annum* for every ſcholar, and half the entrance-money paid on the admiſſion of each ſcholar, by half-yearly payments; and if the plaintiff, or his wife after his deceaſe, choſe to determine that uncertain payment, the defendant *Lewis* agreed to pay a clear annual ſum of fifty guineas, by half-yearly payments, inſtead of the former. At the ſame time the three defendants gave the plaintiff a bond in 1200l. conditioned for the performance of the articles of agreement; and in *Hilary* term, 1787, the plaintiff ſued the defendants on the bond, who ſuffered judgment to go by default; and that judgment ſtood as a ſecurity for the growing payments. It was moved to have the annuity deeds delivered up to be cancelled, becauſe the annuity was not regiſtered. *Per Cur.* This annuity was not granted in conſideration of money paid to the grantor, but of reſigning the grantee's ſituation in favour of the grantor; and the loan of money, which was to be in the option of the grantor afterwards, was no part of the conſideration of the annuity. Even without the authority of the caſe of *Creſpigny* v *Wittenoom*, we have no doubt about the meaning of the act of parliament, which only applies to money conſiderations.—Rule refuſed.

Hudſon *v.* Skinner, Hil. Ter. 36 Geo. 3. 6 *Ter. Rep.* 596.

But if *A.* who is entitled for life to the dividends in certain ſtock, ſtanding in the names of truſtees, grant an annuity to *B.* payable out of the dividends, and impower thoſe truſtees to pay *B.* the annuity, it muſt be regiſtered under the annuity-act; for the eighth ſection, which excepts annuities ſecured by the transfer of ſtock, only extends to thoſe caſes where an actual transfer of the ſtock is made for the purpoſe of ſecuring the annuity.

Fenner *v.* Evans, Ea. Ter 26 Geo. 3. B.R. 1 *Ter. Rep.* 267.

A *ſcire facias* to revive a judgment which has been entered up on a bond ſecuring an annuity granted before the annuity-act, is an action within the clauſe which provides "that a memorial ſhall be regiſtered before *any action* ſhall be brought on any judgment already entered."—Before the ſtatute 17 *Geo.* 3, c. 26. the plaintiff granted to the defendant an annuity, the conſideration of which, as inrolled in the memorial, was 1000l. but in fact, the plaintiff had only received 700l. in money, and a *reſpondentia* bond for 271l. and there was a deduction of 29l. for law charges. After the paſſing of the annuity-act, a *ſcire facias* was iſſued to revive the judgment, and execution was taken out upon it. The Court was therefore moved to ſet aſide the *ſcire facias*, becauſe the real conſideration of the annuity did not appear on the memorial; a rule to ſhew cauſe was accordingly granted, and after cauſe had been ſhewn, THE COURT ſaid, that the execution muſt certainly be ſet aſide; and the only

only queſtion was, as to the *ſcire facias*. But a *ſcire facias* being an action (1), it came within the words of the ſecond ſection of the act, which are, "That no *action* ſhall be brought on any ſuch judgment already entered," &c. The *ſcire facias*, therefore, as well as the execution, muſt be ſet aſide.—Rule abſolute.

Scott v. Whalley, Mic. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 297.

A judgment having been entered on a warrant of attorney, given with a bond, to ſecure an annuity, payable quarterly, by the defendant to the plaintiff; a *fieri facias* was iſſued, by virtue of which the arrears of the preceding half-year were levied upon the defendant's goods. When the next quarter became due, another *fieri facias* was ſued out, and a ſecond levy made, but the judgment had not been revived; in conſequence of this, a rule was obtained to ſhew cauſe, why the goods levied under the latter execution ſhould not be reſtored, on the ground, that the judgment ought to have been previouſly revived by *ſcire facias*. This point THE COURT thought worthy of conſideration; and afterwards declared themſelves clearly of opinion, that it was not neceſſary to revive the judgment, in order to ſue out the ſecond execution; and therefore diſcharged the rule, with coſts.

Saunders v. Hardinge, Mic. Ter. 33 Geo. 3. B R. 5 *Ter. Rep.* 9.

The ſtatute requires that the conſideration for every annuity ſhall be ſet forth in the memorial, otherwiſe that the deed ſhall be null and void to all intents and purpoſes. Thus where it appeared that in October, 1782, the defendant in conſideration of 144l. granted an annuity of 24l. during his life, to one *Baker*, and by way of ſecuring it gave a bond for 300l. and a warrant of attorney to confeſs judgment, and aſſigned his glebe-lands, tithes, &c. of the vicarage of Hall Magna, for ninety-nine years: that in June, 1783, *Baker* aſſigned the annuity to *Collis*, who in April, 1786, aſſigned it to *Saunders* the plaintiff. On this laſt aſſignment, *there was a memorial of a deed-poll*, dated 7th April, 1786, executed by the defendant, reciting that by indenture, dated 26th June, 1783, *Baker, for the conſiderations therein mentioned*, aſſigned the glebe to *Collis* for the remainder of the term, that by an indenture of aſſignment, bearing even date with the deed-poll between *Collis* and the defendant, the ſame glebe-lands were, *for the conſiderations therein mentioned*, aſſigned to the plaintiff for the reſidue of the term; that the plaintiff had contracted with the defendant for the purchaſe of a further annuity of 7l. during the defendant's life (over and above the annuity of 24l.) for 42l. paid by the plaintiff to the defendant, by which deed

(1) Per *Buller*, J. There is no doubt but that a *ſcire facias* is an action, and on that ground it has been held, 2 *Wilſon*, 251, that a plea to a *ſcire facias* muſt conclude, "if the plaintiff ought to have or maintain his action."

poll, in consideration of 42l. paid by the plaintiff *to the defendant*, the latter assigned to the former the said glebe for the residue of the term. The memorial also stated a bond, dated 8th April, 1786, whereby the defendant became bound to the plaintiff in 400l. conditioned for the payment *of one clear annuity of* 31l. by the defendant to the plaintiff, during the life of the former, and also a warrant of attorney of the same date, to confess judgment on the said bond.—In 1786, judgment was entered upon this last bond; upon which a *fieri facias* issued; and upon the return that he had no lay fee, but was a beneficed clerk, being rector of G. a *fieri facias de bonis ecclesiasticis* issued in June, 1791; afterwards, in Michaelmas term, 1791, one *Ward* recovered a judgment against the defendant, in the court of common pleas, on a bond for 4391l. and another writ issued at his suit of *fieri facias de bonis ecclesiasticis*, "without prejudice nevertheless to the former sequestration;" *Ward* supposing there was a defect in the memorial of the annuity of 31l. by the defendant to the plaintiff, obtained a rule calling on the plaintiff to shew cause why the judgment and the writ of *fieri facias de bonis ecclesiasticis*, had thereon, should not be set aside, with a view of giving effect to his own subsequent judgment and execution, the objection to the memorial was, that no consideration whatever is stated in the last memorial for the annuity of 31l. secured by the bond. That the bond does not refer to the deed-poll (as was the case in *Hedges* v. *Money*, in p. 606, supra) by which the two several annuities of 24l. and 7l. were secured; and that there was nothing from whence it could be inferred that it is the same transaction, but the circumstance that both those annuities, when consolidated, amount to the same sum as the last annuity. That on the contrary, any such inference was negatived by adverting to the different deeds; the annuity secured by the bond being "*one clear annuity of* 31*l.*;" and the bond not being of the same date with the deed-poll, by which the two other annuities are secured. That this memorial ought to be taken by itself; but if the two others be referred to, nothing would there appear to connect the annuity of 31l. with the two former ones. And if it could be intended that the annuity of 31l. were merely a consolidation of the two others, then it was open to another objection, that it is secured by two different bonds, upon both of which judgment has been entered up, and execution issued on the last, and on the former one also for any thing that appears to the contrary. Another objection was, that if the memorial be defective, the act renders "the instrument null and void to all intents and purposes (1)." And

(1) Vide *Crosley* v. *Arkwright*, in 2 Ter. Rep. 603, under title EXECUTION.

even

even if it were only *voidable*, a creditor of the defendant, who ſtands in his ſituation, may elect for him to avoid it. PER CUR. We are to form a judgment on the public document, directed by the legiſlature; and as the annuity ſecured by the bond may, from the manner in which it is there regiſtered, be different from the two ſeveral annuities mentioned in the deep-poll, this laſt judgment on the bond cannot be ſupported; but this will leave the other ſecurities ſtill in force. Had there been any words of reference in the memorial of the bond, as "the 31l. which is the ſame annuity ſecured by the deed-poll," &c. the bond might have been ſupported; but there is nothing in the memorial to connect the one with the other.—By the words of the ſtatute, the bond is null and void to all intents and purpoſes. In ſeveral caſes that have ariſen upon this act of parliament, which in general is a very beneficial one, we have found ourſelves fettered with the poſitive terms of the law: but it is better in this, as well as in thoſe inſtances, that a particular inconvenience ſhould be felt, than that all thoſe miſchievous effects ſhould not be remedied, againſt which this act was intended to guard. Rule abſolute.

But where the defendant had in conſideration of 100l. granted an annuity of 16l. to the plaintiff, and by way of ſecuring the ſame, aſſigned a leaſe of two houſes, and gave her a bond and a warrant of attorney to confeſs judgment on the bond. Which three inſtruments were regiſtered, but not within twenty days: and afterwards the defendant for a valuable conſideration ſold his intereſt in the above leaſe to *R. Douſbery*; who, on the defendant's abſconding inſolvent, obtained a rule calling on the plaintiff to ſhew cauſe why theſe three inſtruments ſhould not be delivered up to be cancelled, *becauſe they were not enrolled "within twenty days of the execution" according to the annuity-act.* *The Court* ſaid, that the words of the fourth ſection were expreſsly confined to caſes where the application was made by the grantor himſelf; and that it appeared immaterial whether the deeds in queſtion were or were not delivered up, as they were clearly nullities by reaſon of the firſt clauſe. Rule diſcharged.

Garrood *v.* Sanders, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 403.

A rule was obtained calling on the plaintiff and *Thomas Hipſley*, to ſhew cauſe why the judgment ſigned in this cauſe ſhould not be ſet aſide, and why the indenture of 25th March, 1783, and the bond and warrant of attorney therein deſcribed, given to ſecure an annuity, ſhould not be delivered up to the grantors to be cancelled, &c. The memorial was of "an indenture dated 25th March, 1783, between *R. H. Lovelace*, of, &c. and *Amelia* his wife of the one part, and *W. Hart*, of, &c. of the other part; purporting to be a grant of an annuity of 60l. during the lives of

Hart *v.* Lovelace, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 471.

Lovelace and his wife, and the ſurvivor of them, for the price of 420l. And alſo of *a bond and warrant of attorney*, empowering certain attornies therein named to confeſs judgment thereon, *which ſaid bond and warrant of attorney are particularly and reſpectively ſet forth in the ſaid indenture*; and which ſaid annuity of 60l. is payable quarterly, and charged upon all that annual ſum of 100l. limited or ſecured, &c. in truſt for the ſeparate uſe of the ſaid *Amelia*, by the therein firſt recited indenture; and alſo that other annual ſum of 100l. limited, &c. in truſt for the ſeparate uſe of the ſaid *Amelia*, during the lives of herſelf and her huſband by the therein laſt recited indenture; and alſo that other annual ſum limited, &c. in truſt for the ſaid *R. H. Lovelace*, during his life, by the therein laſt recited indenture, and alſo all the ſurplus of intereſt, &c. of 20,000l. ſubject to the payment, &c. of 4200l. and intereſt ſecured to *Charles Bicknell*, by the therein laſt recited indenture; and which ſaid indenture is executed by the ſaid *R. H. Lovelace*, and *Amelia* his wife, and *William Hart*; and the bond and warrant of attorney are reſpectively executed by the ſaid *R. H. Lovelace*; *and are all atteſted by and executed in the preſence of W. D.* of, &c. and *W. M. of, &c. or one of them. Hart* afterwards aſſigned the annuity and the ſeveral ſecurities above mentioned, by indenture of the 31ſt May, 1783, to *Thomas Hipſley*, who was the real plaintiff in this caſe. On the 10th May, 1791, a bill was filed in the court of chancery by *D. G.* and *S. S.* certain grantees of annuities charged on the ſaid ſum of 20,000l. againſt *R. D.* the ſurviving truſtee in Mr. *Lovelace*'s marriage ſettlement, and againſt *Lovelace* and his wife, *Thomas Hipſley*, *Hart*, and other grantees of other annuities from *R. H. Lovelace*; praying that an account might be taken of what was due to the ſaid *D. G.* and *S. S.* in reſpect of their annuities, and that the ſurviving truſtee might be directed to pay the ſame, and keep down the intereſt, &c. In that ſuit there was a decree on the 31ſt of January, 1792, referring it to the maſter to enquire into the claims of the ſeveral parties, and to ſtate their priorities, &c. all the ſeveral parties (except Mr. *Lovelace*, who was abroad) attended the maſter, and in particular Mrs. *Lovelace* and her ſolicitor, and litigated ſeveral matters touching theſe annuities; but no objection was taken concerning any defect in the memorial or inrollment. The maſter made his report in June, 1793, in which he ſtated the amount of arrears due on the ſeveral annuities, and aſcertained their reſpective priorities; and that report was confirmed. The preſent application was made on behalf of Mrs. *Lovelace*, who ſtated that her huſband had deſerted her, and was now abroad, and that when the ſuit in chancery was depending, ſhe was not aware of the objec-

tions to the memorial of this annuity. On the part of Mrs. *Lovelace*, four objections were taken to the memorial: 1ſt, That no date is therein given to the bond and warrant of attorney; 2dly, That it does not appear with ſufficient diſtinctneſs who were the witneſſes to the indenture, or to the bond and warrant of attorney; the memorial only ſtating, *that all the inſtruments were atteſted by* A. B. *&c. or one of them.* 3dly, That it is not ſtated to whom the conſideration-money was paid, or that it was paid at all; 4thly, That there is no memorial of one of the truſts created by the indenture of the 25th of March, 1783, namely, the truſt of the ſurplus for the grantors reſpectively, according to their ſeveral rights; all of which are expreſsly required by the firſt ſection of the annuity-act. *Per Cur.* We cannot get over the objection, that the names of the witneſſes to each of the deeds are not ſet forth with ſufficient accuracy in the memorial; and this objection applies to the indenture as well as to the bond and warrant of attorney. The legiſlature, in framing this act of parliament, intended that every circumſtance relating to the annuity ſhould be diſcloſed: and more information is likely to be collected on the ſubject if all the witneſſes to the different inſtruments be ſet forth in the memorial, than if only ſome of their names be there mentioned; for ſome important parts of the tranſaction may perhaps be known only to the witneſſes to one of the inſtruments. In this memorial the names of the witneſſes are not diſtinctly ſet forth; if we allow this mode of ſtating their names to be ſufficient, it will be difficult to draw the line; and in the next caſe it may be alleged in the memorial that the different inſtruments were executed in the preſence of an hundred witneſſes (naming them) "ſome or one of them." We are not prepared to ſay whether or not all the inſtruments given to ſecure an annuity muſt be ſet aſide merely becauſe one only is not properly regiſtered. The caſes on this ſubject are not reconcileable: but in the lateſt of them, Lord *Loughborough*, who drew the annuity-act, decided in the court of chancery, that if any one of the deeds conſtituting the aſſurance for the annuity were not properly enrolled all the inſtruments were void. We are not called upon now to determine that point: but the ſtrong inclination of our opinion is, that any defect in the memorial of one of the deeds will vitiate the whole aſſurance. In the courſe of this argument, we have had ſome difficulty reſpecting the decree in the court of chancery. If this queſtion had been brought before that court, and received a judicial deciſion, we ſhould have thought ourſelves bound by it, as being the judgment of a court having competent juriſdiction over the ſubject-matter: but the proceedings there were *diverſo intuitu*; that ſuit had a different

object in view; and the queſtion before us did not ariſe in that court. And on the firſt objection, reſpecting the witneſſes, we are bound to determine againſt the plaintiff, though on the merits it appears to be a hard caſe againſt him: but in conſtruing an act of parliament, which was paſſed for very wiſe purpoſes, we muſt eſtabliſh a rule applicable to all caſes.—Rule abſolute.

Steadman v. Purchaſe and Cox, Tr. Ter. 36 Geo. 3. B.R 6 *Ter. Rep.* 737.

A memorandum indorſed on a deed (by which an annuity is granted for the life of the grantor) importing that the grantor may redeem it on certain terms, muſt be inſerted in the memorial under the annuity-act.—In April, 1783, *Purchaſe*, in conſideration of 240l. 3s. 4d. granted an annuity to *Steadman* of 33l. 12s. for the life of the former, and *Cox* became ſurety for him. They both joined in a bond and warrant of attorney to confeſs judgment on the bond; and alſo for further ſecurity executed an indenture of the ſame date, by which *Purchaſe* aſſigned to *Steadman* his ſalary of 200l. *per annum* as a clerk in the bank of England, and in which was a joint covenant by both for the payment of the annuity. *On the deed an indorſement was written at the time when the deed itſelf was executed, ſigned by* Steadman, *ſtating, that on the treaty for the purchaſe of the annuity it was agreed, that the grantor ſhould be at liberty to repurchaſe the annuity after the expiration of three years, on giving ſix months' notice to* Steadman, *and repaying the full conſideration.* The bond, warrant of attorney, and indenture, were properly regiſtered, but *no notice was taken in the memorial of the indorſement on the latter.* In Eaſter term, 1793, judgment was entered up on the warrant of attorney againſt both the obligors in the bond; after which time *Cox* died. This was an application by Mrs. *Cox*, the widow and executrix of the obligor, to ſet aſide the judgment and the annuity-deeds, becauſe the indorſement on the indenture was not regiſtered as well as the deed itſelf. It was objected that that Court had not any ſummary juriſdiction over this caſe, as the objection aroſe on the fourth, and not on the firſt, ſection of the act. *The Court* ſaid, that as the objection to the want of juriſdiction was of great importance, it would require a great deal of conſideration before they determined it; but that it was not neceſſary to decide it in this caſe, becauſe *they had a ſummary juriſdiction over the judgment, by reaſon of the warrant of attorney*; and that they were clearly of opinion that the memorandum ought to have been inſerted in the memorial.—Rule abſolute, to ſet aſide the judgment, and diſcharged as to ſetting aſide the annuity-deeds.

Ex parte, Anſell and another, Tr. Ter. 37 Geo. 3. C.B.

So, where theſe parties had granted an annuity to *E. Boulton*, and gave a bond, warrant of attorney, and annuity-deed to ſecure the ſame; and the deed contained a proviſo of redemption:

redemption: the memorial ſtated the bond and warrant of attorney properly, but deſcribed the proviſo of redemption as follows, "and in the ſame indenture is contained a certain proviſo or agreement, impowering the ſaid *C. Anſell* to repurchaſe the ſaid annuity upon ſuch notice, terms, and conditions as are therein expreſſed;" a rule was obtained on the part of the grantor, to ſhew cauſe why "the bond, the warrant of attorney, and the deed, ſhould not be delivered up to be cancelled, on the ground, that the memorial had ſet forth the proviſo of redemption in too general a way." THE COURT at firſt differed in opinion (1); BUT after time

1 *Pull. & Bojan.* 62.

(1) *Eyre*, CH. J. ſaid, in the caſe where the courts have held it neceſſary to inſert the proviſo of redemption in the memorial, it has been indorſed on the deed; and has therefore been conſidered either as a ſeparate deed, or as a ſomething collateral to the deed itſelf, and eſſential to be ſet out as a ſuperadded part of the ſecurity; in the caſe of a proviſo in the body of the deed: I doubt whether, on the general idea of a memorial, or the ſpecific deſcription of it in this act, it need be inſerted, I am not, therefore, prepared at preſent to conſider this memorial as inſufficient; it is a memorial only, not a copy of the deed: it ſtates a deed for ſecuring an annuity redeemable "on the terms therein expreſſed," for which reference may be had to the deed itſelf; is not this a ſufficient compliance with the words of the act? He who ſees an annuity redeemable, will inquire after the deed, and look into the terms. It has been ſtated, that the act was made for the benefit of the grantor, who has parted with the deeds. I cannot ſubſcribe to that propoſition; it was made for the benefit of mankind in general, that the world might know the nature of ſuch tranſactions, and the parties be reſtrained by a ſenſe of ſhame from entering into them: the policy of the law would be amply ſatisfied by a memorial like the preſent; it anſwers all ſubſtantial purpoſes, for it cannot be neceſſary to load it with the full contents of the deed, which would be little ſhort of requiring a copy. BULLER, J. I have conſiderable doubts, and cannot quite coincide in the opinion of my Lord. I ſhould ſooner ſay that the proviſo need not be inſerted at all, than that it ſhould be inſerted in this general way: the queſtion is, Whether the proviſo be part of the conſideration or not? look through the act: it was there intended to include *money* conſiderations only; and one clauſe actually ſays, *in money only*; if then the word *conſiderations* means money conſiderations only, a proviſo is not within the terms of the act. But the point has been already ſettled, both here and in the king's bench; and I am not diſpoſed to diſturb what has been ſettled by two determinations, though the act does not appear to go that length. Having got thus far, that the word "conſiderations" includes all the terms of the agreement, the remaining queſtion will be, Whether the preſent proviſo be ſufficiently ſtated? I admit no difference between the caſe of a proviſo indorſed, and a proviſo in the body of the deed: they are both parts of the agreement: ſo in a warrant of attorney with a defeaſance, the defeaſance is a part of the inſtrument: if then the proviſo is to be taken notice of at all, is it not to be taken notice of ſubſtantially? The act, in my opinion, was made for the benefit of the grantor, as well as the public. Let us ſee then if this memorial be ſufficient to protect the grantor, againſt any improper advantages which might be attempted. He knows the

time taken to conſider, *Eyre*, CH. J. ſaid, we have conferred with all the judges on this queſtion, and the reſult is, that we all think that where an annuity is redeemable, the terms and conditions of redemption ought to be ſet forth in the memorial, in order that the party who is to have the benefit of ſuch redemption, may, without being driven to compulſory means, be appriſed of thoſe terms and conditions, and may redeem it with *moſt eaſe and convenience to himſelf*. Rule abſolute.

Harris v. Stapleton, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 205.

So where an application was made to ſet aſide a judgment on a warrant of attorney for ſecuring an annuity; becauſe *a clauſe of redemption contained in the body of the deed*, whereby the annuity was granted, was not inſerted in the memorial. THE COURT ſaid, that the caſe could not be diſtinguiſhed from the above caſe of *Steadman* v. *Purchaſe*, and made the rule abſolute.

Craufurd and others, executors, v. Caines, Hil. Ter. 35 Geo. 3. C.B. 2 *Hen. Black.* 438.

But it was afterwards determined in the court of common pleas, that if there is neither a warrant of attorney, nor a judgment actually entered up in the court to which application is made, the court has no juriſdiction. The circumſtances of this caſe were the following: The wife of the defendant was firſt married to *William Blomberg*, who left her at his death lands in Yorkſhire, of the value of 1200l. a-year for her life: ſhe afterwards married *Walter Neſbit*, which marriage was diſſolved by an act of parliament, by which the lands were confirmed to *Neſbit* during their joint lives, ſubject to a rent-charge of 200l. a-year, which was thereby ſettled on the wife, during the ſame period: ſhe then married the defendant *Caines*, who together with her, aſſigned the rent-charge to Sir *Hew Craufurd*, during the joint lives of *Neſbit* and her; and by the ſame deed covenanted to levy a fine of it, and further granted a rent-charge to Sir *Hew* of the ſame ſum, for ninety-nine years, to be computed from the death of *Neſbit*, in caſe he ſhould die in her lifetime, if ſhe ſhould ſo long live, and alſo demiſed the lands to a truſtee for a long term of years to be computed in the ſame manner, in truſt for the better ſecuring the rent-charge: a fine *ſur cognuzance de droit tantum*,

---

the annuity to be redeemable, but the deeds are in the hands of the grantee: is it not then material for them to know the terms on which it is redeemable; or whether at the end of three or at the end of ſeven years? is it not of importance that he ſhould have it in his power to prove all the material facts out of the mouth of the party himſelf; that he may be able to come to the court, ſtate the ſpecific terms, and demand the deed in compliance with the proviſo? The judges *Heath* and *Rooke*, alſo concurred with *Buller*, J. and doubted. *Curia adv. vult.* ultimately the opinion of the Court, was delivered by *Eyre*, CH. J. as above.

was

was accordingly levied by the defendant and his wife; and he gave, as a further ſecurity, a bond and warrant of attorney to confeſs a judgment in the court of king's bench. A motion was ſoon afterwards made in that court to ſet aſide the annuity; but pending the rule, Sir *Hew* died, no judgment having been entered on the warrant. And now a rule was granted in this court to ſhew cauſe why the annuity ſhould not be ſet aſide, the deed, bond, &c. given up to be cancelled, and the fine vacated, on the ground that the memorial did not truly ſet forth the conſideration, 1700l. being the ſum ſtated to have been paid, when in truth part of it was kept back by Sir *Hew*, that the demiſe to the truſtee was omitted, and no mention made of the fine or the covenant to levy it. THE COURT, without giving any decided opinion as to the alleged defects in the memorial, held, that as there was neither a judgment nor warrant of attorney in this court, they had no juriſdiction of the matter in queſtion? that the fine did not give them juriſdiction, for it was not an action within the meaning of the fourth ſection of the ſtatute, nor was it ſuch an appearance as was meant by the third ſection; and that as there was no intrinſic defect in it, or irregularity in the mode of levying it, they had no authority to interfere, and order it to be vacated.

And where upon a ſummary application to ſet aſide an annuity for non-compliance with the requiſites of the annuity-act, the rule has been diſcharged, after hearing every objection that could be then urged againſt the ſecurity; the Court will not entertain a ſimilar application between the ſame parties on the ſame ſtate of facts; though it be ſtated, that they have objections to offer which were not before entered into, and which are fatal to the annuity; for *Per Cur.* The act of parliament gives a ſummary juriſdiction to the court, which is to be exerciſed according to ſound legal diſcretion; and we cannot govern our diſcretion better than by analogy to the proceedings at common law. Now, if an action be brought, and the merits of the queſtion diſcuſſed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvaſs the ſame queſtion again in another action, although perhaps ſome objections or arguments might have been urged upon the firſt trial which would have led to a different judgment. So, in this caſe, as it appeared that all the facts now brought forward in the affidavits in ſupport of the rule, exiſted at the time of a former rule, and every objection which could now be urged might then have been brought forward, the Court held that the matter muſt now be taken to have paſſed *in rem judicatam*, and that the former deciſion was concluſive between the parties.

Greathead v. Bromley, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 455.

Alſo,

Buck and others, executors, v. Tyte, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 495.

Alſo, where a rule was obtained, calling on the plaintiffs to ſhew cauſe why the judgment ſigned in this cauſe, and the execution iſſued and executed thereon, ſhould not be ſet aſide, and the money levied by the ſheriff be reſtored to the defendant; on the ground, 1ſt, That the agreement for redemption was not ſtated in the memorial; 2dly, Becauſe the grantor had not received the full conſideration ſtated: it appeared that the defendant was ſurety to the teſtator for one *Birch*, and had executed a certain indenture, bond, and warrant of attorney for ſecuring an annuity, redeemable on certain terms, that the teſtator dying, the plaintiffs, as his executors, commenced an action againſt the defendant on his bond; and having obtained judgment therein, ſued out execution, and levied thereon. *Per Cur.* The act only meant to refer to ſuch judgment on warrants of attorney as were intend d to be part of the ſecurity for the annuity; and not to extend to caſes where a judgment is obtained in the ordinary courſe of law on any inſtrument given for ſecuring the ſame. Rule diſcharged.

Symmons v. Mortimer, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 139.

Conſideration-money paid at different times.] A rule *niſi* was obtained for ſetting aſide the judgment which had been entered up in this cauſe, and for delivering up the bond given by the defendant for ſecuring an annuity of 200l. to be cancelled. The tranſaction was this: on 8th July, 1783, the defendant borrowed of the plaintiff 1200l. for which he gave his bond to ſecure an annuity of 200l. for the life of the defendant, and warrant of attorney to confeſs judgment. The defendant not being willing to have his name appear publicly in this tranſaction, it was agreed between him and the plaintiff, that the bond ſhould be renewed every twenty days, to prevent the neceſſity of regiſtering a memorial purſuant to the annuity-act. It was accordingly renewed on 28th July, in conſideration of delivering up the firſt bond and warrant of attorney to be cancelled; on 19th Auguſt following there was a further loan of 600l. from the plaintiff to the defendant; for which the annuity was to be increaſed to 300l. *per annum*; and the ſecurities were again renewed upon the conſideration therein ſtated of 1800l. The ſecurities were again renewed on the 26th September and 15th October, and again on the 12th November, 4th December, 7th January, 1784, 28th January, and finally on the 17th February, when they were enrolled for the firſt time. Upon all thoſe occaſions the conſideration ſtated in the ſecurities was the receipt of 1800l.; but the money was actually paid in the manner before mentioned, and all that paſſed at the ſubſequent times was the giving up the old upon receiving the renewed ſecurities. In the memorial regiſtered of the bond and warrant of attorney, dated 17th February, 1784, for the ſecuring the annuity of 300l. the conſideration therein ſtated for granting the ſame

is

is the ſum of 1800l. It further appeared, that the agent who had negotiated the annuity between theſe parties was lately dead; and the affidavit diſcloſing theſe facts was made by *Mortimer* alone; the plaintiff being unapprized of what had paſſed between them reſpecting the delay of regiſtering the memorial. The objection was, that upon the face of the tranſaction it appeared that the conſideration had not been truly ſet forth in the memorial. *Per Cur.* The length of time which has elapſed ſince the granting of this annuity, and the defendant's having lain by till the death of the agent by whom the buſineſs was negotiated, and till all evidence of the tranſaction, except what he himſelf has diſcloſed, was loſt, might perhaps have been a ſufficient anſwer to the application, without entering further into the merits of it. But taking for granted that the facts are as they have been aſcertained by the defendant, there ſeems no ground for ſetting aſide the annuity. The objection is, that the conſideration has not been truly ſtated in the memorial, becauſe the 1800l. there ſet forth to have been paid as the conſideration of the annuity, was paid in two different ſums at different periods, for which ſecurities were taken at the time, the cancelling of which was the real conſideration for giving the enregiſtered ſecurities. But in truth the money was paid for the grant of a valid annuity; and though the intermediate tranſactions kept the matter open from time to time, yet the ſame original contract ſubſiſted: it remained in *fieri*, and was not conſummated until the giving of the laſt ſecurities, which were properly regiſtered. And when ſome of thoſe ſecurities fell to the ground, the whole conſideration remained as a debt due to the plaintiff (1). Rule diſcharged.

Part of the conſideration only paid in money.] Upon a rule to ſhew cauſe why a warrant of attorney to confeſs judgment, and an indenture, dated 6th July, 1791, for ſecuring an annuity of 80l. to *B. Pigman* from *Fallon* and wife, ſhould not be ſet aſide, the tranſaction appeared to be this: the wife, being entitled to an annuity for life of 800l. previous to her marriage with *Fallon*, aſſigned the ſame in truſt as to 500l. *per annum*, for her ſeparate uſe, and as to the remaining 300l. *per annum* to the uſe of her huſband, during their joint lives, remainder to herſelf. In June, 1787, *Fallon*, for the ſum of 480l. granted an annuity of 80l. to *Wintle* during the joint lives of himſelf and his wife, and charged the ſame on the firſt-mentioned annuity to him of 300l. *Fallon* being again diſtreſſed, he and his wife applied to *Wintle* to purchaſe another annuity of 80l. during the life of the wife only, on condition that *Wintle* would give up the

Ex parte Fallon and wife, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 283.

(1) See alſo *Waſburn* v. *Birch*, in p. 605, ſupra.

former

former annuity of 80l. This was refuſed by *Wintle*, who was alſo unwilling, for ſome time, to permit *Fallon* to repurchaſe the annuity of 80l. already granted. However, *Wintle* at laſt conſented to part with that annuity: but as he ſtill refuſed to take the ſecond, application was made to *Pigman* on behalf of *Fallon* and wife to take up the firſt annuity of 80l. from *Wintle*, and to purchaſe in lieu thereof the annuity of 80l. in queſtion. *Wintle* refuſed to take leſs than 535l.; whereupon *Pigman* paid that ſum to him for the aſſignment of the former annuity; and as it was agreed that *Pigman* ſhould pay to *Fallon* and wife 640l. for the annuity in queſtion, dependent on Mrs. *Fallon*'s life only, the former annuity which had been ſo aſſigned from *Wintle* to *Pigman* was agreed to be aſſigned from the latter to *Fallon* as for 535l. the purchaſe-money, and to be taken as part of the conſideration of 640l.; and the remaining 105l. was paid to *Fallon* and his wife in money. The memorial ſtated accurately all the tranſactions; and that the annuity was granted in conſideration of the aſſignment made by *Pigman* of the former annuity, and alſo in conſideration of 105l. paid by *Pigman* to *Fallon* and his wife. The objection was, that the whole conſideration was not in money, as required by the 17 *Geo.* 3, c. 26, § 3. PER CUR. The great miſchief intended to be provided againſt by the legiſlature in this act was the fraud and circumvention of thoſe who took advantage of the neceſſities of diſtreſſed perſons, deſirous of taking up money upon annuities, by putting off goods upon the latter at their own price, inſtead of money, which goods they were afterwards to diſpoſe of at a conſiderable loſs. For this reaſon the legiſlature required that the conſideration ſhould be in money, and not in goods. But it is not neceſſary, nor was it ever intended, that the money ſhould be actually told down at the time of the grant. If it be a *bona fide* tranſaction, and the money be really paid to the grantor or to his uſe, it ſatisfies the words and meaning of the act. Now that was the caſe here: for here the purchaſer of this annuity redeemed the former at the expreſs requiſition of the grantor, and on his account; and muſt therefore be taken to have expended ſo much money for her uſe, which is the ſame as if he had paid it to her: and then this cannot be diſtinguiſhed from the caſe of a debt, for ſo much money actually borrowed of the grantee by the grantor (1).

Watts v. Millard and another, Ea. Ter. 34 Geo. 3 B.R. 5 *Ter. Rep.* 598.

But where part of the conſideration of an annuity is paid over by the grantee to a third perſon, with the conſent of the grantor, or is accounted for to the grantor by a note

(1) See *Waſbourn* v. *Birch*, in p. 605, ſupra.

from

from a third perſon, the whole of the tranſaction muſt be ſtated in the memorial: a rule was obtained calling on the plaintiff to ſhew cauſe why a bond, warrant of attorney to confeſs judgment, and a deed of aſſignment of a ſalary of 60l. *per annum*, which were executed to ſecure an annuity of 30l. during *Millard*'s life, ſhould not be ſet aſide, for ſeveral objections ariſing on the annuity-act: Firſt, The conſideration is alleged to be 180l. paid by *Watts* to *Millard*, whereas only 130l. was received by the latter, the remaining 50l. being retained by *Watts*, with *Millard*'s conſent, for a debt due from one *Atkinſon*, the attorney for both parties, to *Watts*; 2dly, The chriſtian name of one of the witneſſes to the warrant of attorney is not ſet forth in the memorial, which only contains the true names in the bond and deed of aſſignment; 3dly, The aſſignment of the ſalary is too general; it is merely an aſſignment of "all that his ſalary of 60l. which he is entitled to:" but it does not appear that the ſalary is ſuch as can by law be aſſigned. *The Court* ſaid, That though there was no weight in either of the two laſt objections, the firſt was alone deciſive; for that as the retaining of the 50l. for *Atkinſon*, which was by him accounted for in a note, was part of the terms of the contract, it ſhould have been ſtated in the memorial. And that it had been ſeveral times decided, that where the grantor at the time of the treaty agreed to pay over part of the conſideration-money, it ſhould be truly ſet forth in the memorial. Rule abſolute

So, a ſolicitor, who advances his own money on the purchaſe of an annuity, is not entitled to any commiſſion-fee. And if any part of the conſideration-money be returned to him by the grantor, as a charge for ſuch commiſſion, the court will ſet aſide the annuity deeds. The defendant in April, 1793, granted an annuity of 100l. to the plaintiff in truſt for *Woodgate*: by way of ſecurity he gave a bond, together with Mr. *Wade* his ſurety, to the plaintiff for 1200l. and he and *Wade* gave ſeparate warrants of attorney to confeſs judgment on the bond. The whole conſideration-money, 600l. was paid to the defendant; but immediately afterwards, at the ſame meeting of the parties, the ſum of 19l. 11s. the amount of *Woodgate*'s bill for making the deeds and for commiſſion, was paid back by the defendant. On a rule calling on the plaintiff to ſhew cauſe why the annuity deeds ſhould not be delivered up to be cancelled, on the fourth ſection of the annuity-act, which ſays, that the annuity ſhall be void "if any part of the conſideration ſhall be returned to the perſon advancing the ſame." *The Court* were of opinion, that *Woodgate* was not entitled to any commiſſion on putting out his own money, and that the

Broomhead v. Eyre, Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 597.

the caſe came within the fourth ſection of the annuity-act. Rule abſolute.

Hammond *v.* Foſter, Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 635.

In December, 1789, the defendant granted the plaintiff an annuity of 50l. in conſideration of 325l. In May following, the defendant paid off the principal together with the arrears, under a clauſe of redemption in the deed, and received back from the plaintiff's attorney, the annuity deeds uncancelled. In July following, the defendant having occaſion to borrow another ſum of money, applied to the attorney to procure it, who informed him that he had not returned to his client the money he had received for redeeming the annuity, and that he would redeliver to him (the defendant) that ſum on receiving back the deeds which he had before delivered up. The defendant aſſented to this propoſal, and received, on delivering back the deeds, the attorney's notes for the amount of the money agreed upon, which notes the defendant was obliged to diſcount. There was a memorial of the firſt tranſaction under the annuity-act, but not of the ſecond; and it was moved to ſet aſide the annuity. *Per Cur.* This is not a mere irregularity; the *regrant of the annuity was ſubſtantially a new tranſaction*, and there ſhould have been a memorial of ſuch regrant.

Dann on the demiſe of Dolman *v.* Dolman, Tr. Ter. 34 Geo 3. B.R. 5 *Ter. Rep.* 641.

And, if the memorial of a deed to ſecure an annuity be defective, the whole deed is void to all intents and purpoſes, even though there are other parts of it not connected with the annuity. On the trial of this ejectment at the Weſtminſter ſittings, a ſpecial caſe was reſerved, in ſubſtance as follows—*J. Ogilvie*, in June, 1780, by will deviſed the premiſes in queſtion, with others, to *J. Hoſkins* and *R. Dann* upon truſt, that they ſhould ſettle and convey the ſame, as to one moiety, to the uſe of his grandſon *J. O. Dolman*, the leſſor of the plaintiff, but of no other perſon as his aſſignee or otherwiſe by his act or deed, for life, without impeachment of waſte, remainder to two truſtees to be named in the ſettlement, to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to the daughters as tenants in common, remainder to the defendant, *E. O. Dolman*, for life. In the will is a proviſo, that the aforeſaid deviſe is upon this expreſs condition, that neither the leſſor of the plaintiff or the defendant, "ſhould at any time ſell, aſſign, mortgage, or otherwiſe diſpoſe of, charge, or incumber, their reſpective intereſts or eſtates for life, or any part thereof, of and in the aforeſaid eſtates, or any part thereof," but that in ſuch caſe the eſtate and intereſt of him or her ſo aſſigning, &c. ſhould be utterly void to all intents and purpoſes as if he or ſhe were actually dead, and that from thenceforth ſuch eſtate, &c. ſhould be held and enjoyed by the perſon next in remainder.

remainder. By indentures dated 28th and 29th of November, 1781, after the deviſor's death, the moiety of the premiſes was ſettled to the uſes of the will. By indenture, dated 14th January, 1788, between the leſſor of the plaintiff, who was then ſeiſed under the will, &c. of the firſt part, *H. Toten* of the ſecond, and *R. Griffith* of the third part, in conſideration of 226l. 17s. 10d. paid to *Mark Taylor* by *Toten*, at the requeſt and for a debt of *Dolman*, and of the further ſum of 113l. 2s. 2d. paid by *Toten* at the like requeſt to *Griffith*, "in truſt and for the purpoſes thereinafter expreſſed:" *Dolman* granted an annuity of 37l. to *Toten*, to be iſſuing out of the premiſes in queſtion for ninety-nine years, if *Dolman* ſhould ſo long live; and he alſo thereby demiſed to *Griffith*, his executors, &c. all and ſingular the ſaid premiſes for ninety-nine years, if *Dolman* ſhould ſo long live, upon truſt, that *Griffith* his executors, &c. ſhould receive the rents, &c. and pay and apply them firſt in payment and ſatisfaction of the annuity to *Toten*, then to pay to *Dolman* himſelf for ſo many years of the term as he ſhould live 40l. *per annum*, then to retain 1s. in the pound on the monies received, &c. and ſubject to the ſaid annuity and the other truſts and out-goings upon further truſt out of the reſidue of the money, which ſhould come to *Griffith* by virtue of the indenture, to pay off and diſcharge the ſum of 150l. due from *Dolman* to *R. Hovel*, 14l. 8s. due from *Dolman* to Mrs. *Mathews*, and the reſidue in diſcharge of ſuch debts as might be due from *Dolman* to any other perſons, and the overplus, if any, to *Dolman*. A memorial of this deed was duly regiſtered under the ſtatute 7 *Ann.* c. 20. and another memorial of it under the 17 *Geo.* 3, c. 26. which ſtated truly the date of it, and the names and additions of the parties, and that it was witneſſed that in conſideration of 226l. 17s. 10d. paid by *Toten* at the requeſt of *Dolman* to *Mark Taylor*, and of the further ſum of 113l. 2s. 2d. by *Toten* at the like requeſt, "to *Griffith* paid *in truſt as therein mentioned*;" and alſo in conſideration of 5s. by *Griffith* paid to *Dolman*, *Dolman* granted to *Toten* an annuity of 37l. to be iſſuing out of the premiſes in queſtion (deſcribing them truly), to hold the ſaid annuity for ninety-nine years, in caſe *Dolman* ſhould ſo long live; and that for the conſideration aforeſaid, *Dolman* demiſed and granted the ſaid premiſes to *Griffith*, his executors, &c. for ninety-nine years, if *Dolman* ſhould ſo long live, *upon the truſts therein mentioned*. *R. Griffith* entered into poſſeſſion of the premiſes in queſtion, and received the rents and profits thereof, ſubject to the performance of the truſts in the laſt mentioned deed contained. An ejectment was brought on the demiſe of *Elizabeth Dolman*, to which *Edward Jordan* and *R. Griffith*, who claimed under the ſaid annuity-deed, appeared and

entered into the common rule, in which action the plaintiff recovered; and judgment was thereupon entered up, and poſſeſſion of the premiſes was taken under ſuch judgment; and now this action is brought to recover back the poſſeſſion. The queſtion for the opinion of the court is, Whether the deed of 14th January, 1788, works a forfeiture of the eſtate of the ſaid *J. O. Dolman* in the premiſes? It was admitted on the part of the plaintiff, that the condition created in the will was a legal condition, and that therefore the eſtate of the leſſor of the plaintiff was forfeited, if the deed of the 14th of January, 1788, were valid; but it was inſiſted that that deed was void under the annuity-act, on two grounds, and that conſequently it created no incumbrance on the eſtate. 1ſt, The annuity-act requires that the memorial ſhall contain not only the name of the grantee, but of the perſons for whom any grantee is a truſtee. But here it is ſtated in the memorial, that 113l. 2s. 2d. part of the conſideration of the annuity, was paid to *Griffith* "*in truſt as therein mentioned*," *without diſcloſing thoſe truſts*; 2dly, The deed ſtates, that the premiſes were aſſigned to *Griffith* in truſt to pay *Toten*'s annuity, and for ſeveral other diſtinct purpoſes; but the memorial only ſets forth, that they were aſſigned to him "upon the truſt therein mentioned;" and either of theſe defects, it was contended, was alone ſufficient to void the deed. *Per Cur.* Many caſes have been brought before the Court on the conſtruction of this act of parliament, which have appeared to bear rather hard upon particular individuals; but yet if they were ſet in oppoſition to the benefits which the public have derived from the act, the balance would be greatly in favour of the latter. In framing a new law it is impoſſible to foreſee, and to guard againſt, every poſſible inconvenience that may ariſe from it: and perhaps, if this law were now to be reviewed by the legiſlature, ſome alterations might be made in it, better adapted to the ends propoſed by it. This conſideration may perhaps be a reaſon for an application to be made to the legiſlature, but it cannot induce us, ſitting in a court of law, to break through any of the proviſions of the act. In order to ſee whether or not the deed in queſtion be void, we muſt recur to the words of the act of parliament, and to the caſes that have been decided upon it. The act ſays, that there ſhall be ſet forth in the memorial the date of the deed, the names of all the parties, "*and for whom any of them are truſtees*," and of the witneſſes, otherwiſe the deed "*ſhall be null and void to all intents and purpoſes*;" and not merely as in the ſtat. 7 *Ann.* c. 20, ſ. 1. alluded to, that "*the deed ſhall be adjudged fraudulent and void, againſt any ſubſequent purchaſer or mortgagee for valuable conſideration.*" Now if this memorial does not ſet forth all the truſts of the deed, we cannot

not fritter away the words of the ſtatute, and ſay that the deed is only void for ſome purpoſe, *when the act has declared in expreſs terms, that it is void to all intents and purpoſes.* By referring to the deed it appears, that to a certain extent *Griffith* was a truſtee for *Toten*, and a truſtee for other purpoſes after *Toten*'s annuity was ſatisfied. But though the former truſt is ſet forth in the memorial, the ſubſequent truſts are not; and therefore the deed is void: for if the name of any one *ceſtuique* truſt be not diſcloſed in the memorial, that is ſufficient to avoid the whole deed. Much ingenuity has been ſhewn by the defendant's counſel in the argument; but the reſult of it is merely this, that perhaps it may be proper to apply to the legiſlature to relax the ſeverity of the preſent law, and to confine its operation to thoſe parts of the deed only which affect the annuity: but as long as this act of parliament is to guide our conduct, we cannot get rid of an objection, like the preſent, which is founded on the poſitive words of the ſtatute. This caſe is widely different from that of *Toldervy* v. *Allan*, becauſe there all the truſts were ſet forth in the memorial.

But where the defendant in conſideration of 2100l. granted an annuity of 300l. to the plaintiff, and for ſecuring the ſame, executed a bond, a warrant of attorney to confeſs judgment on the bond, and an indenture, by which the defendant granted and demiſed to the plaintiff certain manors, &c. in reverſion, expectant and to take effect in poſſeſſion on the deceaſe of the defendant's father, for 100 years, upon truſt, for the better ſecuring the payment of the annuity. In the memorial it was alleged, that the parties executed the above deed, &c. by which the plaintiff demiſed to the defendant, as above, for 100 years, "*upon truſt as therein mentioned*, and upon further truſt that in caſe the ſaid annuity of 300l. or any part thereof, ſhould be unpaid by the ſpace of twenty days after the reſpective days of payment, the plaintiff ſhould and might, by and out of the rents and profits, raiſe and levy ſuch ſum, &c. as ſhould be ſufficient to ſatisfy the ſaid arrears, &c." But it appeared by the plaintiff's affidavit, that there was no other truſt, and that he had purchaſed the whole annuity for himſelf, and not as a truſtee for any other perſon, though he had ſince aſſigned one moiety. It was objected, that the plaintiff had not complied with the annuity-act, becauſe the memorial did not diſcloſe the truſts of the deed according to the 1ſt ſection of the act, which enacts that the memorial ſhall contain the dates, &c. of the deeds, and the names of all the parties, and for whom any of them are truſtees, &c. *Per Cur.* There is no foundation for the objection: It is anſwered by the fact, that there was no other truſt but that ſet forth in the memorial; and the legiſlature did not

Toldervy v. Allan, Hil. Ter. 34 Geo. 3. K.R. 5 *Ter. Rep.* 480.

mean to require the parties to mention all the truſts which were a lien on the eſtate, independently of the annuity, as to pay taxes, chief-rents, &c. but only thoſe truſts which were created in conſequence of the annuity being granted.

Dalmer v. Barnard, Ea. Ter. 37 Geo. 3. B.R. 7 Ter. Rep. 250.

"*The conſideration*" required by the 3d ſect. of the annuity-act to be ſtated in every deed, &c. whereby any annuity was granted, means the conſideration which is paid by the grantee, and which that ſection expreſsly requires "*ſhall be in money only*;" and that act having required that "the name or names of the perſon or perſons, '*by whom*' and *on whoſe behalf* the conſideration was advanced, ſhould be truly ſet forth;" *the names of both the perſons ought to be inſerted when the perſon actually paying the money pays it on account of ſome other perſon.* The particular words of this act of parliament are ſo explicit, as to leave no room for doubt. Therefore in the caſe of the D. of *Bolton* v. *Williams* (1), cited in this caſe of *Dalmer* v. *Barnard*, Lord *Thurlow* in the firſt inſtance, and Lord *Loughborough* afterwards upon a rehearing, held the grant of an annuity to *Creſwell* from Mrs. *Williams* void, for want of a proper memorial, *the conſideration money being therein ſtated to have been paid by* Creſwell, *whereas in fact it was paid by one* Jenkins, *the agent for* Creſwell. Lord *Loughborough* there ſaid, that "if this could ſtand, it would be neceſſary immediately to repeal the act; for the conſequence would be that the memorial, which it was obvious ſhould ſerve as a check on theſe tranſactions, would be a cover to them." And in another place he ſaid, "that he could not agree with the argument that the omiſſion of the actual mode in which the payment was made, was a mere matter of circumſtance. Circumſtances of as little moment as the names of the witneſſes, &c. were required in other parts of the act. The object of the legiſlature was that the whole tranſaction, the names of all the parties concerned, of whom inquiry might be made, or who might be called on as witneſſes, ſhould be inſerted." The legiſlature foreſaw that much miſchief was done by effecting tranſactions of this kind in a private room, where the money was paid by an agent who received a large premium, while the perſon actually advancing the money was in an adjoining room, and that if the agent's name were not diſcloſed, ſo that recourſe might be had to him to know what really paſſed, the truth could not be obtained, ſince in ſuch caſe the principal not being preſent could not give all the information; and therefore they required the inſertion of the agent's name, as well as that of the principal. So alſo in this caſe of *Dalmer* v. *Barnard*, where the defendant

(1) 2 *Vezey Jun.* 138, 152, 3 4 *Bro. Cha. Cas.* 297.

had

had agreed to become ſecurity wiith one *Whaley*, for the repayment of an annuity of 160l. to the plaintiff, in conſideration of 600l. which *Whaley* was to receive: the purchaſe-money was paid to *Whaley*, by a man of the name of *Howſon*, who acted as agent for the plaintiff, who was not preſent at the time: the memorial enrolled was of a bond, and it ſtated that the conſideration *was advanced and paid by or for the ſaid* J. Dalmer (the plaintiff), in promiſſory notes of the bank of England, &c. the memorial was alſo of two ſeveral warrants of attorney, in which the conſideration-money was ſtated to have been paid by *Dalmer*. On a rule calling upon the plaintiff to ſhew cauſe why the bond and warrant of attorney, and all other aſſurances given for ſecuring this annuity ſhould not be delivered up to be cancelled, and why the judgment ſhould not be vacated: *the principal objection* was, that the conſideration-money was falſely ſtated in the ſecurities, to have been paid by *Dalmer, whereas it was paid by* Howſon *for* Dalmer, *and ought to have been ſo ſtated:* the caſe was fully argued, and THE COURT perfectly agreed with the opinions of Lord *Thurlow* and Lord *Loughborough*, in the caſe of the Duke of *Bolton* and *Williams*, that if this conſtruction be not put on the act of parliament, the parties will have an opportunity of doing the very thing that the ſtatute meant to prohibit: and they decided, that by the third ſection, the deed is void if the names of the agent and principal be not inſerted; and that therefore, in this caſe, the warrant of attorney was void, and could not be the foundation of a judgment (1). The Court made the rule abſolute, as far as reſpected the vacating of the warrant of attorney and judgment, and diſcharged it as to the deed.

But where an objection was taken to the memorial, that it was therein ſtated, that the conſideration was paid "by *E Boulton*, OR her ſolicitor;" in the alternative, *Eyre*, CH. J. ſaid, That the *deed* muſt expreſs by whom the conſideration was paid, but not the memorial. *Ex parte* Anſell and another, Tr. Ter. 37 Geo. 3. C B 1 *Pul. & Boſan.* 63. n a.

So, where the defendant granted an annuity of 450l. to the plaintiff, in conſideration of 3400l. which though advanced by the plaintiff, was in fact paid by *Bunce*, as his attorney, and ſo it was ſtated in the memorial: a rule having been obtained, calling on the plaintiff to ſhew cauſe, why a warrant of attorney to confeſs judgment ſhould not be delivered up to be cancelled, becauſe *a deed* of the ſame date with the warrant of attorney, and given with it to ſecure this annuity, ſtated, that the conſideration-money was paid Glaſſe *v.* Mount, Mic. Ter. 38 Geo. 3. B R 7 *Ter. Rep.* 390.

(1) *Groſe*, J. obſerved, that if the plaintiff was diſſatisfied with the determination, he might ſtill bring an action on the deed, and then if the objection under the act was pleaded, the queſtion would appear on the record, and a writ of error might be brought.

by the plaintiff (inſtead of *Bunce*) to the defendant. THE COURT ſaid, That the words of the third ſection of the annuity-act, require in poſitive terms that it ſhall be ſtated in *the deed*, "by whom and on whoſe behalf the conſideration-money was paid," and that therefore the objection ought to prevail: and we have no reluctance in determining this caſe, becauſe, as was obſerved by *Groſe*, J. in *Dalmer* v. *Barnard*, if the plaintiff be diſſatisfied with our judgment, he may ſtill bring his action on the deed, by which means he will have an opportunity of putting this queſtion on record (1).

Grant v. Foley, Tr. Ter. 23 Geo. 3. C.B. *Hunt's Ann. Caſes* 182.

The ſtatute requires, whenever any ſtep is taken reſpecting an annuity granted before the act paſſed, that an inrolment ſhall be made like to the memorial which muſt be made at the making a new grant; therefore the aſſignment of any annuity granted before the act paſſed, muſt be regiſtered before the aſſignee can take any ſtep upon it, if ſuch aſſignment exiſted at the time of the inrolment of the ſaid deeds.

Bromley v. Greathead, Hil. Ter. 34 Geo. 3. B.R. *Hunt's Ann. Caſes*, 188.

But the aſſignee of an annuity which was properly inrolled when it was firſt granted, need not inrol afreſh for the ſake of inſerting his deed in the memorial, before he proceeds againſt the grantor; for the court of king's bench has held that the act is fully complied with by regiſtering a memorial of the original ſecurities.

Dixon v. Birch and Tyte, Ea. Ter 34 Geo. 3. C.B 2 *Hen. Black.* 307.

So, where the defendant, *Birch*, had granted by an indenture, bond, and warrant of attorney, an annuity to the plaintiff, *Dixon*, who afterwards aſſigned the whole of it to *Couſins*, who ſued out execution in the name of *Dixon*; an objection was taken that there was no memorial of the aſſignment from *Dixon* to *Couſins*; but there was a memorial of the original indenture, bond, and warrant. *Per Cur.* As there was a memorial of the original ſecurities inrolled, the object of the ſtatute, which was the protection of the grantor, was fully complied with, and it is not neceſſary to inrol the aſſignment.

Ince v. Everard, Hil. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 545.

The Court will not ſet aſide annuity deeds for a mere clerical miſtake in the memorial, as if, in ſtating the aſſignment of a term of ſixty-one years, it ſet forth a term of ſixty-two; or if, after reciting the true conſideration, as, for inſtance, 280l. it afterwards ſtate, "*which ſaid ſum of* 250l. *was paid, &c.*"—Neither need a conſideration of 10s. paid to a truſtee be ſet forth in the memorial as part of the conſideration.—Or that an annuity was payable for the portion of time from the laſt quarter-day to the death of the annui-

(1) See n. (1) in p. 629, ſupra.

tant.—

tant.—On a rule obtained, calling on the plaintiff to ſhew cauſe why the annuity deeds ſhould not be ſet aſide, for ſeveral objections ariſing on the annuity-act: it appeared that the objections were, 1ſt, That there were two conſiderations for the deed, viz. 280l. paid by *Ince* to *Everard*, and 10s. paid by *Ince* to *Dawſon*, a truſtee, whereas it was only averred in the memorial that the former was paid. 2dly, That it was not ſtated that even the ſum of 280l. was paid; only that *the ſaid* 250l. was paid by *Ince* to *Leonard Jones* [which was a clerical miſtake in the name.] 3dly, That in the memorial the aſſignment appeared to be of the remainder of a term of ſixty-two years, when in truth, the original term was for ſixty-one years only. 4thly, That the annuity was in fact granted not only for the lives of *Dawſon* and another perſon, and the ſurvivor of them, but alſo for a proportional part of the quarter after the laſt quarter-day to the day of the death of the ſurvivor, which latter part is not ſtated in the memorial. Lord *Kenyon*, CH. J. (after argument) All theſe objections are ſo extremely trivial that I ſcarcely know which is moſt relied upon. Thoſe relative to the ſum of 250l. for 280l. and of ſixty-two years inſtead of ſixty-one, are evidently clerical miſtakes. And it would be perfectly ridiculous to ſet out the 10s. conſideration, which is like the reſervation of a pepper-corn rent, and is in fact never paid: that kind of conſideration is in many caſes inſerted for no purpoſe whatever, though in others it is of importance, as for inſtance where an eſtate is in a truſtee, and that conſideration is inſerted to make a deed valid as to him under the ſtatute of Uſes. But in none of the memorials of deeds that are regiſtered in Middleſex or Yorkſhire is the circumſtance of the 10s. conſideration, or of the pepper-corn rent reſerved, taken notice of. In anſwer to the laſt objection, it is ſufficient to ſay, that the annuity-act does not require that the days of payment ſhould be inſerted in the memorial. All that the act of parliament requires to be done has been done in this caſe; and we ought not to ſuperadd other requiſites to thoſe contained in the ſtatute. That act requires, that the tranſaction ſhould be fairly ſtated in the memorial, to enable the public by reference to the memorial to ſee what that tranſaction was; and here the tranſaction is fairly ſet forth. *Per Cur.*—Rule diſcharged.

Halſey *v.* Hales, bart. and another, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 194.

Sir *E. Hales*, prior to the year 1781, was tenant for ninety-nine years, if he ſhould ſo long live, of an undivided moiety of certain eſtates in Kent, remainder to truſtees to ſupport contingent remainders, remainder to his firſt and other ſons in tail, remainder to himſelf in fee; and as to the other undivided moiety he was tenant for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to himſelf in fee. In 1781, Sir *E. Hales* and *E. Hales* his only ſon (the other defendant)

ſuffered a recovery of the firſt moiety, and in 1783, they ſuffered a recovery of the ſecond; the uſes of the former were declared to be the ſame as thoſe to which that moiety was before ſubject; the uſes of the ſecond were to ſuch perſon and perſons, and for ſuch eſtate, &c. and upon ſuch truſt, &c. as Sir *E. Hales* and his ſon ſhould by any deed, &c. jointly appoint, and in default of ſuch appointment, to ſuch uſes, upon ſuch truſts, and for ſuch purpoſes, as the ſame moiety was ſubject to before the recovery. In 1787, Sir *E. Hales* and his ſon, in conſideration of 3200l. granted to the plaintiff an annuity of 400l. during the joint lives of the grantors and the life of the ſurvivor; and by way of ſecurity gave him a bond for 6400l. and a warrant of attorney to confeſs judgment on the bond; and they executed an indenture, in which they limited, appointed, granted, and demiſed, both the moieties of the above eſtates to *J. Harcourt* for ninety-nine years in truſt for the plaintiff. A memorial of theſe deeds was enrolled within the time limited, but a rule was obtained, calling on the plaintiff to ſhew cauſe why the judgment ſhould not be ſet aſide, and the ſecurities delivered up to be cancelled, on a ſuggeſtion of ſome defects in the memorial. *Per Cur.* When a perſon affects to grant the whole of an eſtate, and his power extends only to part, the grant may operate on that part over which he had power: here it appears that the grantors had no authority to charge one of the undivided moieties, but the grantee of the annuity is ſatisfied with the other. We are called upon in this caſe to decide according to the ſtrict letter of the act of parliament: but that is not the true line of conſtruction, for Lord *Coke* ſays, *qui hæret in literâ hæret in cortice.* We muſt therefore conſider what is the fair meaning of the act: the object of the legiſlature was to prevent perſons, who had no marketable eſtates, making improvident bargains in granting annuities: but they thought that a perſon who could bring a real ſecurity to market was not ſubject to ſuch impoſitions; and therefore they provided by the laſt clauſe, that *the act ſhould not extend to any annuity ſecured by lands of equal or greater annual value whereof the grantor was ſeiſed in fee-ſimple or fee-tail.* Now what eſtate had the grantors of this annuity? They had the power over the fee-ſimple; and it ſeems as if Lord *Thurlow* thought in the caſe of *Sharpnel* v. *Vernon*, 2 *Bro. Cham. Cas.* 268, that ſuch a caſe came within the exception of the act. The grantors had the controul over the eſtate; they went to market with a good title, and were not in the ſituation of perſons who are induced from the imbecility of their title to grant an annuity to a diſadvantage, and the conveyance which they executed was competent to charge the real eſtate: this caſe therefore comes within the fair meaning of the exception in the act of parliament. Rule diſcharged.

Appeal

Appeal of Death.

THIS was an appeal of death, brought by the widow of the perſon killed—as it is only a vindictive *action*; the proceedings are on the civil ſide of the court, and not on the criminal; though the defendants are purſued not only criminally, but even capitally. Appeals are alſo *local* actions; and may be commenced either by writ (an original out of chancery, returnable in this court) or by bill, if the defendant be in actual cuſtody.

Bigby, widow, *v.* Matthew Kennedy and Patrick Kennedy, Mic. Ter. 10 Geo. 3. B.R. 5 *Burr.* 2643. 2 *Black.* 710. 714.

The preſent caſe came before the Court upon Monday the 21ſt of May, 1770, and the proceedings were, according to Sir James *Burrows* and *Blackſtone*, the following:

Mr. *Walker*, on behalf of the proſecutrix, moved for a writ of *certiorari*, to be directed to the juſtices of our lord the king, aſſigned to deliver the gaol of Newgate in and for the county of Middleſex, of the priſoners therein being, at juſtice-hall in the Old Bailey, in the ſuburbs of the city of London, to remove into this court all and ſingular *appeals* of whatever felonies and murders whereof *Matthew Kennedy* and *Patrick Kennedy* are appealed before them. Lord *Mansfield*, Take your *certiorari*. But we give no particular directions about it, you muſt conduct yourſelves as you ſhall be adviſed (1).

On Friday, 25th May, 1770, the defendant, *Matthew Kennedy*, was brought into court by *habeas corpus* directed to the ſheriff of Kent, and alſo to the keeper of Maidſtone gaol, who returned that he was taken and detained in Maidſtone gaol, by virtue of a writ of appeal teſted the 30th of April preceding, brought by *Ann Bigby*, widow, againſt the ſaid *Matthew* and *Patrick*, for the death of *John Bigby* her huſband, returnable the morrow of the aſcenſion, which writ *(an original writ of chancery)* was ſet forth *verbatim*.

The defendant *Matthew Kennedy*, being thus brought into court, it was moved that he might be committed to the marſhal, and he was ſo.

---

(1) Lord *Mansfield* declared his opinion, that the parties were at their peril, to make their application *properly*; and that neither the court, nor the officers of it, ſhould interfere in directing it

It

It was then moved, that the appellant being in court, might count againſt this defendant, *Matthew Kennedy*: and ſhe thereupon delivered in the appeal engroſſed on parchment, to Mr. *Benton*, ſecondary on the civil ſide, who read it: it purported to be a bill of appeal, as of the preſent term, againſt *Matthew* and *Patrick Kennedy*, in the cuſtody of the marſhal, for the murder of her huſband *John Bigby*, on 24th December, 1769: it was ſigned by the appellant's mark, and atteſted by a witneſs.

The counſel for the defendant prayed oyer of the original writ, the return and the declaration, which was granted; and therefore *Matthew* was remanded to the cuſtody of the marſhal, and taken away by a tipſtaff.

Afterwards, on the ſame day, *Patrick Kennedy*, the other appellee, was brought into court by the keepers of Newgate, by virtue of a *habeas corpus* to him directed, and alſo to the ſheriff of Middleſex; who made a return, ſetting forth the commitment of *Matthew* and *Patrick Kennedy*, and *Michael Mac Mahon*, to Tothill Fields Bridwell, by a warrant, which was ſtated *verbatim*, on ſuſpicion of the murder of *John Bigby*, and alſo on a charge by the coroner's inqueſt for the ſame. The conviction and attainder for murder in February ſeſſions: the reſpite of execution for one week by Lord *Weymouth*, dated 24th February, 1770:—another reſpite by the ſame, during the king's pleaſure, dated 1ſt March, 1770:—and that, in April ſeſſions, 1770: a bill of appeal was then brought by *Ann Bigby*, againſt *Matthew* and *Patrick Kennedy*, for the murder of her huſband *John Bigby*, which appeal was adjourned by the ſaid court to the then next ſeſſions. The return being read, and the writ and return being ordered to be filed: it was prayed that this defendant *Patrick Kennedy*, might alſo be committed to the marſhal, and he was committed accordingly. It was then moved, that the appellant being in court might count againſt him: ſhe will give her conſent to the count, as read by the officer.

It was obſerved by the counſel, on the behalf of the appellant, that they proceeded now by bill againſt the defendant *as in cuſtody of the marſhal*; and that the former proceedings would drop of courſe: and it was alſo noticed, that the count was joint againſt *Matthew* and *Patrick* both: that it was in the poſſeſſion of the officer of the court: and the counſel ſaid it was the only method of proceeding againſt two who come from different cuſtodies; that there was no other way than this when the appeal is againſt two; that there cannot be two writs.

On the other hand, the counſel for the defendantsobſerved, that this bill was exhibited againſt *Matthew* before *Patrick*

trick was in cuſtody: therefore it could not affect *Patrick*, though he was then in cuſtody: and it was inſiſted, that if they would affect *Patrick*, as being now in cuſtody, it muſt be by another bill, 4 *Co.* 47, b. Caſes of Appeals and Indictments: they did not object againſt the former count's being read as againſt this defendant; provided it were as a writ, not as a bill: and they agreed to its being now read; provided the entry was made according to the fact. Lord *Mansfield*, The entry muſt be made ſo: Mr. *Benton* then read the count over again. Lord *Mansfield*, Do either of you pray any thing elſe? Anſwer, "No." Lord *Mansfield*, Then the officer muſt take him away.

On Monday, 28th May, 1770, the counſel for the appellant moved for a *habeas corpus* to bring up both the defendants, in order to arraign the appeal: granted: the defendants being brought in before the Court roſe, the counſel prayed that they might plead: the counſel for the defendants ſaid they had no copies of the writ, or return or declaration. The counſel for the appellant prayed that they might be arraigned upon the bill, and ſaid, we purſue the bill of appeal lodged at the Old Bailey: Lord *Mansfield*, Do you pray that they may be arraigned upon the count or bill read here in court on Friday laſt? Anſwer, We do. Lord *Mansfield*, Take that down: they are to take the method they think proper. Mr. *Benton* informed the Court that he had not that bill in court, "it was filed in the office, and he had no notice to bring it." The counſel for the appellant then deſired that he might ſend for it. Lord *Mansfield*, You ſhould have given notice, the record remains in the office, upon the file; the Court cannot give directions to ſend for it; nor are they to ſtay for it: you may apply to the officer to ſend for it, if you think proper. If you had arraigned them on Friday, you might have aſked for a plea. Mr. *Benton* ſent to the office for the record, but it did not come in time; and the Court being ready to riſe, the counſel for the appellant moved to adjourn the appeal to the next term, which was oppoſed by the counſel for the defendant: and whilſt this matter was debating, the record arrived. The record being now arrived, the defendants were ordered down to the bar; their counſel deſired to hear the bill read again by Mr. *Benton*: this was done before they were actually taken down to the bar. The counſel then objected on the behalf of the defendants, to their being arraigned at the bar upon this bill, which, as they alleged, contained *a falſe fact:* which falſe fact, if it ſtood upon record, might preclude them from ſhewing the truth of the fact. The falſe fact alleged in the bill was, that the defendants were both of them brought into court at the ſame inſtant; and that the appellant counted againſt both at the ſame time; both being then in the cuſtody of the marſhal: whereas

whereas the truth of the fact was, that *only one* of them, namely *Matthew*, was in the cuſtody of the marſhal at that time (the time when the appellant counted againſt Matthew), "*Patrick* was not then in the cuſtody of the marſhal;" and therefore the bill ought not to have alleged that he was: it ought to have recited the truth, that "*Matthew* was in his cuſtody, and *Patrick* not ſo." They prayed therefore that the truth of the fact might be recorded, before the defendants were arraigned at the bar; as this bill contained theſe falſe facts. The counſel for the appellant denied that there was any inſufficiency upon the face of this bill, and inſiſted that the defendants could not avail themſelves of this objection, otherwiſe than by plea. The bill muſt be either quaſhed or anſwered; and they do not move to have it quaſhed. The defendants ought therefore to be ſet to the bar, and arraigned upon it. The counſel for the defendants ſaid that they could not plead to it, becauſe ſuch a plea would be averring againſt the record. The counſel for the appellant argued, that as the court had received the bill, and the defendants had not prayed to quaſh it, it muſt be anſwered; and if they had a defence againſt it, or could take advantage of it, it muſt be by plea: they even aſſerted that the fact alleged in the bill was true; for the whole term is conſidered as one day: and therefore this is one act of one and the ſame day, neither *Matthew* could object *that* Patrick *was not in cuſtody*, nor *Patrick that* Matthew *was not in cuſtody:* at leaſt there can lie no objection in the mouth of *Matthew*, for he was then in cuſtody. Only one bill could be brought againſt both: this is the only method. The counſel for the defendants urged, that the idea of the perſon who framed this bill certainly was, that both would be brought into court, and both committed to the cuſtody of the marſhal, at the very ſame time: yet notwithſtanding the fictitious notion of the whole term being but one day, or a whole day being but one inſtant, it is clearly true in real fact, "that *Patrick* was not in cuſtody," at the time this bill ſays he was, nor was he in court when the bill was arraigned againſt him: that therefore the Court had no authority to receive the bill, as againſt him. THE TWO JUDGES, *Willes* and *Blackſtone*, were of opinion, that they could not refuſe the arraigning the defendant at the bar upon this bill, as there had been no motion made *to quaſh it*. The appellant ought not therefore to be precluded from the liberty of arraigning them; whatever objections the defendants might be entitled to take after the arraignment. The defendants were then ſet to the bar. Serjeant *Leigh* thereupon arraigned the appeal, which he did by reading over only the bill itſelf, paſſing over the memorandum part, or introduction to it. Mr. *Benton* then read it, in the ſame manner, beginning where the ſerjeant began, and only changing the third

third perſon to the ſecond, viz. altering "*he*" into "*you*," and addreſſing himſelf to the defendants: and he concluded by aſking them ſeparately, "whether they were guilty of the felony and murder charged upon them by this bill of appeal, or not guilty?" The counſel for the defendants then prayed that it might proceed no further at preſent, as they had no previous notice at all of being brought up hither this day; nor had any *oyer* of the *original writ*, return, and declaration: and it was then underſtood to be a count upon the original writ: therefore it was not reaſonable they ſaid, that the defendants ſhould be called upon to plead now directly, and yet they did not care to move expreſsly and explicitly for an adjournment of the appeal:—the counſel on the other ſide declared that they did not deſire to precipitate the matter. THE COURT, on their part, were not inclined to adjourn it *as from themſelves*, without any motion on either ſide; neither ſide however inclining to move to adjourn, THE COURT at length ſaid, that they ſaw no harm in adjourning it till next term, *if the appellant did not object to it*: the counſel for the appellant did not object to it: and thereupon THE COURT made a rule to adjourn the appeal till Friday next after the morrow of the Holy Trinity, and remanded the defendants, and ordered them to be brought up again upon that day.

On Friday, 15th June, 1770, the defendants were accordingly brought into court; and the appellant was alſo preſent in court. The defendants were now ſet to the bar; and it was moved that they might plead: the counſel for the defendants objected, that they had not yet had oyer of the original writ, return, and declaration, which they prayed the firſt day: they ſaid they had examined the records in court, and there was no ſuch writ there: therefore it was out of their power to take copies of it: in *Child*'s caſe, 2 *Bulſtr.* 19. the Court ordered the ſheriff to return his writ preſently: they ought to bring it into court: the counſel for the appellant denied that they were obliged to bring it into court: we have nothing to do with it: we have not the legal cuſtody of the writ: we cannot give oyer of it. THE COURT were all of opinion, that as it appeared upon the return of the ſheriff of Kent, and the keeper of Maidſtone gaol, to the *habeas corpus* directed to them, that there was an original writ, and as oyer of it had been prayed and granted; they ought to have it, before any further ſtep could be taken to oblige them to plead: and that the appellant ought to produce the record. Let them be remanded.

On Tueſday, 3d July, 1770, the counſel for the appellant notified, that they intended to bring up the defendants on the morrow; and to argue, "that the Court ought not to have granted oyer of the writ:" it was anſwered by the Court

Court and the counſel for the defendants, " that this oyer had been granted long ago (the 25th of May), in a preceding term: and *Aſton*, J. intimated, that if the Court had granted oyer when they ought not to have granted it, it was error. THE COURT thought it would be improper and inconvenient to enter into a ſolemn argument upon this queſtion, upon the laſt day of a term, as the next day would have been; but upon the counſel for the appellant obſerving, that though it ſhould not be ſolemnly argued, yet it was neceſſary that ſomething ſhould be done, and at leaſt the appeal adjourned. A rule was made to bring the defendants up next day at the ſitting of the Court. Accordingly next day (Wedneſday July 4th, 1770), the defendants being brought into court (not ſet at the bar), it was moved on behalf of the appellant that the appeal might be adjourned till next term. THE COURT granted the motion, and ordered the defendants to be remanded.

On Tueſday, 6th of November, 1770, being the firſt day of Michaelmas term, the defendants were brought into court by a *habeas corpus*, *applied for by themſelves:* the counſel for the appellant moved that they might plead: the counſel for the defendants moved that the appellant might be called. The appellant was accordingly called, " Ann Bigby *come forth and proſecute your appeal againſt* Matthew Kennedy, *or he will be diſcharged.* This was repeated three times in each cauſe: BUT *the appellant, though thus called upon three times in each cauſe, did* NOT *appear* (1). The counſel for the defendants thereupon moved that the nonſuit might be recorded. Lord *Mansfield*, Let the nonſuit be recorded.—The counſel for the defendants then moved that they might be remanded into the cuſtody of the marſhal.

---

(1) Mr. Juſtice *Blackſtone* was preſent at the Old Bailey, on the trial and conviction of the appellees; and in a note annexed to his report of the caſe, he expreſſes himſelf as follows—" It was indeed A MOST " FOUL MURDER: but through the powerful mediation of their ſiſter, " *who was 'intimately' connected with ſome perſons of quality*, a condi- " tional pardon for tranſportation was obtained for *Matthew*, who " ſtruck the ſtroke, and he was on board a tender, when the appeal " was exhibited at the Old Bailey: *Patrick* had been reſpited two or " three times, on the very morning appointed for his execution!! and " the appeal was at laſt taken up, and proſecuted, by a ſet of perſons " in London, who were in violent oppoſition to the government; " merely to raiſe an *odium*, and popular clamour, on account of ſo UN- " ADVISED A PARDON." 2 *Black.* 716.

The ſame learned judge alſo ſtates in his report of the caſe, that " the appellant (the widow) being called to appear, made default, and " was nonſuit, having (as was ſaid) accepted a ſum of money from the " friends of the appellees" !!!

Lord

Lord *Mansfield*, Let the defendants be remanded into the cuſtody of the marſhal.

On the firſt day of Hilary term, 1771, the defendant was brought up by an *habeas corpus*, iſſued on the civil ſide: to which the ſheriff of Surrey returned ſeveral warrants of commitment and detainer, for the murder of *James Smith*, viz. the firſt by two juſtices of peace; the ſecond by the coroner; the third by an order of the court of gaol-delivery; and fourthly, *upon a writ of appeal of death*, brought by *Elizabeth Smith*, widow of the deceaſed.—The widow produced and delivered in her count, which Mr. *Benton*, the ſecondary on the civil ſide read: the counſel for the appellant prayed that the defendant might plead: the counſel for the defendant prayed over of the writ: Mr. *Benton* read the writ and return. The counſel for the defendant moved for a ſpecial imparlance, in order to plead the ſpecial verdict which had been found: this was not oppoſed, and he had an imparlance to the laſt return of the term granted him by the Court. The counſel for the appellant prayed that ſhe might proſecute by attorney: this was neither objected to nor conſented to, and the counſel ſaid he claimed it as a right.—Lord *Mansfield*, Be it ſo. The appellant then put in a warrant of attorney, authoriſing *Robert Criſpen* to proſecute for her. Nothing further being aſked on either ſide, the defendant was committed to the cuſtody of the marſhal.

Rex *v.* John Taylor, and Elizabeth Smith *v. eundem*, Tr. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2793.

On Wedneſday, 6th February, 1771, the attorney for the proſecution of the indictment having had notice, and alſo a copy of the ſpecial verdict, did not, and had declared that he ſhould not employ any counſel to argue the ſpecial verdict; nor did he at all appear in court: the counſel for the widow upon the appeal alſo declared that he would not undertake to argue it: it proceeded therefore *ex parte:* and by the facts ſtated in the ſpecial verdict, it appeared moſt clearly that the defendant had been only guilty of manſlaughter (the defendant having been firſt, without any previous provocation, reflected on by words, and afterwards perſonally aſſaulted by the deceaſed), and ſo the Court determined; for, per Lord *Mansfield*, it is ſettled, that *words* are not a ſufficient provocation, but *blows* are a provocation ſufficient to leſſen the crime into manſlaughter! UPON THIS DECISION, the priſoner being aſked by Mr. *Benton*, the ſecondary of the crown-office, "what he had to ſay for himſelf, why the "Court ſhould not proceed to give judgment, and award "execution againſt him according to law?" he fell on his knees (being directed ſo to do, as is uſual), and prayed the benefit of his clergy, which was allowed to him: *Aſton*, J. (as ſecond judge of the Court) pronounced ſentence "that "having been convicted of manſlaughter, he ſhould be burnt "in

" in the hand;" and thereupon he was removed backwards in a ſtraight line from the bar, but in the face of the court (the doors of the incloſure remaining open) and burnt in the hand by one of the marſhal's people, who were prepared for that purpoſe; for as the defendant came up in cuſtody of the marſhal, he was the proper perſon to execute by himſelf or ſome one appointed by him, the ſentence of the Court (1); the defendant was afterwards remanded; and the counſel for the appellant moved that he might be brought up the next day, to plead to the appeal. Afterwards, the counſel for the defendant made the like motion on Monday the 11th, that he might be brought up on the next day, the 12th, to plead to the appeal, which was ordered.

Smith, widow, v. Taylor.

On Tueſday the 12th, the defendant was brought up, and ſtood in court, on that ſide of it where criminal defendants uſually ſtand, his being brought down to the bar being diſpenſed with by conſent: he pleaded in bar to the action a conviction of manſlaughter, and judgment thereupon "to be burnt in the hand," and that he had been thereupon actually burnt in the hand accordingly; and then he pleaded over to the felony and murder, not guilty. It was agreed that this ſhould be the ſubſtance of his plea, and that it ſhould be afterwards drawn up and delivered in form, within a fortnight, but to be entered as of this day: THE COURT adjourned the appeal to the following term.—Note; the eſſoin day of the following term was the proper day, being by original writ.

To the plea which was afterwards drawn up and delivered in form, the appellant replied, that ſhe ought not to be barred, becauſe "*long before* the giving of the ſaid ſuppoſed judgment in the ſaid plea mentioned, ſhe, the ſaid *Elizabeth, ſued out her original writ of appeal* againſt the ſaid *John Taylor:*" the defendant demurred generally to this replication, and the appellant joined in demurrer.—On the behalf of the defendant it was argued, that it is now ſettled, that this is a bar; and as it is *in favorem vitæ*, the Court will not overturn it; and for this were cited 4 *Co.* 45, b. 47. Sir *William Jones*, 145. 3 *Inſt.* 131, c. 57. 4 *Rep.* 45. 2 *Leon.* 83, 160. 1 *Ander.* 68. *Coke's Inſt.* 53 to 56. and *Armſtrong* v. *Liſle*, *Kelynge*, 89 to 108. in which it was ſettled that the defendant being convicted of manſlaughter, and allowed the benefit of clergy, and reading as a clerk, did bar the appellant of his appeal of murder: the counſel for the defendant finiſhed his citations with *Hawkins's Pl. Cor.* lib. 2, c. 36. §

(1) See 1 *Strange*, 502, 553.

13. and concluded with ſaying, that a man ſhall not be puniſhed twice for the ſame offence. On the other hand, the counſel for the appellant endeavoured to ſhew, that the preſent caſe was diſtinguiſhable from the caſes cited, but he chiefly relied upon the caſe of *Goring* v. *Deering*, reported in 3 *Mod.* 156. which was an appeal for the murder of *Henry Goring*, brought by the widow: the defendant pleaded, that he was indicted for murder, and found guilty of manſlaughter, and that he was *clericus*, &c. if the court would have admitted him; to this plea the appellant demurred: the fact was, that the appeal was brought after conviction, and before ſentence; eleven of the judges (all except *Street*) held this no good plea; and that the Court ought not to aſk the priſoner what he had to ſay, and ſo let him in to the benefit of his clergy. It was alſo obſerved, that in the caſe now before the Court, the defendant was not entitled to the benefit of clergy, at the time when he was arraigned upon the appeal: whereas in the laſt caſe, the defendant had been convicted of manſlaughter, before the appeal was brought. THE WHOLE COURT were of opinion, that this point had been conſidered as ſettled, ſince the caſe of *Armſtrong* v. *Liſle*; and *Aſton*, J. obſerved, that even the caſe of *Goring* v. *Deering*, does not controvert, but that if the defendant *had had* his clergy, that would have been a good bar to the appeal: he approved alſo of Serjeant *Hawkins*'s reaſoning, in the 14th ſection of the 86th chapter of his ſecond book.—*Per Cur.* unanimouſly, judgment for the defendant, and rule to diſcharge him.

Apprentices.

IT is not eſſential to the validity of the indenture that the maſter ſhould ſign a counterpart. Caldecot's Caſes, 31.

And if a perſon is bound apprentice to a maſter who is an infant under age, yet the indenture of apprenticeſhip is not abſolutely void, on account of the infancy of the parties, but only voidable, and the apprentice ſerving under the indenture is entitled to the benefit of the apprenticeſhip. K. v. St. Petrex in Dartmouth, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 198.

But infants cannot be bound by indentures of apprenticeſhip beyond the age of twenty-one, and if they be, they may diſſent from them after they arrive at that age.—This perſon bound himſelf by indentures as an apprentice for ſeven Caſe of Mary Ann Davis, Tr. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 715.

ſeven years, being in the indentures deſcribed as of the age of fourteen, but in fact being above ſeventeen years old at the time of the binding; having now attained twenty-one years and upwards, an *habeas corpus* was moved for, to bring her up in order to be diſcharged from theſe ſubſiſting indentures of apprenticeſhip: AND *the Court* were clearly of opinion, that infants cannot be bound by indentures of apprenticeſhip beyond twenty-one, but that they may diſſent from them after they arrive at that age. *Per Cur.* Every indenture of an infant is voidable at his election; and in ſuch caſe the maſter muſt truſt to the covenant of them who engage for the infant; were it otherwiſe an infant who improvidently bound himſelf to the age of fifty or upwards, would be bound to ſerve till that time, but it is impoſſible to ſupport ſuch a propoſition; this apprentice ought not to have been bound longer than till ſhe was twenty-one, and it is clear that we muſt now diſcharge her.

Aſhcroft v. Bittles, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 652.

But the mere act of leaving the maſter's ſervice is not an avoidance of the indentures, though the apprentice be of age.—This was an action for enticing away and harbouring an apprentice: it appeared that the apprentice on attaining the age of twenty-one years, had eloped from his maſter, and entered into the ſervice of another; the plaintiff obtained a verdict; and upon a motion for a new trial it was inſiſted, that here the apprenticeſhip was put an end to, by the young man quitting his maſter's ſervice, not ſecretly or fraudulently, but openly and avowedly for the purpoſe of diſſolving the relation between them. BUT the Court declared themſelves perfectly ſatisfied with the verdict, and ſaid the mere act of quitting the maſter's ſervice was not an avoidance of the indentures.

K. *v.* Evered, Tr. Ter. 17 Geo. 3. B.R. *Cald. Cas.* 26.

So, where an apprentice, who had been bound when an infant, for ſix years, by indenture, ran away, alleging that he did ſo with an intent to avoid the apprenticeſhip made when he was an infant, and to his prejudice: two juſtices committed him under ſtat. 20 *Geo.* 2, c. 19, § 4. and it was moved in the court of king's bench, for a rule to ſhew cauſe, why he ſhould not be diſcharged: againſt his diſcharge it was inſiſted, that the apprentice, who had ſubmitted to the indenture as long as he derived any advantage from it, and till he had learnt his trade, ſhould not be permitted to deſert his ſervice as ſoon as he became uſeful in it; that this conſtruction of the contract would be injurious to the maſter: that the contract at the time of its commencement, which was during infancy, the time at which almoſt all apprenticeſhips are entered into, was beneficial to the infant; and being ſo, might legally be made, and therefore could not be abandoned. *Per Cur.* It has been adjudged,

judged, that an infant may bind himſelf for his own benefit; but ſuppoſing the indenture voidable, *how can the apprentice's running away avoid them?* Had he ſerved regularly, and during ſuch ſervice declared his intention to depart, it might have been different. Here, he would make uſe of his offence in order to avoid the puniſhment that attends it; but it is too late to do it before a juſtice, when charged with a crime.

And the indenture of apprenticeſhip, cannot be avoided by the apprentice while under age. In the courſe of the argument in this caſe, it was contended, that an infant, if no other perſon join him in executing the indentures of apprenticeſhip, *may avoid them at any time*, as well before as after he comes of age. But Lord *Kenyon*, CH. J. (the Court concurring) ſaid, he deſired it might not be taken for granted, that an infant who binds himſelf an apprentire (a contract ſo notoriouſly for his own benefit) may put an end to that contract at any time: he added, it would be ſufficient to determine that queſtion when it neceſſarily aroſe, which it did not in this caſe (1).

K. v. Hindringham, Hil. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 558.

But it is clear that the indentures may be cancelled and the apprenticeſhip diſſolved, *with the conſent of all parties:* namely, if the apprentice is under the age of twenty-one, an agreement between the maſter, apprentice, and father, or guardian, or, in the caſe of a pariſh apprentice, with the aſſent of the pariſh officers; but if the apprentice is of full age, it may be diſſolved by an agreement between him and the maſter only, without the intervention of any other perſons.

Burr. Sett. Cas. 441, 562, 766.

And where a maſter received money of an apprentice of full age, to vacate his indentures, and gave the apprentice a diſcharge under his own hand, but kept the indenture in his own poſſeſſion without cancelling it: *The Court* held, though the indenture did remain in the maſter's hands uncancelled, yet the relationſhip between him and the apprentice was diſſolved, and that the apprentice might have brought an action againſt him for it.

K. v. Juſtices of Devonſhire, Tr. Ter. 17 Geo. 3. *Cald. Cas.* 32.

An action of covenant was brought upon an indenture of apprenticeſhip, by the maſter againſt the apprentice's father. The indenture, as ſtated in the declaration, was in the common form under the ſtatute 5 *Eliz.* c. 4. The plaintiff expreſsly covenanting to find the apprentice with meat and lodging, the defendant to find him in clothes

Branch v. Ewington, Mic. Ter. 20 Geo. 3. B.R. 2 *Doug.* 518.

(1) Neither the Court nor counſel ſeem to have recollected the caſe of K. v. *Auſtrey*, Hil. Ter. 31 *Geo.* 2. wherein it was decided, that *the indentures cannot be diſcharged by the conſent of the apprentice* if he be under age. *See Burr. Sett. Cas.* 441.

and washing, and the apprentice that he would faithfully serve, &c. and for the true performance of all and every of these covenants, each of the parties bound himself to the other. The breach assigned was, that the apprentice had absented himself from the service. To this declaration the defendant demurred generally, on the ground, that the parties were only bound by the express covenants which they had *severally* entered into: but the Court were clearly of opinion, that the father was bound for the performance of the covenants by the son, and therefore gave judgment for the plaintiff.

K. v. St. Nicholas in Nottingham, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 730.

Binding out parish apprentices.] The stat. 43 *Eliz.* c. 2. having given the churchwardens and overseers power to bind poor children to be apprentices, *where they shall see convenient*; it has been determined that the churchwardens and overseers are not restrained to bind such children to inhabitants of the same parish, but they may, under these words, in their discretion bind them to persons residing in another parish, as well as in their own, *the master consenting*; for if any objection could be supported against such binding, on account of the pauper's being out of the county, it would be productive of great inconvenience; for many children living in parishes where there is no manufacture, would thereby be deprived of an opportunity of being instructed in beneficial trades, and be confined to the station of day labourers.

K. v. Clapp, Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 107.

And it is now clearly settled, that a person occupying lands in a parish, but living out of it, *may be compelled* to receive a parish apprentice. The parish-officers of Sowton, in the county of Devon, having, with the assent of two justices of that county, apprenticed *Sarah Hellier*, a poor child of Sowton, to the defendant, according to the statute; he appealed to the quarter sessions, where the order was confirmed, subject to the opinion of the court of king's bench on the following case: "The appren-"tice was bound to the appellant, who resided in the pa-"rish of Pinhoe, on an estate which he rented and occupied "in the parish of Sowton, of the value of 20*l. per ann.* which "was divided by the highway from the house in which he "lived. There was no house on the estate of which the "appellant was the occupier. The indenture, together "with the apprentice, was tendered to him in the parish of "Sowton, in the highway adjoining to his estate in that "parish." The question upon this case was, *Whether, under the statute* 43 *Eliz. c.* 2. *s.* 5. *a person occupying lands within the parish, is exempted from the burthen of taking an apprentice, because he does not reside within the parish?* And after this question had been fully argued, Lord *Kenyon* said, The general purview of that statute, was to make a provision for

for the maintainance of the poor; and the general object of the act was to compel all those, who had any property in the parish, to contribute their due proportion towards the maintenance of the poor; and the receiving apprentices is one mode of contributing to their general relief. In construing the words of the statute, there is no reason for confining the power of binding on the *inhabitants* of the parish; they ought to be extended to persons *occupying lands in the parish, though residing out of it.* Then it is said, that if this construction be put upon the statute, the party may be doubly charged, in the parish in which he lives, in respect of his inhabitancy, and in that in which he has lands, in respect of his occupation of them. But if he finds himself aggrieved, he may appeal to the sessions, and we must take it for granted that the justices will do what is right. They are to adapt the charge to the size of the property which the person charged possesses; and these are incidental charges which fall on him in respect of that property. However, the ground of my decision here is, that this is one of the modes provided for the maintenance of the poor in this statute, which imposes the duty in respect of the property. The other judges being of the same opinion, the order of sessions was confirmed.

And it is not necessary that the master should *actually reside in the parish*, if he be an occupier there it is sufficient. These directors under a private act for these districts (25 *Geo.* 3, c. 27), with the consent of two justices, bound a poor male child, belonging to one of the hundreds, apprentice to *Joseph Reynolds*, who was *an occupier of lands, but not an inhabitant* within the hundreds: *Reynolds* appealed to the sessions, who were of opinion, that he was not bound to receive the apprentice, because he was not *an inhabitant as well as occupier*; subject however to the opinion of this Court on a case stating these facts. In support of the order of sessions, it was observed, that the statute 20 *Geo.* 3, c. 36. which is "an act for obviating doubts, touching the binding and receiving of poor children apprentices, in pursuance of several acts of parliament made for the relief of the poor within particular incorporated hundreds or districts." It enacts that persons shall be compellable to receive and provide for such poor children; with a proviso that nothing in the act shall be construed to compel any person to take any such poor child apprentice, *unless such person shall be an inhabitant and occupier of lands, &c. in the parish to which such child belongs.* And therefore that no person ought to be bound to receive an apprentice, unless he be an *inhabitant as well as occupier* in the parish. *Per Cur.* This case is not to be distinguished on principle from that of *K.* v. *Clapp:* if indeed the legislature had used imperative words, we must have been bound by them,

K. v. the Directors and Guardians of the Poor within the Hundreds of Tunstead and Happing. Hil. Ter. 30 Geo. 3. B R. 3 *Ter. Rep.* 523.

but there are none ſuch in this ſtatute. Great ſtreſs has been laid on the proviſo in 20 *Geo.* 3. which has the words, "inhabitants *and* occupiers;" now the ſtatute 43 *Eliz.* uſes the word "inhabitants," which has been held not to be confined to *reſiants:* and Lord *Coke*, in his reading on the 22 *Hen.* 8. c. 5. relative to the repairing of bridges by the *inhabitants* of counties, ſays, the word "*inhabitants*" includes thoſe who occupy lands in the county, though they do not reſide there. For ſome purpoſes "*inhabitants*" and "occupiers" are ſynonimous terms. Where a perſon derives a benefit from property which he occupies in a pariſh, he is liable to contribute to the eaſe of it; and in *K.* v. *Clapp*, we obſerved, that this was one of the modes by which he was to contribute to the eaſe of his pariſh. If indeed the legiſlature had added the words "reſiants" to "inhabitants" in this act of parliament, that would have confined this burden to perſons actually reſiding within the pariſh. Order of ſeſſions quaſhed.

K. v. Barwick, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 33.

So, where ſeveral perſons hold land in partnerſhip, ſome of whom actually reſide on and occupy it, and others reſide at a diſtance in another pariſh; the latter as well as the former, are bound to take pariſh apprentices. A poor child was put out as an apprentice by the overſeers of the townſhip of Hunſlet, to *John Barwick*, a ſurgeon and apothecary, reſident in Leeds, and the indenture was duly allowed: upon appeal the ſeſſions confirmed the appointment and indenture, ſubject to the opinion of the court on the following caſe: The appellant was a partner with eleven other perſons in a manufactory of earthen-ware, in the townſhip of Hunſlet: two of the partners were reſident within the townſhip, and had each received an apprentice, bound and indentured to them by the overſeers of Hunſlet, without any objection: the apprentice was appointed and tendered to the appellant to be his apprentice individually; the appellant was not reſident in Hunſlet, but at Leeds, the adjoining townſhip; the partnerſhip was rated for buildings and land in Hunſlet, to the amount of 270l. a year, of which 23l. a year was the appellant's ſhare; the juſtices were of opinion, that the appellant was in every reſpect a proper perſon to take an apprentice, if bound by law to take one; the queſtion was, therefore, Whether, under theſe circumſtances, the apellant was liable to have ſuch apprentice appointed and tendered to him, being ſo reſident, and a partner as aforeſaid, by the overſeers of the townſhip of Hunſlet? By Lord *Kenyon*, Ch. J. Pariſh apprentices are to be bound to maſters in reſpect of their inhabitancy, or occupation of lands within the pariſh: this is one of the modes pointed out by the ſtatute 43 *Eliz.* of relieving the poor, and every perſon ought to bear

bear this burthen in reſpect of his property; here the appellant occupies lands in the pariſh, to the amount of 23l. *per annum*, that being his aliquot part of the whole; and in reſpect of that occupation he is bound, according to the caſe of the *King* v. *Clapp*, to take the apprentice. It has been taken for granted in the argument of this caſe, that the appellant is not an inhabitant, but the contrary is moſt clear, according to the conſtruction put on the ſtat. 22 *Hen.* 8, c. 5. which makes the inhabitants of counties liable to the repair of bridges. Lord *Coke*, 2 *Inſt.* 702, in his comment on that ſtatute, ſays, that perſons having lands in their own poſſeſſion, though dwelling in a foreign county, are inhabitants; and that doctrine has never been doubted from that time to the preſent. On the authority of the *King* v. *Clapp*, this order muſt be affirmed. *Lawrence*, J. the argument againſt the order proceeds on this ground, that there was an occupation of the partnerſhip-land and houſes, by two of the partners, to the excluſion of all the reſt; but that is not ſo, for each of the others may go and reſide there if he pleaſe. *Per Cur.* Order of ſeſſions confirmed.

An indenture of a pariſh apprentice aſſented to by two juſtices ſeparately, and not at the ſame time, is abſolutely void. —Thus, where the indenture, by which the pauper was bound apprentice, was *ſeparately aſſented to* by two juſtices of the peace, by their ſigning the ſame; *but they did not aſſent to, or ſign it, at the ſame time, or in the preſence of each other.* Lord *Kenyon* ſaid, Perhaps the rule requiring the concurrence of two magiſtrates at the ſame time, may be ſometimes attended with inconvenience; the rule, however, has been long ſettled to be, that concurrence of juſtices together is not neceſſary, *where the act to be done is merely miniſterial*; but they muſt confer together, and form a joint opinion, *where the act is of a judicial nature.* It has been held (whether rightly ſo or not, we are not now to enquire) that the allowance of a poor-rate is an act merely *miniſterial*; and that being once eſtabliſhed, the conſequence reſults, that the two magiſtrates need not meet when they allow the rate. The words indeed of the ſection on which this queſtion ariſes, are nearly ſimilar to thoſe uſed in the firſt, under which the poor-rate is to be allowed; but when the nature of this caſe is conſidered, it appears to be one of the moſt ſerious ſubjects that fall within the deciſions of the juſtices. For they are empowered by this act of parliament, to take children out of the arms of their parents, and to bind them out as apprentices, till they are twenty-one. For the law has made them the guardians for thoſe children, who have no others to take care of them. And who ought to judge of the fitneſs of the perſons to whom the poor children are thus to be apprenticed? Not

K. v. Hamſtall Ridware, Tr. Ter. 29 Geo 3. B.R. 3. *Ter. Rep.* 380.

the overſeers, for they are frequently obſcure people, and perhaps in managing the buſineſs of the pariſh, are not always attentive to the feelings of parents. But the legiſlature intended, that in this inſtance the magiſtrates ſhould have a check and control over the pariſh officers; and, in my mind, they are called upon to examine with the moſt minute and anxious attention, the ſituations of the maſters to whom the apprentices are to be bound; and to exerciſe their judgment ſolemnly and ſoberly, before they allow or diſallow the act of the pariſh officers; and for this purpoſe it is neceſſary that they ſhould confer together.

K. v. Reynolds, Mic. Ter 35 Geo. 3. B.R 6 *Ter. Rep.* 497.

Maſter's intereſt in the ſervice of the apprentice.] If an apprentice leaves his maſter, and enters into the ſervice of another, the firſt maſter cannot ſue out an *habeas corpus*, but muſt bring his action againſt the other for ſeducing him.—Thus, where a writ of *habeas corpus* had been iſſued at the inſtance of a maſter to bring up an apprentice, who had voluntarily entered himſelf as a ſeaman on board of a ſhip of war. LORD *Kenyon*, CH. J. after argument, ſaid, that the writ ought not to have been iſſued at the inſtance of the maſter; but that the apprentice, who was of ſufficient age to judge for himſelf, ſhould have applied for it, if he had wiſhed it. And he obſerved, that if the apprentice had been taken into the ſervice of any other maſter, the Court would not have granted an *habeas corpus* at the inſtance of his firſt maſter, but would have left him to his action for ſeducing his apprentice: the writ of *habeas corpus* therefore, having been improperly iſſued, was quaſhed.

K. v. Inhabitants of Leighton, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 732.

Stamp-duty on apprentices fees.] It was long a litigated queſtion, whether the covenant of the parent or friends of an apprentice to maintain him, and to provide him with clothes during the term of his apprenticeſhip was not ſuch *a benefit to the maſter*, as was liable to the payment of the ſtamp-duty? and it had been always cuſtomary at the ſtamp-office to ſet a value upon ſuch covenants, in order that the duty might be paid: but in this caſe, the queſtion came directly before the court of king's bench; and they ſolemnly determined that *no duty is payable in reſpect of any ſuch covenant*; and that the meaning of the ſtatute is, that where money, or money's worth, as an horſe or other valuable conſideration, is given to the maſter by the friends of the apprentice, by way of premium, a duty ought to be paid for it; but that where meat, clothes, or the like are to be provided by the parent or friends, no duty is payable, becauſe there is not any thing given to the maſter.

4 *Ter. Rep.* 735, 736.

The argument in the above caſe, that a duty ought to be paid in reſpect of ſuch covenants, proceeded upon a ſuppoſition that by law the maſter is bound to provide for his apprentice; but Lord *Kenyon* denied that there was any ſuch obligation

obligation reſulting from the mere relation of maſter and apprentice; and *ſaid*, that in all caſes (except thoſe of pariſh apprentices, for whom the maſter is compellable to provide by the ſpecial directions of the ſtat. 8 & 9 *Will.* 3, c. 30, § 5.) This matter depends on the expreſs ſtipulations to be made by the parties intereſted. It has never been held that the obligation of the maſter extended to the providing of clothes for the apprentice; and that cannot be diſtinguiſhed from the obligation to provide ſuſtenance; for the former are equally neceſſary with the latter, and in other caſes than thoſe of pariſh apprentices, clothes are generally provided by the friends of the apprentice: *and if every thing was to be valued, and a duty ſet upon it from which a benefit ariſes to the maſter, it might be equally ſaid that the earnings of the apprentice ſhould be liable to the duty*; and per *Buller*, J. The terms of this clauſe mean ſomething which is given to the maſter, or contracted for, and only apply to caſes where the maſter is to derive benefit from the friends of the apprentice, independently of the benefit to be derived from the apprentice himſelf; *and therefore whatever is given for the advantage, benefit, or accommodation of the apprentice, does not fall within the meaning of the clauſe.*

Alſo money given by the pariſh-officers to bind out a child, is not liable to the duty, though the binding is voluntary, and not compulſory under the ſtat. 43 *Eliz.* c. 2. Two juſtices removed *Ann Hamblin*, and her two children, from St. Petrox, in Dartmouth, to Slapton, both in the county of Devon; but, on appeal, the ſeſſions quaſhed this order, ſubject to the opinion of the Court, on the following caſe.—"*John Hambling*, the father of the pauper's "huſband, *John Hambling* deceaſed, having been told by the "pariſh-officers of Townſtall, that they would give him "twenty ſhillings to bind out his ſon an apprentice, if he "would find a place for him, did, in July, 1768, agree with "*Mary Hayne*, widow, who occupied a farm in Slapton, to "bind his ſon *John Hambling* deceaſed, then aged about "eight years, an apprentice to *Richard Hayne*, ſon of *Mary* "*Hayne*, who was then between the age of fourteen and "fifteen, and was reſident in his mother's houſe, as a part "of her family, and had no habitation, or buſineſs of his "own. When this agreement was made between *Hamb-* "*ling* the father, and *Mary Hayne*, they alſo agreed, that "he, *Hambling*, ſhould pay to *Mary Hayne*, twenty ſhil- "lings, as a conſideration for ſuch apprenticeſhip; but it "did not appear, that *Mary Hayne* knew that any promiſe "was made by the overſeers of Townſtall to *Hambling*, "with reſpect to the advancing any money to him for this "purpoſe. *Hambling*, the father, afterwards received "twenty

K. v. St. Petrox, in Dartmouth, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 196.

" twenty ſhillings from the churchwardens and overſeers of " Townſtall, five ſhillings of which he paid to *Mary Hayne*, " and promiſed to pay her the reſt, at five ſhillings a time, but " applied the remaining fifteen ſhillings to his own uſe. It " appeared, by the indenture of apprenticeſhip, dated 21ſt " July, 1768, that *John Hambling* the ſon, of his own free- " will, and with the conſent of his father, voluntarily bound " himſelf apprentice to *Richard Hayne*, of Slapton, till he " ſhould attain the age of twenty-one, to learn the art of " huſbandry. This indenture was ſigned by *Hambling* the " father, and *Hambling* the ſon, and by *Richard Hayne*, and " was ſtamped with an half-crown ſtamp (which was then " a proper ſtamp), but had no ſtamp thereon for the conſi- " deration-money. Some time in April, previous to the " date of the indenture, *John Hambling* the father, received " from the pariſh of Townſtall five ſhillings, as need- " money, he having applied for relief. The caſe alſo ſtat- " ed, that *John Hambling* the ſon, lived in *Mary Hayne's* " houſe, in Slapton, till he was twenty years old." After counſel had been heard in ſupport of the order of ſeſſions, the counſel on the other ſide were ſtopped; THE COURT ſaying, it has been very properly admitted, that this indenture of apprenticeſhip was not abſolutely void, on account of the infancy of the parties, but only voidable; and that unleſs there be ſome other objection, the pauper is entitled to the benefit of the apprenticeſhip. But it has been contended, that it is void on another ground, namely, for the want of an additional ſtamp for the conſideration-money of twenty ſhillings, given with the apprentice, and that this does not come within the proviſo, in the ſtatute of *Ann*, relative to ſums given with apprentices *at the public charge of any pariſh, or by or out of any public charity*. But we think there is no foundation for the argument. We muſt conſider this to be a fair binding to the ſon, becauſe the ſeſſions have not ſtated that it was fraudulent. Then if it were, as it profeſſed to be, a binding to the ſon, and not colourable to the mother, the ſtatute requires no duty for the conſideration-money, even though the money were not raiſed at the charge of the pariſh. The act of parliament, taking it altogether, undoubtedly impoſes the duty on money paid to the maſter, or miſtreſs only; for it ſays, " *That every maſter or miſtreſs, to or with whom, or to whoſe uſe, any ſum ſhall be given, paid, ſecured, or contracted, for, or in reſpect of any ſuch apprentice, &c.*" Now here the maſter did not receive the money, which was given with the apprentice, but for reaſons (not here ſtated) his mother received it; and it is not ſtated, that ſhe received it as agent for her ſon. But even ſuppoſing that the maſter had received, or contracted for the conſideration-money, it was not ſubject to the duty

impoſed

impoſed by the ſtatute of *Ann*, becauſe it was money raiſed at the common and public charge of the pariſh of Townſtall, and as ſuch, it comes within the proviſo in that act. It was aſſumed, in argument, as a propoſition, that there can be no binding of any pariſh apprentice within the meaning of this proviſo, unleſs it be a compulſory binding, under the 43d of *Elizabeth*, with the concurrence of two magiſtrates. But that cannot be the conſtruction of that ſtatute, for one of the purpoſes of raiſing rates for the relief of the poor, was to put out children apprentices, at the expence of the pariſh. That is not reſtrained to the caſe of a compulſory binding, which is under a ſubſequent clauſe. And the object of that act is as well anſwered by a binding, with the conſent of the parents, as by a compulſory binding without their interference. All that is required is, that the binding ſhould be obligatory on the children. If the parents diſcharge their duty to their children, then there is no neceſſity for the interference of the magiſtrates and pariſh officers; but if the parents neglect their duty, or are not able to procure maſters, then the pariſh officers are bound to interpoſe, and they ſtand in *loco parentum*. Then in this caſe, the conſideration-money was advanced by the pariſh officers; it came out of a fund excepted by the ſtatute of *Ann*. Therefore, on both the points, firſt, that there was no money for which any duty was payable, under any circumſtances; or ſecondly (if there were), that it was excepted in this caſe, as the money was paid at the public charge of the pariſh, we are of opinion, that the pauper gained a ſettlement in Slapton, by ſerving under the indenture; and conſequently, that the order of ſeſſions ſhould be quaſhed.

In an action on a promiſſory note which was given by the defendant as an apprentice-fee with his ſon, *T. W.* to the plaintiff, to whom the ſon was bound: the indentures were not produced at the trial, and were ſtated to be loſt; but there was evidence to ſhew that there was no mention made therein of this premium having been given with the apprentice, nor any ſtamp thereon in proportion to the value, as required by the ſtat. 8 *Ann.* c. 9. in default of which by the 39th ſection of the act, the indentures are declared to be void and unavailable to any purpoſe. The apprentice remained ſome part of his time with his maſter, and then abſconded. At the trial, it was objected, that *the indentures being void for this defect, the conſideration of the note had failed, and that the plaintiff ought to be nonſuited.* To this it was anſwered, that the avoiding of the indentures could not collaterally affect this note; but that at all events it was ſufficient if there were any conſideration to ſuſtain it; and here the maſter had provided board and lodging for ſome time for the apprentice, which

Jackſon *v.* Warwick, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 121.

which was in itſelf a ſufficient conſideration. But the judge who tried the cauſe, was of opinion that the conſideration was entire, and that it had wholly failed. However, he ſuffered a verdict to be taken for the plaintiff, with liberty for the defendant to move to enter a nonſuit; which being afterwards moved for, THE COURT were of the ſame opinion, and ordered a nonſuit to be entered.

Beach *q. t. v.* Turner, Tr. Ter. 3 Geo. 3. B.R. 4 *Burr.* 2449.

Privileges reſulting from an apprenticeſhip.] Journeymen are not liable to the penalties for exerciſing a trade, without having ſerved an apprenticeſhip thereto.—An action was brought againſt the defendant, for exerciſing the trade of a currier, without having ſerved an apprenticeſhip; and it appearing upon the trial, that the defendant was only a journeyman, Lord *Mansfield*, who tried the cauſe, directed the plaintiff to be nonſuited. A rule was afterwards obtained for the defendant to ſhew cauſe, why the judgment of nonſuit ſhould not be ſet aſide, and a new trial granted. After this matter had been argued, the ſingle queſtion was, Whether the ſtatute of *Eliz.* extends to journeymen, or only to maſters? Lord *Mansfield* ſaid, I continue of the ſame opinion that I was of at Guildhall. There is a great difference between *ſetting up a trade*, and *working in it*; for a man may *work in it*, by doing a very trifling part. This act of parliament meant to prevent perſons from ſetting up a trade, who were unqualified for it, or employing unqualified perſons; but it did not mean to give a penalty againſt both. A journeyman does not exerciſe the trade, and I am ſatisfied, that the ſpirit of the act was intended to prevent the *maſter only* from ſetting up the trade, being himſelf unqualified, or employing unqualified perſons; but that it was not intended againſt the *journeyman himſelf*. Rule diſcharged.

French *q. t. v.* Adams, Tr. Ter. 3 Geo. 3. C.B. 2 *Wil.* 168.

And a man may exerciſe as many trades as he has worked at, or ſerved to, ſeven years.—An action of debt was brought upon the ſame ſtatute againſt the defendant, for exerciſing the trade of a *carpenter*, he not having ſerved an apprenticeſhip to that trade. The cauſe was tried before Lord Chief Juſtice *Pratt*, at Weſtminſter, when it appeared in evidence, that the defendant had worked, or ſerved, as a ſervant, for ſeven years in the trade of a *glazier*, and for ſome time afterwards exerciſed that trade as a maſter; that he afterwards exerciſed the trade of a *carpenter*, for nine years; and that he well underſtood that trade. It was objected at the trial, that the defendant being originally bred up to the trade of a *glazier*, he could not now follow two trades, both *carpenter* and *glazier*; and therefore the queſtion, Whether he could or could not? was reſerved for the conſideration of the Court. Upon this occaſion the Court ſaid, That all the judges of England, at a meeting lately held

held, reſolved, that *if any man had exerciſed and followed any trade as a maſter, without interruption or impediment, for the term of ſeven years, he was not liable to be ſued or proſecuted upon the ſtatute of* 5 Eliz. *And that if a man hath followed two or more trades, for the term of ſeven years or more, he ſhall not be liable to be ſued or proſecuted upon that ſtatute.* There is no law againſt one man following ſeveral trades at this day. There was however an ancient ſtatute, made 37 *Edw.* 3. c. 6. that artificers, or handicraftſmen, ſhould uſe but one myſtery; and that none ſhould uſe any myſtery, but that which he had before choſen and uſed; but this reſtraint upon trade and traffic was immediately found prejudicial to the common-wealth; and therefore, at the next parliament, it was enacted, that all people ſhould be as free as at any time before the ſaid ordinance. Lord *Coke* ſays, that acts of parliament which are made againſt the freedom of trade, merchandizing, handicrafts, and myſteries, never live long, 4 *Inſt.* 31. There can be no doubt, that a man may follow twenty trades, if he has worked at each trade ſeven years. Judgment for the defendant, and *poſtea* delivered to him.

A rule was granted calling upon the defendant, who was town-clerk of the borough of Heydon in Yorkſhire, to ſhew cauſe, why a *mandamus* ſhould not iſſue, directing him to inrol the indentures of apprenticeſhip, by which *John Briggs* was bound an apprentice to *John Burſtall*, as a mariner, in one of the public books of the corporation of Heydon. It appeared from the affidavit on which the rule was founded, that by the uſage and conſtitution of this borough, *all perſons who had ſerved apprenticeſhips for ſeven years, to any freeman of the corporation, reſident within the town, were entitled to their freedom.* That by a bye-law of the corporation, made in February, 1752, it was enacted, that no apprentice ſhould be entitled to his freedom, unleſs he ſhould, within four months after the date of the indentures of apprenticeſhip, cauſe them to be inrolled by the town-clerk, in one of the public books belonging to the corporation. It was alſo ſtated that *Burſtall* was a freeman of, and reſident within, the town of Heydon, and had ſerved the ſeveral offices of bailiff, alderman, and mayor. That on the 1ſt of May, 1786, *Briggs* was bound apprentice to *Burſtall* for ſeven years, and that upon an application to the defendant, within the four months, to inrol the indentures, he had refuſed; aſſigning as a reaſon, that *Burſtall* uſually reſided at Kingſton-upon-Hull, where his buſineſs was carried on, and that Heydon was only his place of reſidence, during ſome of the ſummer months. After hearing counſel againſt and in ſupport of this rule, THE COURT were clearly of opinion, That as the trade was carried on at Kingſton,

K. v. Marſhall, Ter. Geo. 3. B.R. 2 *Ter. Rep.* 2.

Kingſton, and the ſervice performed there, the apprentice was not entitled to have the rule made abſolute. That the privilege ſought for, was in reſpect of the benefit which the borough of Heydon might receive from the ſervice of the apprentice; whereas, in the preſent inſtance, the benefit to be derived from the ſervice of the apprentice, could only be received by the inhabitants of Kingſton. That it was a kind of fraud upon the bye-law of the corporation of Heydon; and that it was evident from the indentures, that the ſervice under them could not be performed at Heydon, which is an inland town, becauſe *Briggs* was bound apprentice *as a mariner*. Rule diſcharged.

Approver.

The King v. Rudd, Tr. Ter. 15 Geo. 3. B.R. *Coup.* 331.

UPON an *habeas corpus*, directed to the keeper of Newgate, he made return that the priſoner, *Margaret Caroline Rudd*, was in cuſtody by two orders of the court of ſeſſions and gaol-delivery at the Old Bailey, for the forgery of two ſeveral bonds: and alſo that ſhe was further detained by a warrant from a juſtice of peace for uttering one of thoſe bonds, knowing it to be forged: upon this return it was moved to bail the defendant, upon the ground of her having been admitted and even examined as a king's evidence againſt the *Perreaus:* in ſupport of the application an affidavit from the juſtices was produced, in which it was ſworn, "that they "admitted her as a general witneſs for the crown, as to *all* "the forgeries; that they told her if ſhe would ſpeak the "truth, and the whole truth, not only in reſpect of the "bond in queſtion, but of all the other forgeries, that then "ſhe would be ſafe, if not ſhe would be proſecuted." That upon her own confeſſion ſhe acknowledged herſelf a *particeps criminis* in the forgery of a bond of 7500l. for "that *Daniel* "*Perreau* came with a knife to her throat, and threatened "to kill her if ſhe did not forge one of the bonds in queſ-"tion; that under the terror of death ſhe forged it; and that "*Robert Perreau* brought the bond before ready filled up;" but denied having any knowledge of, or concern in, any of the other bonds. The counſel for the defendant contended that ſhe might be admitted to bail on three grounds: 1ſt, by the general diſcretion of the Court; 2dly, becauſe her health would be endangered by confinement; and, 3dly, becauſe ſhe had been drawn in by promiſes and aſſurances to anſwer to an examination, and to ſwear to it on oath, which ſhe would

would not have done, but from a confidence that theſe promiſes and aſſurances would have been kept and performed. By the Court, As to the *firſt point*, though this Court has undoubtedly a diſcretionary power to bail *in all caſes whatſoever*, yet when the ſeſſions are near, and the offence committed by a priſoner is of ſuch a magnitude, as that of repeated forgery, there is no colour for an application for bail upon the ground of that general diſcretion. *Secondly*, As to the next allegation, that her ſtate of health is ſuch as to be endangered by the confinement, it is not of itſelf a ſufficient circumſtance, in ſuch a caſe, to induce the Court to interfere in her behalf. As to the *third ground*, the inſtance has frequently happened of perſons having made confeſſions under threats or promiſes: but the conſequence has been, that ſuch examinations and confeſſions have not been made uſe of againſt them on their trial: but it has been urged, that the priſoner in this caſe is an accomplice who has been admitted to give evidence; that ſhe has already given evidence, and is further ready to give evidence to convict her partners in the buſineſs; and therefore that ſhe is entitled by law to the king's pardon, which would operate in bar of her own crime: if ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her: if ſhe had not ſuch legal right, but yet came under circumſtances ſufficient to warrant the Court in ſaying, that ſhe had a title of recommendation to the king for a pardon, we ſhould bail her for the purpoſe of giving her an opportunity of applying for ſuch pardon.

There are three ways in law and practice, which give accomplices *a right to a pardon*, and there is one mode, which entitles them to *a recommendation to the king's mercy*.

The three legal ways are, 1ſt, In the caſe of approvement, which ſtill remains a part of the common law, though by long diſcontinuance, the practice of admitting perſons to be approvers is now grown into diſuſe. 2dly, The caſe of perſons who come within the ſtatutes 10 & 11 *Will.* 3, c. 23, § 5. and 5 *Ann.* c. 31, § 4 (1). And, 3dly, The caſe of perſons to whom the king has, by ſpecial proclamation in the Gazette, or otherwiſe, promiſed his pardon—approvers have a right to a pardon: perſons within the ſtatutes of *Will.* & *Ann.* have a right to a pardon: and in all theſe caſes the Court will bail them, in order to give them an opportunity of applying for a pardon. There is, beſides, a practice, which indeed does not give them a legal right, and that is, where accomplices having made a full and fair confeſſion of

(1) By theſe ſtatutes, perſons who have been guilty of burglary, houſebreaking, ſtealing of horſes, or certain other felonies, and who ſhall be out of priſon, who ſhall diſcover and convict two offenders, are entitled to a pardon.

the

the whole truth, are in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders: if, in that caſe, they act openly and fairly, and diſcover the whole truth, though they are not entitled of right to a pardon, yet the uſage, the lenity, and the practice of the Court is, to ſtop the proceedings againſt them, and they have an equitable title to a recommendation for the king's mercy. The preſent caſe reſts only on the equitable practice which gives a title to recommendation to the mercy of the crown. The law of approvement, in analogy to which this practice has been adopted, and ſo modelled as to be received with more latitude, is ſtill in force, and is very material: *a perſon deſiring to be an approver, muſt be one indicted of the offence, and in cuſtody on that indictment:* he muſt confeſs himſelf guilty of the offence, and deſire to accuſe his accomplices: he muſt likewiſe upon oath diſcover not only the particular offence for which he is indicted, but all treaſons and felonies which he knows of: and after all this, it is in the diſcretion of the Court, whether they will aſſign him a coroner, and admit him to be an approver or not: for if, on his confeſſion, it appears that he is a principal, and tempted the others, the Court may refuſe and reject him as an approver: when he is admitted as ſuch, it muſt appear that what he has diſcovered is true; and that he has diſcovered the whole truth: for this purpoſe, the coroner puts his appeal into form; and when the priſoner returns into court, he muſt repeat his appeal, without any help from the Court, or from any byſtander: and the law is ſo nice, that if he vary in a ſingle circumſtance, the whole falls to the ground, and he is condemned to be hanged: if he fail in the colour of a horſe, or in circumſtances of time, ſo rigorous is the law, that he is condemned to be hanged, much more if he fail in eſſentials: the ſame conſequences follow if he do not diſcover the whole truth; and in all theſe caſes the approver is convicted on his own confeſſion (1). A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the jury ſhould believe him; for if the partners in his crime are not convicted, the approver himſelf is executed.

Great inconvenience aroſe out of this practice of approvement. If it was not abſolutely neceſſary for the execution of the law againſt notorious offenders, that accomplices ſhould be received as witneſſes, the practice is liable to many objections: and though under this practice, they are clearly competent witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with the jury to convict the of-

(1) 2 *Hale's Pl. Cor.* 226. *Staun.* lib. 2. c. 52. 3 *Inſt.* 129.

fenders;

ſenders; it being ſo ſtrong a temptation to a man to commit perjury, if by accuſing another he can eſcape himſelf—what has come in the room of this practice of approvement, is a kind of *hope*, that accomplices who behave fairly, and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment, and be pardoned: this is in the nature of a recommendation to mercy: but no authority is given to a juſtice of the peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others: the accomplice is not aſſured of his pardon; but gives his evidence in *vinculis*, in cuſtody: and it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed: a juſtice has no authority to ſelect whom he pleaſes to pardon or proſecute; and the proſecutor himſelf has even a leſs power, or rather pretence, to ſelect than the juſtice of peace. It reſts therefore on uſage, and on the offender's own good behaviour, whether he ſhall be proſecuted or not: and if in a proper caſe, an application was to be made to the Court by an accomplice to be bailed, that is, in the caſe of a perſon properly within the uſage, and who has fully complied with the requiſite conditions, *this Court would have no difficulty in bailing him, in order that he might apply for the king's pardon* (1); theſe are the general rules: now what diſcloſure has the priſoner in the preſent caſe made? it is this, that "*under the fear of immediate death*, ſhe did forge one of the bonds in queſtion." In this ſhe is no accomplice; ſhe has confeſſed no guilt, if the fact is true; for it is the will that conſtitutes the crime. She comes, therefore, in the character of a perſon injured, in the character of one to whom this violence has been done: inſtead of being a party offending, ſhe is a party offended, as much as a man robbed on the highway.—Further, the juſtices do not treat her as an accomplice; for they ought to have kept her in cuſtody, if ſhe had been an accomplice; but they diſcharged her, and they did right, there being no charge againſt her: but ſtill they ſay in their affidavit they did conſider her as an accomplice: ſuppoſe they did really think her guilty, ſhe is not the more or leſs on that account an accomplice: it is true, if ſhe has made a fair and full diſcloſure of all that ſhe knew, and the juſtice had deceived her under a promiſe or aſſurance, or hope of a pardon, from them, ſhe would be entitled to a recommendation to mercy: and in that caſe we ſhould be of opinion to bail her, though the juſtices had, in ſtrictneſs,

(1) In a caſe before *Gould*, J. an accomplice made a fair and full diſcovery to the ſatisfaction of the judge, who tried the other offenders: the other witneſſes proved the identity of the accomplice, but failed as to the identity of the other offenders, and the jury acquitted them: the counſel for the proſecution then contended, that the accomplice ought to be tried, but the judge was of a contrary opinion, and, per Lord *Mansfield*, rightly.

no right to make ſuch a promiſe, or give her ſuch aſſurance: if any evidence or confeſſion has been extorted from her, it will be of no prejudice to her at the trial.—Let her be remanded.

Afterwards the defendant being brought to the bar, at the gaol-delivery, held at the Old Bailey, to plead to the indictments, the ſame objections were taken to the propriety of putting her upon her trial, and the judges differing in opinion it was poſtponed, that the opinion of all the judges might be taken: and at the enſuing gaol-delivery, *Aſton*, J. delivered the opinion of the judges as follows.—Eleven of the judges (the Lord Chief Juſtice of the common pleas having been prevented attending through illneſs) are of opinion, that in caſes not within any ſtatute, an accomplice who fully and truly diſcloſes the joint guilt of himſelf and of his companions, and truly anſwers all queſtions that are put to him, and is admitted by juſtices of the peace as a witneſs againſt his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumſtances of the caſe to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be proſecuted for his own guilt ſo diſcloſed by him, nor perhaps for any other offence of the ſame kind, which he may accidentally, and without any bad deſign, have omitted in his confeſſion: but he cannot by law plead this in bar to any indictment againſt him, nor avail himſelf of it upon his trial, for it is merely an equitable claim to the mercy of the crown, from the magiſtrate's expreſs or implied promiſe of an indemnity, upon certain conditions that have been performed; it can only come before the Court by way of application to put off the trial, in order to give the priſoner time to apply elſewhere. *Nine* of the eleven judges were of opinion, that *all the circumſtances* relative to a priſoner's claim of indemnity, in ſuch a caſe, not only may, but ought to be laid before the Court, to enable them to exerciſe their diſcretion, whether upon the ground before them the trial ſhould be put off, and conſequently have intimation given that the priſoner ought not to be proſecuted: for the diſcretionary power exerciſed by the juſtices of peace in admitting accomplices to be witneſſes founded in practice only, cannot controul the authority of the court of gaol-delivery, and exempt at all events the accomplice from being proſecuted: upon every motion made upon collateral equitable grounds, the Court will ſee and examine into the whole truth; and conſequently ought to be informed of all the circumſtances affecting the caſe. The affidavit of the juſtices muſt therefore in this caſe be neceſſarily taken into conſideration, to ſee upon what ground they admitted the priſoner as a witneſs: and upon their affidavit it appears, that the public faith was not engaged but conditionally, and that there

there was an expreſs admonition given to the priſoner not to conceal any part of the truth: the ſame nine judges were alſo of opinion, that if the matter ſtood ſingly upon the two informations of the priſoner compared with the indictments againſt her, that ſhe ought to have been tried upon all or any of them: for from the priſoner's information ſhe is no accomplice; ſhe has not confeſſed herſelf guilty of any offence at all: by her repreſentation, the ſhare ſhe has had in theſe tranſactions is perfectly innocent, and ſhe anſwers to the juſtice's interrogation, that *ſhe does not know of any other forgeries:* ſo ſhe does not confeſs, make any diſcovery, or become a witneſs concerning theſe offences; and if ſhe has ſuppreſſed the truth, and not made a full and fair diſcloſure, ſhe forfeits all equitable claim to favour and mercy; but if ſhe has told *the truth, and the whole truth,* ſhe cannot be convicted. On the other hand, taking the affidavit of the juſtices, and all the caſe into conſideration, if ſhe is guilty of the charge contained in the indictment, the judges are of opinion, as her information before the juſtices have no relation to thoſe charges, they can in no light be applied to mitigate her offences: upon the whole, whether the priſoner is guilty or not guilty, is a fact ſtill to be tried by a jury, upon legal evidence only, without prejudice to the priſoner from any thing which has been inſiſted upon in point of law by her counſel, to exempt her from any trial at all: for it would be hard indeed upon the ſubject, who has a right to the advice and aſſiſtance of counſel, in all matters and points of law that may ariſe upon his caſe, if the eventual deciſion of the Court againſt the points of law inſiſted upon in his behalf ſhould prejudice the ſubſequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the jury.—It is only neceſſary to add, that an accomplice who deſires his trial may be put off, that he may apply for mercy under all the moſt regular pretenſions before laid down, *confeſſes the guilt:* but under the circumſtances of this caſe, if the priſoner confeſſes the offences charged in theſe indictments, ſhe has no promiſe of mercy, and no claim to favour for the reaſons aforeſaid. The judges are therefore of opinion that the trial ought to proceed.

Arreſt.

THE defendant was attending his cauſe againſt one *Leycroft* at the ſittings; and though his cauſe was put off early in the day, yet he ſtaid in court till five in the afternoon, to ſpeak with his attorney, who was engaged in other cauſes; and then, at the riſing of the Court, went with his attorney and witneſſes to dine at a tavern in New Palace-yard: during dinner he was arreſted; and *the Court,* on mo-

Lightfoot v. Cameron, Mic. Ter. 17 Geo. 3. C. B. 2 *Black.* 1113.

tion, diſcharged him; for, *Per Cur.* Such a neceſſary refreſhment as this is not to be looked upon as a deviation, ſo as to cancel the defendant's privilege *reduendo*. But this privilege is not conſidered as the privilege of the perſon attending the court, but of the court which he attends; and therefore the allowing or not allowing the privilege is diſcretionary: and it hath been diſallowed in colluſive actions, *Raſtal.* 76. and in vexatious ones, 11 *Mod.* 79. or where the party attended as a volunteer, and not upon proceſs, *Salk.* 544.

2 *Black. Rep.* 1193.

The King v. John Wilkes, M.P. Ea. Ter. 3 Geo. 3. C.B. 2 *Wilſ.* 151.

In the very memorable caſe of the arreſt and commitment of *John Wilkes* to the Tower, under the general warrant of a ſecretary of ſtate; the court of common pleas, on the return to an *habeas corpus*, was moved that he might be diſcharged on ſeveral grounds: viz. TWO OBJECTIONS were taken to the legality of this warrant of commitment; and THIRDLY, it was inſiſted, that being a member of parliament, he was as ſuch entitled to the privilege of being free from arreſts in all caſes, except, *treaſon, felony, and actual breach of the peace.* THE FIRST OBJECTION was, that it did not appear to the Court by the warrant of commitment that the defendant was charged by any evidence before the ſecretaries of ſtate, that he was the author or publiſher of the North Briton: AND *the Court were all of opinion*, that it was not neceſſary to ſtate in the warrant that the defendant was charged by any evidence before the ſecretaries of ſtate; and that this objection had no weight: whether a juſtice of peace can, *ex officio*, without any evidence or information, iſſue a warrant for apprehending for a crime, is a different queſtion; if a crime be done in his ſight, he may commit the criminal upon the ſpot, but where he is not preſent he ought not to commit upon diſcretion. If a magiſtrate hath notice, or a particular knowledge that a perſon has been guilty of an offence, it is not a ſufficient ground for him to commit the criminal; but in that caſe, he is rather a witneſs than a magiſtrate, and ought to make oath of the fact before ſome other magiſtrate, who ſhould thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuſer ſhould appear as a witneſs than act as a magiſtrate: but that is not the queſtion upon this warrant; the queſtion here is, *Whether it is an eſſential part of the warrant, that the information, evidence, or grounds of the charge before the ſecretaries of ſtate, ſhould be ſet forth in the warrant?* and we think it is not: in the caſe of a conviction, it is otherwiſe. It was ſaid, that a charge by witneſs was the ground of a warrant, but we think it not requiſite to ſet out more than the offence, and the particular ſpecies of it. It may be objected, if this be good, every man's liberty will be in the power of a juſtice of peace: but *Hale*, *Coke*, and *Hawkins* take no notice that a charge is neceſſary to be ſet out in the warrant; in the caſe of the ſe-

ven

ven biſhops, their counſel did not take this objection, which no doubt they would have done if they had thought there had been any weight in it. We do not rely upon the determination of the judges who then preſided in the king's bench, we have been attended with many precedents of warrants returned into the king's bench, they are almoſt univerſally like this; and in Sir *William Wyndham*'s caſe, 1 *Stra.* 2. 3. this very point before us is determined, and *Hawkins*, in his *Pl. Cor.* vol. 2, c. 16. § 17. ſays, "it is ſafe to ſet "forth that the party is charged upon oath; *but this is not* "*neceſſary*; for it hath been reſolved, that a commitment "for treaſon or for ſuſpicion of it, without ſetting forth "any particular accuſation or ground of ſuſpicion, is good." THE SECOND OBJECTION was, that the libel ought to have been ſet forth in the warrant *in hæc verba*, or at leaſt ſo much thereof as the ſecretaries of ſtate deemed infamous, ſeditious, &c. that the Court might judge whether any ſuch paper ever exiſted, or if it does exiſt, whether it be an infamous and ſeditious libel, or not. BUT *the Court were all of a contrary opinion*; and ſaid, a warrant of commitment for felony, muſt contain the ſpecies of felony briefly, as "for felony for the death of *J. S.* or for burglary in breaking the houſe of *J. S.*" and the reaſon is, becauſe it may appear to the judges upon the return of an *habeas corpus*, whether it be felony or not: the magiſtrate forms his judgment upon the writing, whether it be an infamous and ſeditious libel or not at his peril, and perhaps the paper itſelf may not contain the whole of the libel; *inuendos* may be neceſſary to make the whole out. There is no other word in the law but *libel*, whereby to expreſs the true idea of an infamous writing; we underſtand the nature of a libel, as well as a ſpecies of felony; it is ſaid the libel ought to be ſtated, becauſe the Court cannot judge whether it is a libel or not without it; but that is a matter for *the judge and jury* to determine at the trial: it may be ſaid, that without ſeeing the libel we are not able to fix the *quantum* of the bail; but in anſwer to this, the nature of the offence is known by us: it is ſaid to be an infamous and ſeditious libel: it is ſuch a miſdemeanor as we ſhould require good bail for (moderation to be obſerved), and ſuch as the party may be able to procure. In reſpect to THE THIRD MATTER, inſiſted upon for the defendant, namely, that he is a member of parliament, and entitled to privilege to be free from arreſt in all caſes except *treaſon, felony, and actual breach of the peace*, and that therefore he ought to be diſcharged from impriſonment without bail: WE ARE ALL OF OPINION that he is entitled to that privilege, and muſt be diſcharged without bail. In the caſe of the ſeven biſhops, the Court took notice of the privilege of parliament, and thought the biſhops would have been entitled to it, if they

had not judged them to have been guilty of a breach of the peace, for three of the judges deemed a ſeditious libel to be an actual breach of the peace, and therefore they were ouſted of their privilege moſt unjuſtly: if the defend nt had been deſcribed as a member of parliament in the return, we muſt have taken notice of the law relative to the privilege of parliament, for otherwiſe the members would be without remedy, where they are wrongfully arreſted againſt the law of parliament; and therefore we are bound to take notice of their privilege, as being part of the law of the land. Lord *Coke*, in 4 *Inſt.* 25. ſays, that the privilege of parliament holds, unleſs it be in three caſes, viz. *treaſon, felony, and the peace.* Theſe are his words; and in the trial of the ſeven biſhops, the word *peace* in the caſe of privilege was explained to mean, where ſurety of the peace is required. Privilege of parliament holds in informations for the king, unleſs in the caſes before excepted; and the caſe of an information againſt Lord *Tankerville* for bribery, 4 *Ann*, was within the privilege of parliament. See alſo the reſolution of the lords and commons, *anno* 1675. *We are all of opinion, that a libel is not a breach of the peace; it tends to the breach of the peace, and that is the utmoſt*; but that which only tends to the breach of the peace, cannot be a breach of it, 1 *Lev.* 139. Suppoſe a libel to be a breach of the peace, yet it cannot exclude privilege; becauſe I cannot find in any book whatever, that a libeller is bound to find *ſurety of the peace*; nor ever was in any caſe, except one, viz. the caſe of the ſeven biſhops, where three of the judges ſaid, that *ſurety of the peace* was required in the caſe *of a libel*; but Judge *Powell*, the only honeſt man of the four, diſſented. And we are bold to be of his opinion, and to ſay that caſe is not law; but it ſhews the miſerable condition of the ſtate at that time. Upon the whole, it is abſurd to require ſurety of the peace, or bail, in the caſe of a libeller; and therefore the defendant muſt be diſcharged from his impriſonment.

Lee v. Ganſell, Hil. Ter. 14 Geo. 3. B.R. *Cowp.* 1.

A bailiff in execution of meſne proceſs may break open the door of a lodger, having firſt gained peaceable entrance at the outer-door of the houſe.—The court of king's bench granted a rule to ſhew cauſe, why the defendant ſhould not be diſcharged out of the cuſtody of the warden of the fleet, upon the ground of his having been illegally arreſted; that is, that *the officer broke into the apartment of the houſe where he lodged, and which he had rented by the year, for the ſpace of eight-and-twenty years before.* The breaking open the door was poſitively ſworn to, on the part of the defendant, and as poſitively denied by the officer, who ſwore, that the door was open; and that having got his thigh in, a ſtruggle enſued, in which after a time he prevailed, and then arreſted the defendant. *The entrance of the officer into the houſe, was at the outer-door, and was admitted on all hands to have been peaceable*

peaceable and legal. After hearing counſel againſt, and in ſupport of this rule, the Court took time to conſider; and on a ſubſequent day, Lord *Manſfield* delivered the opinion of the Court.—After noticing the particular facts in this caſe, and obſerving that the defendant was up two pair of ſtairs, in his bedchamber, as he ſaid, the door locked; and that, after notice, the officers broke it open; his lordſhip ſaid, though nothing turns upon the notice or mode of breaking, the queſtion is, "*Whether by law this door could be broke open?*" I ſhould firſt ſtate, however, added his lordſhip, that the *outer* door of the *houſe* was *open*, and that the officers entered there legally. The queſtion therefore turns upon the ſubſequent breaking open of the bedchamber door. The books talk of *the privilege of a manſion-houſe, and of the privilege of the door* of it, which cannot be broken open. The whole queſtion will therefore turn upon the *extent* of that which is called *privilege*. Now this rule of privilege, ariſing from a ſound maxim of *policy*, is no privilege of a *debtor*, properly ſpeaking, who abſconds from juſtice, in avoidance of legal proceſs; but is annexed to the *houſe* and *door* (to which door I forbear at preſent to give any particular epithet), for the *protection* of a man and his family. It is therefore by conſequence only, that the privilege is a protection to ſuch a perſon, and not for his own ſake. The ſound maxim of policy is this, "*that a greater evil ſhould be avoided for a leſs, and a leſs good ſhould give way to a greater.*" THE OUTER DOOR, therefore, OR WINDOW of a man's houſe, ſays the law, SHALL NOT BE BROKEN OPEN by proceſs. This has been long and well underſtood. The ground of it is this, that otherwiſe the conſequence would be fatal; for it would leave the family within naked and expoſed to thieves and robbers. It is much better, ſays the law, that you ſhould wait for another opportunity, than do an act of violence, which may probably be attended with ſuch dangerous conſequences. But as this is a maxim of law, in reſpect of political juſtice, and makes no part of the privilege of a debtor himſelf, it is to be taken *ſtrictly*; and not to be extended by any equitable analogous interpretation. The oldeſt caſe to be found in the books, that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a caſe in the Year-book, 18 *Ed.* 4, p. 4, pl. 19. "There an action of treſpaſs was brought, for *breaking* the *outer* door in execution of a *fieri facias*. The Court held, that treſpaſs would lie, for the officer ſhall *not break* open an *outer* door, to execute his proceſs; but when the officer had ſo got in, he *broke* open a *trunk*, and took out the goods that were in it; in reſpect of which they held, that treſpaſs would not lie; for he had a right to break the trunk, and take the goods." I quote this caſe, not to imply

that I ſhould perhaps have been of the ſame opinion myſelf, in a caſe of the firſt impreſſion; but to ſhew, that the rule of privilege is taken moſt *rigidly*. Afterwards, in *Semaine's* caſe, 5 *Co.* Mic. Ter. 2 *Jac.* p. 93, the ſame ſtrict doctrine was held, namely, "That breaking open the *outer* door was a treſpaſs, but taking away the goods was lawful." In *Yelverton*, Mic. Ter. 44 *Eliz.* 29. which was the ſame caſe, *Popham* doubted whether *even* the *outer* door was privileged, becauſe it would be a hindrance to juſtice; but afterwards, in Mic. Ter. 2 *Jac.* 5 *Co.* 92. b. 93, *a.* the whole Court held, "That the *outer* door ought not to be broken open; and grounded their opinion upon the ſingle authority of 18 *Ed.* 4, p. 4. pl. 19. before quoted. You ſee from hence with what rigour the privilege has been conſtrued in the oldeſt caſes. *But no caſe or* dictum *has been cited at the bar, nor indeed did there ever exiſt a caſe which intimated a doubt whether an* inner *door might* not *be broken open.* In *Hob.* 62. and 263. among other outrageous things, the bailiffs broke open a chamber door, having entered legally at the outer door; but ſuch breaking was held lawful, the firſt entrance at the outer door, which was open, having been legal; and yet the latter was a very harſh caſe, for they broke in when the man and wife were in bed, and behaved with great violence and outrage; but I lay ſtreſs on this to ſhew how *ſtrictly* the privilege has been underſtood, when the *outer* door or *window* is ſecure, and the entrance has not been forcible through either of them, ſo as to lay open the houſe and its inhabitants to inſult and violence from without; but on the contrary has been quiet and peaceable. In addition to theſe authorities, I recollect a note of a caſe lately determined, which ſays, "an *inner* door has *no* protection at all." It was the caſe of *Aſtley* and *Pindar*, and was heard in the year 1760, Mic. 1 *Geo.* 3. there all the other charges againſt the bailiffs were anſwered, except breaking the *inner* door; which was accompanied with ſuch violence, that the door fell, and the officer with it, into the room. *But all the Court were of opinion, that the officers having lawfully entered at the* outer *door, might break open the* inner *to execute the duty of their office.* Beſides theſe caſes, and in conformity to the principles upon which they have gone, I ſhall cite a very ſenſible and material diſtinction, from a book in my hands, which is *Foſter's C. L.* title *Homicide*, c. 8. § 20. which is this:—"The rule that every man's houſe is his caſtle, when applied to arreſts on legal proceſs, has been carried as far as political juſtice will warrant, and perhaps further than in the ſcale of reaſon and ſound policy they will warrant; but in caſes of life, we muſt adhere to rules well known and eſtabliſhed. But this rule is not one of thoſe that will admit of any *extenſion.* It muſt, therefore, as I have before hinted, be confined to the breach of windows, and outer doors, intended for the ſecurity

of

of the houſe, againſt perſons from without endeavouring to break in." This brings the queſtion to this point, "*Whether this was the* outer *door to the* houſe *of the defendant?*" *For the law we have ſeen does not privilege an* inner *door.* It has been ſaid, that this lodging is an houſe, and has an outer door; and it has been likened to the caſe of chambers in the inns of courts, and in colleges, which have each an outer door that opens, like the d or in queſtion, upon the common ſtaircaſe, and which, in caſes of burglary, have been held to be the houſes of the reſpective occupiers. The fact is, that from the nature of theſe buildings, they are *all* as *ſeveral* houſes, and have *ſeparate outer* doors, which are the extremity of obſtruction; becauſe the *ſtaircaſe* is no outer door; again, they are enjoyed as ſeparate property. In Lincoln's-Inn they have ſeparate eſtates of inheritance; in the others, they have eſtates for life, and in colleges, as long as they reſide. So if that which was one houſe originally, comes to be divided into ſeparate tenements, and there is a diſtinct outer door to each, they will be ſeparate houſes, as Newcaſtle-houſe. The diſtinction, therefore, can only be between ſeveral outer doors, and one outer door. How far Lord *Hale* meant to carry his opinion, in the paſſage that has been cited, it is difficult to ſay. Where a burglary is committed in the apartments of one who lodges in a houſe, the circumſtance of the *owner's living* in it, or his occupying only a ſhop or cellar in which he does *not ſleep*, makes a very material difference as to the form of the indictment; for in the latter caſe, the lodger has the *outer* door entirely to himſelf; and the burglary, in ſuch caſe, muſt be laid in the houſe of the lodger; but it is otherwiſe in the former caſe, for there it muſt be laid in the houſe of the owner. And, notwithſtanding the greatneſs of Lord *Hale*'s authority, it appears not clearly expreſſed, or perhaps not fully conſidered; at all events, we muſt not determine upon a ſingle and uncertain *dictum*, againſt the many late and poſitive caſes, grounded on the oldeſt deciſions, and moſt eſtabliſhed principles. But if there were nothing more to confute the doctrine which has exhauſted ſo much learning and ingenuity in ſupport of it, the abſurdity of the propoſition, would, of itſelf, be ſufficient. And it is this, that whereas the *greateſt houſe* in London has but *one* outer door; this gentleman having *four rooms* in one houſe, ſhall have *four* diſtinct *outer* doors. If any of them could be ſaid to be an outer door, it muſt be the door of the lower rooms, but the truth is, they are all inner doors. Therefore we are all moſt clearly of opinion, that by law, *this* door was *legally broke* open. With regard to the point of relief, in caſe the arreſt had been illegal, I give no opinion; though I think it would depend upon

on the behaviour of the party applying. It is poſſible a perſon might come to aſk that relief, under circumſtances of ſuch groſs miſbehaviour as might induce the Court to refuſe it. Though the Court, where a perſon is arreſted, who has been attending its proceſs, will interpoſe, not only by puniſhing the officer, but by diſcharging the priſoner out of cuſtody; yet caſes of this ſort are always matters of diſcretion with the Court, under their particular circumſtances. But it is not neceſſary here to enter into that point; as we are all clearly of opinion, that General *Ganſel* was legally arreſted, and therefore ought not to be diſcharged.

Hatchw. Archer, Ea. Ter. 14 Geo. 3. B.R. *Comp.* 63.

An arreſt muſt be by the authority of the bailiff; but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance of the perſon arreſted; and in debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its having been delivered to the ſheriff.—An action of debt was brought againſt the ſheriff of Eſſex, for the eſcape of one *Moody*. The declaration ſtated a judgment of the court of king's bench in debt, an arreſt upon that judgment, and a ſubſequent eſcape. Upon the trial a queſtion aroſe, Whether the arreſt was legal? For it was objected, firſt, That there was no proof of a *ca. ſa.* having been *delivered* to the ſheriff. But the learned judge held, that the return of *non eſt inventus* indorſed upon the writ was ſufficient in this action. Secondly, that the arreſt, if any, was by the ſon of the bailiff, and not by the bailiff himſelf, who was at the diſtance of thirty roods, and not *in ſight*, therefore *no legal* arreſt. But the judge left it to the jury to ſay, whether old *Fenton*, the officer, was not *quodam modo* preſent at the time of the arreſt. The jury found that he was, and therefore gave a verdict for the plaintiff. The defendant afterwards obtained a rule to ſhew cauſe, why there ſhould not be a new trial. The learned judge reported the caſe as above ſtated; and after hearing counſel on both ſides, THE COURT ſaid, that though this is rather a hard action, and though in caſes attended with hardſhip, the juries have a leaning, as far as juſtice will permit them, and ſo has the Court alſo, yet ſtill we are not ſatisfied to ſay, that the verdict in this caſe is wrong. Several objections have been made. 1ſt, That the arreſt was not by the ſheriff's officer himſelf, for that the father was the officer, and the ſon the hand that arreſted. That the officer muſt be the *authority* to arreſt is certain, but he need not be the hand that arreſts, nor in the preſence of the perſon arreſted, nor actually in ſight, nor is any exact diſtance deſcribed. As to the bailiff being the authority in this caſe, it was in proof, that *old Fenton* came to Ingateſtone to arreſt *Moody*, and went out of the public-houſe for *that purpoſe*. It is true, one of the witneſſes

neſſes ſpoke to his being at the diſtance of thirty roods, but he does not ſpeak at the time of the arreſt, nor is it eaſy to ſpeak with certainty, as to diſtance at a particular time. But it is ſaid, that *young Fenton*, the ſon, who could have cleared up the doubt, ought to have been ſubpœned by the plaintiff. It is certainly a maxim, that all evidence is to be weighed according to the proof which it was in the power of one ſide to have produced, and in the power of the other to have contradicted. But we think it would have been very improper to have called the ſon, for in fact it is an action againſt his father, the bailiff, though nominally againſt the ſheriff. Upon the whole, therefore, we are of opinion, that the fact was fairly and properly left to the jury; that it was their province to judge, whether the officer was on *that buſineſs*; and that if he was immediately following the ſon, it is ſufficient. It would have been a different caſe, if he had been upon ſome other errand, or had ſtaid at home, and ſent a third perſon to make the arreſt. As to the other objections, it is clear that *old Fenton* was the officer who was to arreſt, and being ſo, his name, according to the uſual practice, was indorſed on the writ; and laſtly, that the return of *non eſt inventus* on the back of the writ, is ſufficient evidence againſt the ſheriff of the delivery of the *ca. ſa.*; for it is an acknowledgement of it under his own hand. Rule diſcharged.

A peace-officer may juſtify an arreſt on a reaſonable charge of felony, without a warrant, although it ſhould afterwards appear that no felony has been committed. An action of treſpaſs and falſe impriſonment was brought againſt one *Payne*, a conſtable, and two others, upon the following caſe. *Hall*, one of the defendants, charged the plaintiff with having ſtolen ſome laces from him, which he ſaid were in the plaintiff's houſe. Upon this charge, a ſearch warrant was granted by a juſtice of the peace, but upon the ſearch the goods were not found; and though no warrant had been granted to apprehend the plaintiff, yet *Payne*, *Hall*, and the other defendant, who was an aſſiſtant to *Payne*, arreſted the plaintiff, and carried him to the Poultry Compter, on a Saturday, when no alderman being ſitting, he was detained until the Monday following; and then, after examination, was diſcharged. The cauſe was tried before Lord *Manſfield*, when a verdict was found againſt all the defendants. At the trial, his lordſhip, and the counſel on both ſides, conſidered the rule of law to be, that *if a felony has actually been committed, any man, upon reaſonable and probable grounds of ſuſpicion, may juſtify apprehending the ſuſpected perſon, and carry him before a magiſtrate; but that if no felony has been committed, the apprehenſion of the ſuſpected perſon cannot be juſtified by any body.* His lordſhip therefore left it to the

Samuel v. Payne and others, Ea. Ter. 20 Geo. 3. B R. 1 Ter. Rep. 358.

jury to conſider, whether any felony had been committed. *The rule, however, was conſidered as inconvenient and narrow; becauſe if a man charges another with felony, and requires an officer to take him into cuſtody, and carry him before a magiſtrate, it would be moſt miſchievous, that the officer ſhould be bound, firſt to try the truth of the charge, and, at his peril, exerciſe his judgment upon it.* He that makes the charge, ſhould alone be anſwerable; and the officer does his duty in carrying the perſon accuſed before a magiſtrate, who is authoriſed to examine, and either to commit, or diſcharge, according to the reſult of that examination. On this ground, therefore, a motion was made for a new trial; and after hearing counſel, the Court held, that the charge was a ſufficient juſtification to the conſtable, and his aſſiſtants; and therefore the rule was made abſolute. A new trial was accordingly had, when the jury found a verdict againſt *Hall*, who made the charge; but for the other two defendants, who acted in conſequence of it.

Ledwith v. Catchpole, Ea. Ter. 23 Geo. 3. B.R. *Cald. Cas.* 291.

But where a felony *has actually been committed*, not only a conſtable, but even a private perſon, acting *bona fide*, and in purſuit of the offender, upon ſuch information as amounts to a reaſonable and probable ground of ſuſpicion, may juſtify an arreſt.—This was an action of aſſault and falſe impriſonment; and it appeared that the defendant, who was a conſtable, had arreſted the plaintiff in a very violent manner, and without any poſitive charge of felony *againſt him in particular* (1), but under very ſtrong circumſtances, inducing a reaſonable ſuſpicion, that he was the perſon who had committed the felony; on a verdict being found for the plaintiff, the court of king's bench was moved for a new trial; which was granted: For, *per Cur.* the firſt queſtion is, Whether a felony has been committed or not? and then the

(1) The evidence was, that one *Smith*, who had loſt ſome linens to a large amount, brought one *Stevens* to the defendant, the conſtable: that *Stevens* ſaid, one *Madox* had called a coach, and put *Smith*'s bale of goods into it at a public-houſe: that *the plaintiff put his head into the coach*: that afterwards the coach ſtopped at another houſe, and that *the plaintiff met it there*: that *Smith*, ſuſpecting the plaintiff to have been concerned in the theft, from the circumſtance of his having been twice ſo ſeen at the coach, took the defendant on a Sunday to the plaintiff for the purpoſe of having him apprehended: that when they came to him, neither *Smith* or any other perſon charged the plaintiff with a felony: that *Smith* ſaid, "I have loſt ſome cloth, but I don't ſay that it was he who ſtole it: I know nothing of that; but ſtolen it was:" that the defendant being aſked by the plaintiff what authority he had to arreſt him? produced a hanger, and ſaid, "that was his authority:" that he then arreſted the plaintiff, and took him to the Poultry Compter, from whence he was taken the next day before the ſitting alderman, and diſcharged.

fundamental diſtinction is, that if a felony has actually been committed, a conſtable, or even a private perſon, acting *bona fide*, without deſign or malice, or ill-will, in purſuit of an offender, upon ſuch information as amounts to a reaſonable and probable ground of ſuſpicion, may juſtify an arreſt: for upon an highway robbery committed, an alarm ſpread, and particulars circulated, and in the caſe of crimes ſtill more ſerious, upon notice given to all the ſeaports, it would be a terrible thing, if under probable cauſe an arreſt could not be made; felons uſually are taken up upon deſcriptions in advertiſements, and many an innocent man has, and may be taken up upon ſuch ſuſpicion; but the miſchief and inconvenience to the public in this point of view is comparatively nothing.—On the ſecond trial there was a verdict for the defendant.

The King *v.* Myers, Eaſt. Ter. 26 Geo. 3. B.R. 1 *Term. Rep.* 265.

One who is convicted on a penal ſtatute, cannot be arreſted on a Sunday, for non-payment of the penalty.—In this caſe, the defendant had been convicted in a penalty, under the lottery-act, 22 *Geo.* 3. c. 47. and ſent to the houſe of correction, for want of a ſufficient diſtreſs. Afterwards, the Court granted a rule to ſhew cauſe, why he ſhould not be diſcharged out of cuſtody, becauſe he was apprehended on a Sunday. THE COURT, after hearing counſel on both ſides, and taking time to conſider, ſaid, That there was no caſe exactly in point. It is moſt ſimilar to an *action* brought for a penalty on the ſame ſtatute; and it is clear, that upon execution in ſuch an action, the defendant could not have been taken on a Sunday. That this was to recover a penalty given by a ſtatute, and the effect is equally the ſame, whether that penalty is to be recovered in a ſummary proceeding, before a juſtice, or in an action. Rule abſolute.

Hopkins *v.* De Robeck, Hil. Ter. 29 Geo 3. B.R. 3 *Ter. Rep.* 79.

A meſſenger from a foreign prince to his ambaſſador reſident here, is privileged from arreſt. A rule was obtained to ſhew cauſe, why a bill of Middleſex ſhould not be ſet aſide, and the bail bond delivered up to be cancelled, upon the defendant's affidavit, ſtating, that he was a ſubject of the king of Sweden, and an officer in his army; that in conſequence of the war between Sweden, Ruſſia, and Denmark, he was ſent here with diſpatches from the Swediſh king to his ambaſſador, Baron *Nolken*; that ſince his arrival, he had been really and truly employed as ſecretary to the baron, in tranſcribing ſtate papers relative to his embaſſy, and that he did not carry on any trade, nor was he ſubject to the bankrupt laws. This affidavit was accompanied with a certificate from Baron *Nolken*, that the defendant was his ſecretary. After hearing counſel for and againſt the rule, the Court thought that the defendant was in a ſituation in which he was entitled to the privilege claimed; for that it would be impoſſible to carry on ſtate negociations, unleſs perſons

perſons in his ſituation were protected. The ſtatute of 7 *Ann.* c. 12, is only explanatory of the law of nations, and the words *domeſtic*, and *domeſtic ſervant*, are only put by way of example. The privilege was held in the caſe of *Triquet* v. *Bath*, 3 *Burr.* 1478 (1), to extend to ſecretaries. The ſtatute only requires the names of the perſons privileged to be regiſtered, for the purpoſe of proceeding againſt the parties criminally, for a violation of that act; and as it appears, that the defendant is really attached as ſecretary to the embaſſy, and it is not even ſuggeſted that there is any impoſition in this claim, the rule muſt be made abſolute.

Wilkinſon *v.* Jacques, Tr. Ter. 29 Geo. 3. B R. 3 *Ter. Rep.* 392.

A creditor may lawfully enter a detainer againſt his debtor, who is in fact reſident within the walls of a priſon, though he be not there as a priſoner. A rule was granted to ſhew cauſe, why the defendant ſhould not be diſcharged out of the cuſtody of the warden of the fleet, he having been irregularly detained. The facts were in ſubſtance theſe.—The defendant having been committed to the cuſtody of the warden, in another ſuit, by a different creditor, had been permitted by him to eſcape voluntarily; in conſequence of which, an action had been commenced againſt the warden by that creditor, and the debt was recovered againſt him. The defendant afterwards ſatisfied the warden, and obtained a releaſe from him; but he ſtill continued to reſide in the fleet, though he went out whenever he pleaſed. In this ſituation, the preſent plaintiff lodged a detainer againſt him with the warden, who thereupon took him within the fleet, and kept him in cuſtody. After hearing counſel, THE COURT ſaid, The authorities are clear, that a perſon who has been permitted to eſcape out of cuſtody by a gaoler, cannot be retaken by him in that ſuit. But this was a detainer by another creditor, who found the defendant in the fleet, and to whom it was indifferent on what account, or by what means he was there. If he was in fact within the walls of the priſon at the time, that is ſufficient; for then he could not be arreſted in the ordinary manner, but could only be detained. Rule diſcharged, with coſts.

Bonafous *v.* Schoole, Tr. Ter 31 Geo. 3. B.R. 4 *Ter. Rep.* 316.

And a perſon in cuſtody under an attachment for nonpayment of coſts, may be charged with an execution in a different action. In this caſe a rule was obtained to ſhew cauſe, why the detainer againſt the priſoner ſhould not be ſet aſide, becauſe when it was lodged againſt him he was in cuſtody on an attachment for nonpayment of coſts, which was (it was ſaid) a criminal proceeding. And it was contended that a plaintiff in a civil action could not change the cuſtody of the defendant under a criminal charge without

(1) See title AMBASSADORS.

leave

leave of the Court, or an order by one of the judges. But on cauſe ſhewn, *the Court* were clearly of opinion, that the application could not be ſupported. That in the firſt place, an anſwer in point of fact had been given to it, that the defendant was in cuſtody in a civil ſuit at the time when he was charged with the attachment; and ſecondly, that the rule, on which the motion was grounded, did not apply to this caſe. The foundation of the rule is, that a priſoner, who is in cuſtody at the ſuit of the king, cannot be charged with civil proceſs, without leave of the Court, or of one of the judges. But this defendant was only in cuſtody on an attachment for non-payment of coſts; which, in whatever light it may have been conſidered formerly, has of late years been deemed to be only a civil execution; ſo much ſo, that a perſon charged in cuſtody on ſuch an attachment is entitled to be diſcharged under the lords' act. Rule diſcharged.

The defendant in this caſe, was junior clerk of the kitchen to the king, at St. James's palace, and having been ſued for a debt owing to the plaintiff, and taken in execution under a judgment by default, and a writ of enquiry executed thereon; a rule was obtained to ſhew cauſe, why he ſhould not be diſcharged out of the cuſtody of the ſheriff, upon the ground of his privilege: the caſe was fully argued, and a variety of authorities cited by the counſel on each ſide. *Per Cur.* We are perfectly ſatisfied that the defendant is entitled to be diſcharged; and with reſpect to the mode of application, it was finally ſettled in *Pitt*'s caſe, that a perſon entitled to privilege might be diſcharged on motion; and though that is diſcretionary in the Court under the circumſtances, as where there is any doubt whether the party applying be really ſuch a perſon as is entitled to privilege, or other unfavourable and ſuſpicious circumſtances, yet here it being admitted, that the defendant is a ſervant of the king, there is no ground for refuſing to diſcharge him on motion. Rule abſolute. Bartlett, v. Hebbes, Tr. Ter. 34 Geo. 3. 5 *Ter. Rep.* 686.

But an indictment will not lie againſt an officer of the palace-court for arreſting a perſon, not of the king's houſehold, within the king's palace, againſt whom a writ has iſſued out of that court, though no leave to make the *arreſt* has been obtained from the board of green cloth. In this caſe the defendant was indicted for aſſaulting and impriſoning *Edward Pyott*, eſq. within the king's palace, at Weſtminſter, his majeſty then being actually reſident, and abiding in his royal perſon in the palace. To this indictment he pleaded not guilty; and on the trial, the jury found a ſpecial verdict, which ſet forth the ſtatute 28 *Hen.* 8, c. 12. by which, after reciting that the king had purchaſed the palace of Weſtminſter, it was enacted, that it ſhould have the ſame prerogatives, liberties, juriſdictions, and privileges, which The King v. Stubbs, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 735.

which belonged to the king's ancient palaces, and the limits of it were thereby defined. The verdict then ſtated letters patent, 16 *Car.* 2. conſtituting a court of record, within the palace of Weſtminſter, and twelve miles round it (except Weſtminſter Hall, and ſome other places), to be called the court of the palace of the king; "for the adminiſtration of juſtice in perſonal actions, pleas, and plaints, to all and ſingular perſons who ſhall chooſe to plead there, concerning all and all manner of treſpaſſes *vi & armis*, treſpaſſes upon the caſe, debt, account, detinue of goods and chattels, deceipts and contracts, and other perſonal cauſes, plaints, and pleas whatſoever, concerning whatſoever ſum ariſing, within the palace, or within twelve miles round it (except the city of London, and except all actions of treſpaſs, and all other perſonal actions, pleas, and plaints of this kind, in which as well the plaintiff or plaintiffs, as the defendant or defendants, is or are of the houſehold"). That charter then appointed the judges of the court, to whom the king "gave power and authority to bring into plea by ſummonſes, attachments, and diſtreſſes, and *other proceſſes*, according to the laws and cuſtoms of this realm, *to be directed to the bearers of the rods of the houſehold, the officers and miniſters of the ſaid court*, the defendants againſt whom ſuch plaints, pleas, or actions in the ſaid court, ſhould happen to be levied, and moved, and for want of goods and lands, &c. by which ſuch defendants may be ſummoned, &c. to bring into plea by attachment, or *capias*, any where within the juriſdiction of the court; and of all and ſingular actions, plaints, and pleas (except in the caſes before excepted), to have cognizance, and to hear and hold pleas reſpectively, *in as ample manner and form as any other court of record, by the laws and cuſtoms of this kingdom of England may and ought to have cognizance, &c.*" The verdict then ſtated, that the defendant, at the time of iſſuing and executing the writ after-mentioned, was, and ſtill is, one of the officers of the palace court, viz. one of the bearers of the verge of the houſehold. That on the 5th of January, 1789, one *S. Ameſon*, proſecuted, out of the palace court, a writ againſt *Pyott*, directed to the bearers of the verge of the houſehold, which was delivered to the defendant, requiring him to take *Pyott*, if he ſhould be found within the juriſdiction of that Court, to anſwer to *Ameſon* of a plea of treſpaſs on the caſe. That the defendant, on the ſame day, arreſted *Pyott* within that part of the palace mentioned in the ſtatute 28 *Hen.* 8. at which time *Pyott* was reſident and abiding within that part of the palace, but was not of the king's houſehold. That at that time the king actually reſided within the palace. *That in many inſtances, for one hundred years laſt paſt, and upwards, upon civil writs being iſſued to arreſt perſons reſident within the*

the boundaries deſcribed by the act, permiſſion has been firſt obtained from the king, ſignified by the officers of his houſehold; and the writs have, in ſuch inſtances, been backed by the clerk of the board of green cloth; and that for one hundred years laſt paſt, and upwards, many writs, upon civil proceſſes, have been executed, and many perſons reſident at the time, within the boundaries deſcribed by the ſtatute, have been arreſted thereon, within thoſe boundaries, without the king's leave ſo ſignified; but that it does not appear, whether ſuch writs were executed with the knowledge of the officers of his majeſty's houſehold. That the defendant arreſted *Pyott* as aforeſaid, by virtue of the ſaid writ, without any leave or permiſſion obtained from the king; but whether, upon the whole matter, &c. After this ſpecial verdict had been fully argued, Ld. *Kenyon*, Ch. J. delivered his opinion to the following effect.—There is a great deal of good ſenſe in guarding the king's palaces in an extraordinary manner, againſt any thing which may lead to a riotous aſſembly of perſons there. And therefore the common law has, in my opinion, wiſely ordained (if it has provided) that perſons, not immediately connected with the houſehold, ſhould not come within the palaces, though profeſſing to execute the proceſs of the law. Upon this principle ſtands the authority in the third *Inſt.* But no one caſe has been cited to ſhew, that the proceſs, iſſuing out of the palace court, cannot be executed within the juriſdiction of that court. Then ſuppoſing that there were certain privileges annexed, by the common law, to the king's palaces, prior to the reign of *Car.* 2. yet undoubtedly the king had a right to diſpenſe with any of thoſe privileges; and he did, by that charter, diſpenſe with ſome of them, as far as reſpects the palace at Weſtminſter; for by that he erected a juriſdiction *within* the palace of Weſtminſter, and extending twelve miles round it, and directed, that one of the proceſſes of that court ſhould be a *capias*. And this charter gave a general power to execute the proceſs of that court, within the juriſdiction. It is true, indeed, that *the officers of the houſehold are exempted out of this charter, and that accounts for the ſeveral applications that have been made to the board of green cloth, in order to diſcriminate between thoſe perſons who were exempted in the charter, and thoſe who were liable to the proceſs of the court.* Theſe applications probably were made to the board of green cloth, who have the ſuperintendance of the houſehold, to know whether the perſon againſt whom proceſs had iſſued, did or did not belong to the houſehold; upon which depended the privilege of being exempt from the arreſt. I avoid giving any opinion as to the powers which other courts may have, at common law, within the palace; my judgment proceeds entirely on the charter of *Car.* 2. by which this court was

created; and which gives expreſs juriſdiction and power to execute the proceſs of the palace court within the palace. This determination, therefore, will leave untouched, every common law privilege, and every authority which has been cited. The reſt of the judges concurring, judgment was given for the defendant.

Kinder v. Williams, Tr. Ter 31 Geo. 3. B.R. 4 *Ter. Rep.* 377.

The Court will not diſcharge a perſon in cuſtody, becauſe he was arreſted while attending commiſſioners of bankrupt to prove a debt.—In this caſe the defendant was arreſted upon proceſs out of the ſheriff's court of London, while he was attending to prove a debt, as a creditor, under a commiſſion of bankrupt. He afterwards removed the cauſe, by *habeas corpus*, into the court of king's bench, and then moved that court, that he might be diſcharged out of cuſtody, on the ground of his being privileged from arreſt, during his attendance before the commiſſioners for the above purpoſe. BUT *the Court* refuſed the application, ſaying, that the general rule was founded on the contempt of the Court, by the arreſting perſons who were giving their neceſſary attendance upon it. In this caſe, the contempt, if any, was to the commiſſioners of bankrupts, and not to the Court; and even the proceſs under which the arreſt was made, was ſued out of another court; ſo that the ſubſequent removal of the cauſe hither, by the defendant, could not vary the caſe. Nor were the Court ſatisfied, that the commiſſioners of bankrupts could be conſidered as a court of juſtice, or could afford any relief in the premiſes; but certainly there was no pretence for this Court to interfere.

Meekins v. Smith, Ea. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 636.

But the court of common pleas have laid down this general rule, viz. That all perſons who have relation to a ſuit, which call for their attendance, whether they be compelled to attend by proceſs or not (in which number, bail are included), are entitled to privilege from arreſt, *eundo et reduendo*, provided they came *bona fide*.—In this caſe, one Davis was arreſted by an officer of the ſheriff of Middleſex, as he was returning from Weſtminſter Hall, where he had attended to juſtify himſelf as bail for the defendant, but was rejected. Upon this a rule was granted to ſhew cauſe why he ſhould not be diſcharged out of cuſtody; on the ground, that he was entitled to privilege from arreſt, both in going to and returning from the court, his attendance being in the courſe of the cauſe, and the adminiſtration of juſtice. After cauſe had been ſhewn againſt the rule, the Court ſeemed much inclined to think, that not only witneſſes, but all perſons who were coming to, or returning from it, whether directly on the buſineſs of the court, or in any manner *relative* to that buſineſs, were entitled to a freedom from arreſts, and that to arreſt them was a contempt of the court. Several caſes were alſo mentioned of barriſters, who were

arreſted

arreſted on the circuit, being diſcharged by the judge. At length it was agreed, that the rule ſhould be enlarged to a ſubſequent day: and then *Davis* was brought up by an *habeas corpus*, which had iſſued in the mean time, and offered again to juſtify as bail, but he was again rejected; it appearing that he was an uncertificated bankrupt, and in deſperate circumſtances. The Court, however, laid down the above general rule; but in the preſent caſe ordered the defendant to be remanded, as there was a manifeſt intention on his part to impoſe on the Court: and on that account he was not permitted to avail himſelf of the exemption.

The clauſe in the ſtat. 32 *Geo.* 2. c. 28. § 1. which provides that no perſon arreſted ſhall be carried to priſon within twenty-four hours, relates only to perſons arreſted on meſne proceſs.—In an action of debt, to recover a penalty of 50l. under the ſtat. 32 *Geo.* 2. c. 28. § 1. 4. 12. the declaration ſtated, that the plaintiff was arreſted by the defendant, who was a ſheriff's officer, on a *ca. ſa.* and carried to priſon within twenty-four hours after the arreſt, contrary to the proviſions of that ſtatute. After the cauſe was tried, and a verdict given for the plaintiff, the Court was moved in arreſt of judgment; upon the ground, that this act being a remedial law, the Court would extend it as far as the words would permit, for the liberty of the ſubject; and that as it was paſſed to prevent oppreſſion by ſheriffs' officers, on thoſe who were in their cuſtody, it applied as ſtrongly, in principle, to the caſe of arreſts in execution, as on meſne proceſs. BUT *the Court* ſaid, this point ſeems perfectly clear, as well from the general purview of the act, as from the words of the two clauſes; namely, the firſt and fourth which have been relied on. The firſt ſection prohibits ſheriffs' officers from carrying perſons arreſted to priſon within twenty-four hours; and the reaſon why they ſhall not be carried to priſon ſooner is, that they may, in that time, have an opportunity either of procuring bail, or of agreeing with the perſon at whoſe ſuit they are arreſted. This, therefore, can only apply to thoſe perſons who are bailable. And the fourth clauſe ſhews, that the legiſlature knew how to deſcribe perſons in execution, and that the words uſed in the former ſection, *arreſted, or in cuſtody*, would not extend to *perſons in execution*; for theſe laſt words are uſed in the fourth clauſe, in contradiſtinction to the former, and would not have been added, if the legiſlature had thought the former words ſufficient. So that as well on the reaſon of the thing, as on the fair conſtruction of the words of the act, *the perſons arreſted, or in cuſtody*, mentioned in the firſt clauſe, mean only perſons arreſted on meſne proceſs; and ſuch indeed has always been the opinion in Weſtminſter Hall, ſince

Evans *v.* Atkins, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 555.

ſince the paſſing of this act. Rule for arreſting the judgment abſolute.

Atkinſon *v.* Jameſon, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 25.

The defendant having been arreſted by the ſheriff of Middleſex at the ſuit of another plaintiff on Saturday, November 3d, was diſcharged on the ſame day, the ſheriff not knowing that at that time there was a detainer lodged in his office againſt him at the ſuit of this plaintiff: this being afterwards diſcovered, the defendant was arreſted on this writ on the next day, Sunday; on which he obtained a rule to ſhew cauſe why he ſhould not be diſcharged out of cuſtody, the arreſt being contrary to the ſtat. 29 *Car.* 2, c. 7, § 6. *Per Cur.* If a party wrongfully eſcape from the cuſtody of the law, he may be retaken at any time, and is not protected by the ſtat. 29 *Car.* 2. which forbids an original arreſt on Sundays. But here the defendant was not guilty of any contempt; he was regularly diſcharged on the Saturday, the ſheriff not even knowing that he was authoriſed to detain him. Rule abſolute.

Puckford *v.* Maxwell, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 52.

The defendant having been arreſted for 80l. on a *teſtatum capias* into Surrey, gave to the plaintiff a draft for 45l. ſaying it would be immediately paid, and agreed to meet the plaintiff a few days afterwards to ſettle the remainder of the debt, on which the plaintiff agreed that the defendant ſhould be diſcharged out of cuſtody. The draft was diſhonoured, the defendant having no effects in the hands of the drawee; whereupon the defendant was again arreſted on the ſame affidavit on a *teſtatum capias* into Middleſex. A rule having been obtained, calling on the plaintiff to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody, THE COURT ſaid, In caſes of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may conſider it as a nullity, and act as if no ſuch bill had been given at all. And there was no neceſſity for a freſh affidavit. Theſe queſtions have frequently ariſen at *niſi prius*, where they have always been determined the ſame way. There was one in particular a few years ago, where a rider in the country gave a draft on a perſon in London, with whom he had no connection whatever; and it was admitted on all hands that it ought to be conſidered as if no bill had been given at all, and that the original debt remained in force. Rule diſcharged.

Houſin *v.* Barrow, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 122.

A rule was obtained, calling on the plaintiff to ſhew cauſe why the defendant, who had been arreſted at the ſuit of the plaintiff by one *Cook*, ſhould not be diſcharged out of the cuſtody of the ſheriff of Nottingham, and why the plaintiff ſhould not pay the coſts of this application, on an affidavit, ſtating

ſtating that *Cook*'s name was not originally in the warrant, for that it was directed to *Moore* and all the others of the ſheriff's officers for the county of Nottingham, *and that* Cook's *name was inſerted after it was ſigned and ſealed by the ſheriff.* PER CUR. This was clearly an illegal arreſt; and it is proper that it ſhould be made known in the moſt ſolemn manner. Some years ago, a gentleman ſtruck out the officer's name, and inſerted his own in its ſtead in the warrant; and he was ſhot by the defendant in arreſting him; the defendant was tried for the murder, and on the trial a ſpecial verdict was found; but it was held not to be murder, becauſe the arreſt was illegal, and that at the moſt it was only manſlaughter. In ſuch caſes, the law does not throw any protection round the perſon, who attempts to arreſt by an illegal warrant. Rule abſolute without coſts, as it aroſe from the miſconduct of the ſheriff's officer.

Maule and another, *v.* Murray and another, Hil. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 470.

The defendants were held to bail by proceſs out of the Court in New York, and the plaintiffs proceeded ſo far in that ſuit as to obtain judgment there. The defendant Murray, coming to this country upon neceſſary buſineſs, was arreſted here by the plaintiffs for the ſame demand, and a rule was obtained, calling upon the plaintiffs to ſhew cauſe why he ſhould not be diſcharged on filing common bail. After cauſe ſhewn, THE COURT were of opinion, That they could not take judicial notice of an arreſt in a foreign country; and that it would be unjuſt to deprive the plaintiffs of perhaps the only ſecurity they had for the payment of their debt. Rule diſcharged.

Loveridge *v.* Plaiſtow, Ea. Ter. 32 Geo. 3. C. B. *Sitten. Black.* 29

If a perſon be arreſted after the writ is returnable, the officer cannot legally detain him (though for the ſhorteſt time), till the writ be continued.—In this caſe, the writ was returnable on *Sunday*, April 29; on Monday, April 30, at eight o'clock in the morning the defendant was arreſted, and detained by the officer till ten o'clock on that morning, when the writ was renewed. On a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody, THE COURT held this not to be a legal detainer, and made the rule abſolute for the defendant's diſcharge.

Crooks *v.* Holdich. Mic. Ter. 38 Geo. 3 C.B 1 *Pul. & Poſan.* 176.

In this caſe, the plaintiff had ſued out a bailable attachment of privilege, and renewed his proceſs four ſeveral times, but without marking it to be an *alias* or *pluries*; the laſt proceſs was taken out after the paſſing of the bank-indemnity act, which requires, that in all affidavits to hold to bail, the plaintiff ſhall add, that the defendant has not tendered the amount of the debt in bank-notes. On a rule, calling upon the plaintiff to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody on filing common bail, for omitting to negative a tender in his affidavit: the queſtion was, Whether a new affidavit, made according to

the directions of the act, was not neceſſary when the laſt proceſs was ſued out? *Per Cur.* The continuances ought to have been by alias and pluries; and though theſe ſubſequent writs may, by miſtake, have iſſued in the form of firſt proceſs, yet, in the nature of the thing, they muſt be conſidered as continuances: if the affidavit was regular at firſt, no new affidavit can be requiſite: we cannot ſay, that what once was regular is irregular now, becauſe an act of parliament has intervened: the act which relates to affidavits made ſubſequent to it cannot apply to regulate the form of an affidavit made before the paſſing of the act; we muſt adopt a conſtruction which does not require impoſſibilities. Rule diſcharged.

See alſo ATTACHMENT, BAIL, and other Titles.

Arſon.

The King *v.* Donnevan, Ea. Ter. 10 Geo 3. B.R. 1 *Black.* 682.

ARSON may be committed by ſetting fire to a priſon, the entrance to which is through a dwelling-houſe. The priſoner was indicted, found guilty, and condemned on the ſtat. 9 *Geo.* 1. c. 22. for malicioufly ſetting fire to the common gaol belonging to the corporation of Liverpool, in which he was confined for debt: it appeared that the keeper's dwelling-houſe adjoined the priſon; and that the entrance to the priſon was through the dwelling-houſe: that the priſoners are ſometimes allowed to lie in the dwelling-houſe: that the priſoner lay in the priſon, and voluntarily ſet fire to the ſame. *Gould*, J. who tried him, reported the caſe to all the judges, who (*abſente Adams*, B.) were of opinion that this caſe was fully within the act; the dwelling-houſe being to be conſidered as a part of the priſon, and the whole priſon being the houſe of the corporation.

Rex *v.* Pedley, Tr. Ter. 22 Geo. 3 B.R. *Caldecot's* Caſes, *Ca.* 218.

But a tenant from year to year is not guilty of arſon by burning the houſe of which he is in poſſeſſion; but if by firing his own houſe he thereby burn the houſe of another, he is guilty of the crime. This was a ſpecial verdict found at the gaol-delivery for Briſtol, on the trial of an indictment againſt the priſoner for arſon: the indictment contained ſeventeen counts, in which the offence was reſpectively laid to be committed, 1ſt, againſt the common law; and, 2dly, againſt the ſtat. 9 *Geo.* 1. c. 22. ſeveral of the counts diſtinctly charged, that the priſoner did ſet fire to, and burn the houſe of *Freeman*, *Lucy*, and *Giles*. Other counts charged, that he

he ſet fire to his own houſe, with intent to burn the houſe of *Freeman*, *Lucy*, and *Giles*, near to the priſoner's dwelling-houſe; by reaſon whereof the ſaid houſe of *Freeman*, *Lucy* and *Giles* was ſet on fire and burned: the neighbouring houſe was alſo laid to be the houſe, 1ſt, of *Francis Parry*; 2dly, of *Richard Coombe*; 3dly, of the mayor of Briſtol. The priſoner was alſo charged in ſome of the counts with burning his own houſe. The ſeveral houſes were reſpectively termed *dwelling-houſes*; and the offence laid throughout to have been committed feloniouſly, wilfully, and maliciouſly. Upon the trial, the jury, under the direction of the Court found a ſpecial verdict, in ſubſtance as follows: "all "the houſes mentioned in the indictment were the freehold "and inheritance of the mayor of Briſtol, who had demiſed "that in which the priſoner dwelt, to *Freeman*, *Lucy*, and "*Giles*, for the term of ninety-nine years, determinable with "three lives; *Freeman*, *Lucy*, and *Giles* had demiſed the ſaid "houſe to the priſoner for ſeven years, part of which term "was ſubſiſting. The mayor of Briſtol had alſo demiſed "three other meſſuages, adjoining that in the poſſeſſion of "the priſoner, to *Richard Coombe*, for a term of ninety-nine "years, determinable as aforeſaid; and *Richard Coombe* had "again demiſed the ſaid three meſſuages to *Francis Parry* "for a year, and ſo from year to year, ſo long, &c. On 29th "September, 1780, *Francis Parry* demiſed one of theſe three "meſſuages to *John Lundy* for three months, who entered "and continued in poſſeſſion until and upon 8th December, "1780, and this is the houſe that is alleged in the indict-"ment to be the houſe of *Francis Parry*. The priſoner and "*John Lundy* being then in poſſeſſion of their reſpective "houſes ſo demiſed as aforeſaid, the priſoner, on the 6th De-"cember, 1780, unlawfully, wilfully, and maliciouſly ſet "fire to, and ſet on fire, the ſaid houſe in his poſſeſſion, "with intent wilfully and maliciouſly to burn the ſame, and "did hereby burn and deſtroy great part of the ſame; and "by means thereof the ſaid fire was communicated to the "houſe in the occupation of *John Lundy*, and burned and "conſumed part thereof: but whether, upon the whole of "theſe facts, the priſoner is guilty of the offence charged in "the indictment, the jury ſubmit to the Court." The ſpecial verdict having been found *by the direction of the court below* (1), a writ of *certiorari* to remove the proceedings into this court, and an *habeas corpus* alſo to bring up the

(1) If this had not been by the direction of the court below, the proceedings could not have been removed until after judgment had been given by the court below.—See title CERTIORARI.

body of the priſoner were granted. Afterwards, in this term, the gaoler of Briſtol brought the priſoner into court, and returned the writ of *habeas corpus:* the writ of *certiorari* was alſo returned, and, on motion, filed: the priſoner was then committed to the cuſtody of the marſhal, and an order made to bring him up on a ſubſequent day, when the ſpecial verdict was directed to be argued. On the argument, the counſel for the proſecution ſaid, that three queſtions might be made upon the facts diſcloſed by the ſpecial verdict, FIRST, Whether the priſoner was not guilty of arſon at common law in burning his own houſe? SECONDLY, Whether it was not an offence within the meaning of the ſtat. 9 *Geo.* 1. c. 22? but he acknowledged, that, notwithſtanding the opinion of a great writer upon crown law (1) to the contrary, he was apprehenſive that the doctrine in *Holmes*'s caſe, *Cro. Car.* 533. upon this ſubject, had been too firmly and recently eſtabliſhed (2), for any arguments he could uſe, *ab. inconveniente*, to remove. He therefore confined his arguments to the third queſtion, Whether the priſoner's having burnt his neighbour's houſe by means of burning his own, was not an offence within the legal idea of arſon? and con-

(1) *Foſter*'s Crown Law, 113.

(2) In the caſe of the *K.* v. *Bremme*, Tr. Ter. 20 *Geo.* 3. it has been determined by nine of the judges viz. L. C. B. *Skinner*, Mr J. *Gould*, Mr. J. *Aſhhurſt*, Mr. J. *Nares*, Mr. J. *Buller*, Mr. B. *Eyre*, Mr. B. *Hotham*, and Mr. B. *Perryn*, that a tenant in poſſeſſion, under an agreement for a leaſe for three years, from a leſſee who held under a building leaſe, is not guilty of arſon by ſetting the houſe on fire: and that the ſtat. 9 *Geo.* 1. c. 22, does not vary the nature of the offence: the law upon this ſubject, they ſaid, had been too long and too firmly eſtabliſhed by *Holmes*'s caſe to be now departed from. Some of the judges, however, ſeemed to doubt the propriety of that determination, and ſaid, that if the queſtion had been unſettled, they ſhould have been of a different opinion: but the majority of the judges held that the determination of *Holmes*'s caſe was right, for that the principle of it was the protection of the perſon in the actual and immediate poſſeſſion of the houſe, *Leach*'s *Caſes*, *Ca.* 96.

So, in the caſe of the *K.* v. *Spalding*, Ea. Ter. 20 *Geo.* 3. it appeared that the priſoner had been indicted and tried for ſetting fire to and burning *his own houſe*, and that he was a tenant in poſſeſſion of the meſſuage, which was copyhold, and that he had before ſurrendered it to the uſe of a mortgagee. Ten of the judges, aſſembled at Lord *Manſfield*'s chambers, were unanimous, that as the indictment was for burning *his own houſe*, it was inſufficient; for that the crime of arſon at common law conſiſts in maliciouſly and voluntarily burning the houſe of another, and the ſtat. of 9 *Geo.* 1, c. 22, does not alter the nature of the crime, or create any new offence, but only excludes the principal more clearly from the benefit of clergy than he was excluded before: that the reſolution in *Holmes*'s caſe had been too long eſtabliſhed to be controverted, and that the interpretation of the ſtatute muſt be governed by that determination, *Leach*'s *Caſes*, *Ca.* 95.

tended,

tended, where a man doth an act *malum in ſe*, wilfully and deliberately, and ſuch act occaſions a miſchief, which if it had been immediately done, would have been felony, the act which produced ſuch miſchief ſhall alſo be conſidered as felonious. After the caſe had been fully argued upon this ground, Lord *Mansfield*, CH. J. (ſtopping the other ſide), delivered himſelf as follows:—Though I can neither approve of the policy of the legiſlature, or ſubſcribe to the legal reaſoning that has been uſed on this ſubject, it is now, I am ſorry to ſay, ſettled by authority not to be ſhaken; that it is not felony either at common law, or by the ſtatute, in a tenant for a year, a month, or a day, to ſet fire to a houſe of which he is in poſſeſſion: *arſon*, it is true, is burning the houſe of *another*; and to be ſure a man may do what he pleaſes with what is properly his own: but that a man who has an intereſt no longer than that which I have ſtated, may annihilate the property of his landlord, is a doctrine, which, if the point was now originally before the Court, I could hardly have aſſented to: but the queſtion has been ſubmitted to the conſideration of the judges; and nine of them (all who attended) were unanimous: the legiſlature alone can therefore now apply the remedy. As to the other ground, when a man does a flagitious act, neceſſarily knowing that he commits a crime, which in its conſequences will probably produce a felony; if a felony is the conſequence, he is guilty of that felony, and ſhall anſwer for his own acts in their fulleſt extent: but the law upon this ground will not avail here, as out of ſixteen counts there is no one that is adapted to the fact. *Arſon* is ſettled to be an injury to the actual poſſeſſion; and the miſchief is, that he has not been tried for the offence of which he appears to have been guilty: for in every count the property is alleged to be in the reverſioner or his leſſee, and not in the tenant. He muſt, therefore, be diſcharged of this indictment; and as he has not been tried for the fact found, he muſt be remanded. The other judges concurred.—Remanded.

In both of theſe actions, which were brought upon the ſtat. 9 *Geo.* 1, c. 22, to recover ſatisfaction for ſome ſtacks of oats and a barn, which were laid in the declaration to have been *feloniouſly* ſet on fire in the night by perſons unknown, the plaintiffs had verdicts: and it was afterwards moved, in arreſt of judgment, that it ſhould have been laid to have been done *unlawfully*, or *wilfully*, *and maliciouſly*: BUT, as in this particular offence, the words *wilfully and maliciouſly* are omitted, though expreſſed as to every preceding and every ſubſequent offence mentioned in the ſame clauſe, THE COURT were unanimouſly of opinion, that they need not be laid in the declaration which may follow the words of the ſtatute, however imperfectly expreſſed. And though they

Allan *v.* Hundred of Kirton, and Simpſon *v.* Hundred of Aſhwardhern in Lincolnſhire, Mic. Tr. 13 Geo. 3. C.B. 2 *Black.* 842.

they had no doubt but the burning muſt be unlawful and malicious, elſe it might be no offence, and probably muſt be ſo expreſſed, in an indictment for the felony itſelf; yet they conceived it ſufficient to follow the words of the ſtatute, in a declaration; eſpecially after verdict, when it muſt be preſumed that the malice and illegality were proved on the trial. Rule diſcharged.

The King *v.* Judd, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 255.

Setting fire to a *parcel* of unthreſhed wheat is not felony within 9 *Geo.* 1. c. 22. The defendant was brought up by *habeas corpus*, from Hertford, in order to be bailed; and the warrant by which he was committed ſtated, that he was charged on oath with giving two guineas to another perſon, to diſturb the dwelling-houſe of *G. S.* And alſo with giving to *N. R.* a charcoal-burner, a guinea and an half to keep on with the ſaid *G. S.* as he had then begun, and to do him all the miſchief he could, except killing him. *And for being acceſſory with the ſaid N. R.* who was committed to Hertford gaol, on the oaths of the ſaid *G. S.* and others, as well as upon his own confeſſion, in wilfully and maliciouſly ſetting fire *to a parcel of unthreſhed wheat*, the property of the ſaid *G. S.*: the warrant was ſigned by eleven juſtices. It was objected, that this commitment contained no charge of felony, and therefore that the defendant was entitled either to be diſcharged or bailed under the *habeas corpus* act. Per Cur. Unleſs it appears, upon the face of the commitment itſelf, that the defendant is charged with a felony, we are bound by the *habeas corpus* act to diſcharge him; taking ſuch bail for his appearance to take his trial as we in our diſcretion ſhall think fit, according to the circumſtances of the caſe. And therefore the queſtion is, *Whether there is ſpecified in this commitment ſuch an offence as amounts to felony?* Neither of the two firſt charges in the commitment amounts to felony. With reſpect to the laſt charge, it is not that the defendant was an acceſſory with *N. R.* in *feloniouſly*, but only *with wilfully and maliciouſly* ſetting fire *to a parcel of unthreſhed wheat.* And th ugh it is not neceſſary that the word "feloniouſly" ſhould be uſed in the commitment, yet it ought to appear on the facts ſtated, to be in law a felony, and within the deſcription of the act; now *the ſtatute has only made it felony to ſet fire to a cock, mow, or ſtack of corn; and the defendant is not charged with either of theſe.* Whatever words the legiſlature uſed, we muſt ſuppoſe that they knew the meaning of them; and if a juſtice uſes the ſame words, we are bound to ſuppoſe that he intended them in the ſame ſenſe; but if he makes uſe of other words, he muſt be more preciſe. Now here a *parcel* of corn is too indefinite a deſcription. It does not come within the deſcription of the act, and we cannot ſay how much it is. Twenty ears of wheat is *a parcel.* Therefore, as the warrant

rant of commitment does not charge the defendant with a felony, we are bound to bail him: with regard to the *quantum* of the bail, although the nature of the defendant's crime is not very accurately ſtated, yet as ſufficient appears on the depoſitions returned with the commitment, to ſhew that he has been guilty of an enormous offence, we ought to take ample ſecurity for his appearance:—the defendant muſt find bail himſelf in 1000l. and four ſecurities in 500l. each.

Articles of the Peace.

UPON articles of the peace exhibited, the Court have the power of requiring bail for ſuch a length of time as they ſhall think neceſſary for the preſervation of the peace, and are not confined to a twelvemonth. Articles of the peace having been exhibited againſt the defendant near two years before, by the Counteſs of *Strathmore*, his wife, he then entered into ſecurity for his good behaviour, by the order of the Court, for a twelvemonth. Soon after the expiration of that time, the defendant, and ſeveral others, under pretence of taking Lady *Strathmore* to Lord *Mansfield*'s, at Caen Wood, by virtue of a warrant againſt her, got acceſs to her, and, accompanied by ſeveral armed men, took her by force out of a houſe at noon-day, and carried her to Strickland Caſtle, in the county of Durham, and there detained her againſt her will for ſeveral days, till an *habeas corpus* was obtained, directed to the defendant, in conſequence of which, ſhe was brought up to this court in Hilary term laſt; and then ſhe exhibited freſh articles of the peace againſt the defendant, ſtating the above facts, and ſetting forth many circumſtances of cruelty and ill treatment which ſhe had undergone during her confinement, and while ſhe was in the power of her huſband. At which time the Court, taking into their conſideration all theſe circumſtances, and above all, the outrageous breach of the public peace which had been committed by the defendant, ordered him to give ſecurity for the peace for fourteen years, himſelf in 10,000l. and two ſureties, each in 5000l.—An information was alſo granted againſt the defendant, and thoſe other perſons who were concerned with him upon that occaſion. In this term a rule was obtained calling on the proſecutrix to ſhew cauſe, why the defendant ſhould not be held to bail for one year inſtead of fourteen years, and why the ſum which had been required ſhould not alſo be leſſened, upon an affidavit of the defendant,

The King *v.* Bowes, Ea. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 696.

defendant, ſtating that he had found it impoſſible to procure bail to that amount, and for that length of time. And, independant of the difficulty of procuring bail, it was obſerved, that there had been no inſtance ſince the revolution, in which ſureties for the peace had ever been required for more than a year in caſes of a like nature. By the Court (after argument and full conſideration), The circumſtance laid before the Court, of an information being now pending againſt the defendant for the ſame charge, muſt make great impreſſion upon us in regard to the *diſcretion* which we may exerciſe in this inſtance. *But as to the power of this Court to compel perſons againſt whom articles of the peace are exhibited to find ſureties for a term exceeding one year, we do not entertain any doubt about it.* For *this Court, which has a general authority to preſerve the peace, has a right to require ſuch bail and for ſuch a length of time as will beſt anſwer the ends of public juſtice.* It has been then ſaid, that the Court may require freſh bail at the end of a twelvemonth, and ſo from year to year as long as they ſhould think neceſſary, without any freſh facts being exhibited againſt the defendant. But we very much doubt whether we have ſuch a power: it has been admitted that there never was any inſtance of the kind; and we ſhould be very loth to eſtabliſh ſuch a precedent. The next thing urged is, that it is not neceſſary in this caſe to require ſecurity for more than one year, becauſe the information which is depending againſt the defendant, muſt neceſſarily be tried before the expiration of that time, and in caſe he is found guilty of that charge, the Court may require ſuch bail, and inflict ſuch puniſhment on him, as they may think proper; and that, if he be acquitted, it would be very hard that he ſhould be ſtill confined on a charge, for which it will then appear that there was no foundation. That argument has great weight. For though we have no doubt of the power of the Court, where articles of the peace are exhibited againſt any perſon, to require bail for what length of time they think neceſſary, not indeed by way of puniſhment, but as a ſecurity for the public peace; yet, in this caſe, as the ends of juſtice may equally be anſwered by ſhortening the time for which bail has been required, we ſhall have no objection to it. Therefore, if it were not for the circumſtance of the information being now depending, we think the Court ſhould require ſecurity for the whole time. But that circumſtance weighs very much with us; and as the information muſt neceſſarily be tried within a year or two, the ſecurity may be confined to two years. If the defendant ſhould be acquitted within the time for which the recognizance is taken, the Court will certainly receive an application to diſchage it immediately. As to leſſening the ſum required, no ground has been

been laid before the Court to induce us to do it. The defendant ſtands charged with as daring an outrage as ever was committed in a civilized country. But as there may be ſome difficulty in procuring two bail for ſo large a ſum as 5000l. each, he may be at liberty to ſubſtitute four bail in 2,500l. each.

Artificers.

IN this caſe, the defendant had been convicted of enticing and ſeducing artificers in the manufactures of this kingdom, into foreign ſervice, an offence within the ſtat. 5 *Geo.* 1, c. 27. and the ſtat. 23 *Geo.* 2, c. 13. and Lord *Mansfield* ſaid, That the latter act ſeemed to be a repeal of the former (1), being made to ſupply the deficiencies of the former: and *Aſhton*, J. obſerved, That by the latter act there is no diſcretion left in the Court; the puniſhment directed in it being peremptory, and not as in the former act, which directs the fine for the firſt offence to be in any ſum not exceeding 100l.: the ſentence in this caſe was therefore to pay a fine of 500l. and to be impriſoned in the county gaol of the county of Middleſex for twelve calendar months, and until the fine be paid.

Rex v. Cator, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2026.

Aſſignment.

IF a leſſee of tithes covenants for himſelf, and his aſſigns, that he will not let any of the farmers in the pariſh have any part of the tithes, this covenant runs with the tithes, and binds the aſſignee of ſuch leſſee. In an action of covenant, brought by the rector of the pariſh of Monkſton, in Hampſhire, againſt the defendant, who was the aſſignee of one *James Whitmarſh*, to whom the plaintiff had granted a leaſe of the great and ſmall tithes of the pariſh; the declaration ſet forth the leaſe, which, *inter alia*, contained a covenant on the part of the leſſee, and his *aſſigns*, to find ſufficient wheat ſtraw for thatching the tithe barn, and premiſes, belonging to the rector; and alſo the following covenant, viz. "And the ſaid *James Whitmarſh*, for himſelf, his executors, adminiſtrators and *aſſigns*, doth hereby covenant and agree, not to let any of the farmers now occupying the ſeveral eſtates

Bally Clerk v. Wells, Mic. Ter. 10 Geo. 3. C.B. 3 *Wilſ.* 25.

(1) This muſt, however, be underſtood of the firſt ſection only.

at

at Monkſton, have any part of the tithes aforeſaid, without the conſent of the ſaid *George Bally*, in writing firſt had and obtained." The declaration then aſſigned the breach of this covenant in the following manner, viz. "That the defendant, after the premiſes came to him by aſſignment, did let divers of the farmers then occupying ſeveral of the eſtates at Monkſton, to wit, one *William Cooper*, and one *Roger Hutchins*, have part of the tithes in the indenture of leaſe mentioned, without the plaintiff's conſent, contrary to the covenant of the ſaid *James Whitmarſh*, the leſſee, and his aſſigns, in that behalf made." To this declaration the defendant pleaded, *non infregit conventionem*; and upon the trial, a verdict was found for the plaintiff. But it was afterwards moved, in arreſt of judgment, that an action does not lie againſt the aſſignee, for breach of ſuch a covenant as the preſent; becauſe it is a covenant merely perſonal, and collateral, binding the leſſee only, and not at all affecting his aſſignee. That tithes are incorporeal, lying in grant only, and that therefore ſuch a covenant cannot run along with them, as it would with lands, which lie in livery. *After this caſe had been fully argued, and* THE COURT *had taken time to conſider*, THEY *were unanimouſly of opinion*, that this action might well be ſupported; and that the intention of the parties to the leaſe ſhould have its due effect, without breaking through any of the caſes in the books, concerning the many diverſities of covenants. The intention of the parties clearly was, to keep the tithes continually in *pernancy*; for the covenant is in effect, that the leſſee and his aſſigns, ſhall take them in kind, in order that they might continue in the ſame ſtate, as when the leaſe was made. This being the plain intention of the parties, and the end of the two covenants, in equity and juſtice, of which the aſſignee had full notice, he ought to take the leaſe, *cum onere*, for *qui ſentit commodum ſentire debet & onus*. So that if we can poſſibly make law and equity flow in one channel, we will not leave the plaintiff without remedy here, and ſend him away to the court of chancery. The Court, therefore, after ſtating the reſolutions in *Spencer*'s caſe, 5 *Rep.* 16. a. which is a leading caſe upon the ſubject, and various other authorities, gave judgment for the plaintiff.

Harker and another v. Birkbeck and another, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1556. 1 *Black.* 482.

A Mrs. *Moore*, as executrix of her huſband, was ſolely entitled to dig and ſearch for lead and lead-ore, and work certain veins and mines of lead and lead-ore, within the limits mentioned in the declaration, but had no intereſt in the ſoil; being ſo entitled, ſhe employed one *Roſewarne*, as her agent; and he, on her behalf, and the plaintiff *Harker*, on the behalf of himſelf and partners, ſigned a writing *upon plain paper without ſtamps*, in the following words: "16th June, "1761, memorandum,—Mr. *Thomas Roſewarne*, agent to

"Mrs.

" Mrs. *Moore*, doth let or ſet to *J. H.* and partners, to raiſe " lead-ore in a plat of ground, lying and being in Whita- " ſide, eaſt of the old field, called Grena Hill; this ground " begins at a gate, &c. (deſcribing the boundaries); *J. H.* " and partners do agree to pay to Mrs. *F. Moore*, or her " agent, every ſixth pig of lead, both at the ore hearth and " ſlag hearth; for which Mr. *Thomas Roſewarne* doth agree " to let the above partnerſhip have *the ſaid ground the length* " *of Mrs. Moore's leaſe*, ſhe now has from the crown; Mrs. " *Moore* to find the above partnerſhip a ſmelting mill in " good repair, to ſmelt the ore the partnerſhip ſhall raiſe; " Mr. *Thomas Roſewarne*, or any other agent Mrs. *Moore* " ſhall appoint, ſhall have free liberty or leave to inſpect " the ſaid workings whenever they pleaſe; the above part- " ners not to ceaſe working the abovementioned ground, " for the ſpace of two months, unleſs hindered by water or " ſome other unavoidable accident: Mrs. *Moore* is to carry " one eighth of this bargain." The plaintiffs, under the above inſtrument, worked for and got lead-ore within the limits abovementioned, and the defendants having done the ſame, the plaintiffs brought this action againſt the defendants, for diſturbing them in their privilege under the ſaid writing: upon the trial of the cauſe, a ſpecial caſe was reſerved, and one of the points made (1) was, " WHETHER the writing, not being ſtampt, could be given in evidence to prove the plaintiffs right?" *Per Cur.* This writing is no leaſe, becauſe nothing is reſerved to Mrs. *Moore*; it is not an aſſignment, becauſe it is not by deed; it ſeems rather that the legal property continued in Mrs. *Moore*; ſo that it ſeems to be either an agreement for an aſſignment, or elſe a declaration of truſt, an equitable intereſt, leaving the legal property in Mrs. *Moore*. In a court of equity, the plaintiffs would be conſidered as being in poſſeſſion from the time of the agreement, and being in poſſeſſion, they may maintain treſpaſs, and in an action of treſpaſs this writing might have been given in evidence (2); though if it had been a leaſe, it could not have been given in evidence without being ſtamped.

An executrix aſſigned a leaſe granted to her teſtator, by an indorſement on the back of the indenture, in the following words: " I aſſign all my title to this garden, with a roller equipped with iron, to Mr. *Thomas Pennington*, for ſix guineas, received 4th May, 1744, *Elizabeth French.*" The ſaid writing was *neither ſealed or delivered* by the ſaid *Eliza-*

Beck, on the dem. of Fry, v. Phillips, Hil. Te. 12 Geo. 3. B R. 5 *Burr.* 2827.

(1) See the other point made in this cauſe in p. 13, ſupra.
(2) But as ſuch a writing is evidence of an agreement, it muſt now be ſtamped according to the ſtat. 23 *Geo.* 3. c. 58.

beth

beth French, nor ſtampt according to law: afterwards *Pennington*, by writing under his hand, indorſed, on the back of the aforeſaid indenture, the words following: viz. "I aſſign all my title to the garden within-mentioned, to Mr. *John Fry*, for 4l. ſterling, received of him the 22d of February, 1749, *Thomas Pennington*." The ſaid writing was alſo neither *ſealed nor delivered* by the ſaid *Thomas Pennington*, *nor ſtampt* according to law. *Per Curiam*, If the indorſement by the executrix carried a legal intereſt in the term to *Pennington* from *Elizabeth French*, and *Pennington*'s indorſement to *Fry* had a like effect; then *Fry* had the whole leaſe in him: *and by the* ſtatute of frauds, 29 *Car.* 2, c. 3. § 3. it may be aſſigned by a note in writing, and ſuch a note in writing need not be either ſealed or delivered, or ſtampt, as a deed muſt; and Lord *Mansfield* mentioned a caſe in Tr. Ter. 1755, 28 & 29 *Geo.* 2. between *Farmer*, on the demiſe of *Earl*, and *Rogers*, 2 *Wilſon* 26. wherein it was reſolved, "That it appears by the ſtatute of frauds and perjuries, "that a leaſe for any term of years may be created by "writing without deed, and that the ſame may be ſurrendered by deed or note in writing, and the Court held that "there was no occaſion for any ſtamp duty upon the note or "indorſement, it not being a deed;" ſo in the preſent caſe, the legal intereſt in this term might be aſſigned by a note in writing.—Poſtea to plaintiff.

Scott *v.* Godwin, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul. & Boſan.* 67.

In an action of covenant for not repairing certain premiſes, the declaration ſtated in ſubſtance, "That one "*Thomas Grice* demiſed the premiſes in queſtion to the defendant, for a term of twenty-one years, and afterwards "the fee-ſimple of the ſame premiſes were by deeds of leaſe "and releaſe duly conveyed to *John Scott* and *Robert Scott*, "and the heirs and aſſigns of *Robert Scott* for ever; but nevertheleſs *in truſt for the ſaid John Scott*, his heirs and aſſigns "for ever: CONCLUDING (without averring the death of "*Robert Scott*), by means of which ſaid premiſes, *the ſaid* "John Scott *became, and was and ſtill is ſeized of, and in the* "*ſaid reverſion in his demeſne as of fee?*"—to this there was a general demurrer and joinder therein; the ſpecial cauſes having been abandoned, the caſe was argued as on a general demurrer; and *Eyre*, CH. J. delivered the opinion of the Court, That the declaration was bad.—The queſtion is, "Whether the plaintiff has ſhewn in his declaration a title to ſue as aſſignee of the reverſion?" that title is to be collected from the operation of law on the deeds which are ſtated; and it is moſt clear, that the operation of law upon thoſe deeds, is to conſtitute *John* and *Robert Scott* joint aſſignees; the effect of this is, that the defendant's covenants in the leaſe from *Grice*, became alſo, by operation of law, contracts with *John* and *Robert Scott* jointly; and that all

cauſes of action to them ariſing out of theſe contracts, muſt follow the nature of the contracts, and muſt arise to *John* and *Robert Scott* jointly: now *John Scott* has declared on a covenant made with *John* and *Robert Scott*, and has ſuppoſed himſelf capable of ſuſtaining an action alone for the breach of it, but this is fundamentally wrong.—It has been argued, FIRST, That *Robert Scott* appearing to be a truſtee for *John Scott*, his title cannot be ſet up againſt the *ceſtui que truſt*; and SECONDLY, That if it can, it muſt be by plea in abatement, and by that mode only: on the firſt of theſe points we have had no difficulty; it appearing by the plaintiff's own ſhewing, that *Robert Scott* was made joint aſſignee with *John Scott* (to which, if it were neceſſary, might be added) for purpoſes which require that the legal eſtate ſhould remain in *Robert Scott*, and we cannot by any preſumption, or by any rule of law, take the legal eſtate out of him during his life-time; it is not that the defendant ſets up the legal eſtate of the truſtee againſt the *ceſtui que truſt*, but the *ceſtui que truſt* himſelf has ſet it up as part of his own title; on THE SECOND POINT we have pauſed, not in reſpect of any difficulty in deciding againſt the point as it was ſtated, but on a queſtion, which the reaſoning in ſome of the numerous caſes which have been alluded to in the argument, has ſuggeſted, namely, "Whether on a general demurrer to a declaration of this kind, it can be intended in ſupport of the "declaration, that the joint-tenant, not a party to the action, "is dead?" in which event, the whole legal eſtate would unite in *John Scott*, and he alone might ſue. In the great bulk of the caſes where it has been holden, that if there are not proper parties to a record, advantage muſt be taken of it, by a plea in abatement, the objection has been that other perſons ought to be made *co-defendants* with the defendant on record: and there is an eſſential difference between theſe caſes, and caſes where the objection is, that there are not the proper parties plaintiffs in the ſuit; many plaintiffs can have but one right, having but one intereſt and one cauſe of action; which ought to be, and is indiviſible, admitting but of one ſatisfaction: but if in the nature of the thing, if on the principles of law or authorities, it could be that a man ſhould derive a ſeveral intereſt out of a joint obligation to himſelf and others, and that plaintiffs could ſue ſeparately for their portions of one right, it is moſt obvious that it muſt vex and haraſs defendants extremely; that this cannot be, appears from *Slingſbie*'s caſe, 5 *Co.* 18. and from *Co. Lit.* 180. b. which ſhew that joint-tenants muſt plead and be impleaded jointly; whereas in the caſe of defendants, in reſpect of the ſatisfaction they are to make to the plaintiff, it is exactly the ſame thing whether they are ſued ſingly, or with others, for every individual co-defendant is ultimately

liable to the whole demand, and execution may be had againſt any one. In *Rice* v. *Shute*, 5 *Burr.* 2613 (1), Lord *Mansfield* ſays, "every partner is liable to pay the whole; in what proportion the others ſhould contribute, is a matter merely amongſt themſelves;" there is therefore more of form than of ſubſtance in the objection, that others ſhould be made co-defendants; however the writ ſhall abate that has not made all the parties *co-defendants*, becauſe the plaintiff may have a better writ in the ſame cauſe, but the action ſhall not be barred becauſe the plaintiff has in himſelf an abſolute right to ſue the defendant; the defendant can only inſiſt, if he pleaſes, that the plaintiff ſhall ſue others with him; and this advantage he may waive, where the objection does not appear on the face of the record, and does waive in that caſe, unleſs he plead in abatement: hence it is, that where one of ſeveral joint-obligors is ſued, and *non eſt factum* is pleaded, the better opinion is, that a defendant ſhall not be allowed to object, that there are other co-obligors, for the deed is his, though it is alſo the deed of others (2): It is convenient that the obligors ſhould all be ſued together, and therefore the defendant may plead in abatement; but it is not abſolutely neceſſary, and therefore he cannot plead in bar, nor can he take advantage of the objection on the plea of *non eſt factum*, after oyer. I do not mean to enter into the queſtion, Whether, if the plaintiff ſtate in his declaration, that the bond was made by two, the defendant cannot take advantage of it; but where the declaration is right upon the face of it, if there be no plea in abatement, the defendant cannot take advantage of it afterwards: I admit that it has been eſtabliſhed by many caſes, that in aſſumpſit againſt one defendant, and non-aſſumpſit pleaded, evidence of a contract with more than one does not maintain the iſſue, on the ground, that it does not follow the contract in the declaration: but I take *the contrary* to be now fully ſettled, upon the grounds which I have ſtated, and upon very old authorities, which are taken notice of in the caſe of *Rice* v. *Shute*, and apply with equal force in aſſumpſit, as in other caſes: Lord *Mansfield* lays great ſtreſs on the difficulty under which plaintiffs lie, when they are to ſue partners; they know, ſays he, whom they deal with, but they do not know who are the ſecret partners; a plaintiff may be nonſuited twenty times before he finds them all out, or may be driven to file a bill for a diſcovery; and therefore he argues, that convenience and the ends of juſtice required, that if a defendant would object that others are concerned with him in the tranſaction, he ſhould plead in abate-

(1) See p. 3, ſupra. (2) 5 *Co.* 119.

ment

ment, and ſo tell the plaintiff whom he was to ſue. This reaſoning has its weight as to co-partners being made co-defendants, but as to plaintiffs it does not apply; they are under no difficulty of this kind, every plaintiff knows who is concerned in intereſt with him, he cannot have a better writ given him by a plea in abatement, than he might have had without it; in this, and in other reſpects, the caſe of plaintiffs and defendants eſſentially differ (1); and I conceive the rule of law reſpecting them is, generally ſpeaking, (with perhaps one (2) exception) different. I tak it to have been ſolemnly adjudged in ſeveral caſes (3), and to be the known received law, that one co-covenantee, one co-obligee, or one joint-contractor by parol, cannot ſue alone: in the laſt caſe it is common experience, that where a joint-contract appears in evidence on the general iſſue, the plaintiff is nonſuited; and there are many caſes in the books, in which it has been held to be error for one co-obligee, or one co-covenantee to ſue alone: *the conſequence is, that the objection that it is neceſſary to plead this matter in abatement is ill-founded.* But where it appears on the record, that the plaintiff has a better writ according to his own ſtatement, why ſhould the defendant plead in abatement? The object of a plea in abatement is, to introduce on the record ſome new fact which can only be done in that manner; but where the fact appears in the declaration itſelf, what remains for the defendant but to aſk the judgment of the Court? It may be anſwered, that the defendant ought to plead the variance between the writ and the declaration; but there are caſes which eſtabliſh that it may be taken advantage of in error, which could never be, if it were pleadable in abatement of the writ: "*Cabell* v. *Vaughan*, 1 *Vent.* 34. In an action of "debt upon a bond againſt one, and it appears another was "jointly bound with him, thereupon the defendant demurs; "but it was adjudged for the plaintiff, for the defendant "cannot demur in ſuch caſe, unleſs the other obligor be "averred to be living, and alſo that he ſealed and delivered "the bond:" 3 *Cro.* 494, 544. *Aſcue* and *Hollingſworth's* caſe, 28 *H.* 6. 3. "and if one be bound to two, one obligee "cannot ſue, unleſs he avers that the other is dead, in B.R. "1651. 1068. *Levit* v. *Staineforth.*" For the very purpoſe of preventing the firſt part of the caſe from being miſunderſtood, it adds, that in the caſe of one of ſeveral co-

(1) In *Barnard* v. *Kenzworthy*, B.R.H. 24 *Geo.* 3. Lord *Manſfield* ſaid, "If there are leſs plaintiffs than there ought to be, it goes to a non-ſuit; if leſs defendants, it is only in abatement."

(2) See *Addiſon* v. *Overend*, in p. 3, ſupra.

(3) See *Strange*, 1146, and *Graham* v. *Robertſon*, 2 Ter. Rep. 282.

obligors ſuing alone, a different rule prevails from that which takes place where one of ſeveral co-obligors is ſued; and the rule is, that which goes the whole length of deciding upon the only doubt which could be made in this caſe, "*Whether on a general demurrer it could be intended that a co-covenantee was dead, in order to ſuſtain the declaration*; if one be bound to two, one obligee cannot ſue, unleſs he avers the other is dead." He muſt recover upon his own ſtrength; he muſt ſhew that which is neceſſary to make out his title; having by his own ſhewing given the legal eſtate to himſelf and another, he muſt take upon himſelf the burthen of diveſting that legal eſtate in the other, and veſting it in himſelf; *he muſt aver that he is dead.* The caſe of *Cabell* v. *Vaughan*, is alſo reported in 1 *Sider* 421. by the name of *Chappel* v. *Vaughan*; and in the ſame book, 238, *Oſborn* v. *Cuſborn*, it is ſtated to have been laid down as a rule, concerning the bringing debt on obligations, that if an obligation is made to three, and two bring the action, they ought to ſhew that the third is dead: theſe caſes though they ſtate a rule, do not ſtate in what manner advantage is to be taken of it, which it may be ſaid, ought to be by plea in abatement; but *Eccleſton* v. *Clipſham*, 1 *Saund.* 153. and *Slingſbie*'s caſe, 5 *Co.* 18. b. are deciſive on this head: in the firſt the objection was allowed in arreſt of judgment, and the party driven to diſcontinue; in the laſt the objection was on error in the exchequer chamber, and for that error the judgment was reverſed: theſe caſes were both in covenant, and ſo directly in point. This plaintiff, therefore, could not ſue alone, and there muſt be judgment for the defendant.

Taylor v. Shum and others, Ea. Ter. 37 Geo. 3 C.B. 1 *Pull. & Boſan.* 21.

There is no fraud in the aſſignee of a term aſſigning over his intereſt to whom he pleaſes, with a view to get rid of a leaſe, although ſuch perſon neither takes actual poſſeſſion, nor receives the leaſe.—In DEBT for rent againſt the aſſignees of a term, *the pleas* were; 1ſt, That the term did not come to the defendants by aſſignment and iſſue thereon; 2dly, That the defendants did not by virtue of any aſſignment enter into, and become poſſeſſed of the premiſes and iſſue thereon; 3dly, That before the rent was demanded, or any part of it became due and payable, the defendants aſſigned. *Replication*, That the aſſignment to *Biſhop* was by fraud and covin, with intent to defraud the plaintiff, and iſſue joined thereon.—On the trial it appeared, that one *Sibley* had mortgaged the leaſe to the defendants, who on his becoming inſolvent, and abandoning the premiſes, took poſſeſſion and paid the rent up to Chriſtmas, 1795; at which time they offered to ſurrender the premiſes to the plaintiff, and on his refuſal to accept, aſſigned over to *William Biſhop*, who was afterwards not to be found: there was a verdict for the plaintiff, with liberty for the defendant to move to

ſet

ſet it aſide and enter a nonſuit: a motion for this purpoſe was afterwards made, and PER CUR. (after cauſe ſhewn) The queſtion is, Whether the defendants could aſſign to whom they pleaſed, ſo as to deſtroy their own liability? if you have no remedy againſt the aſſignee, you muſt loſe your rent, and get poſſeſſion of the premiſes as ſoon as you can: the only caſe in which a queſtion of fraud can ariſe, and in which a replication *per fraudum* can be good, is where the aſſignor has kept poſſeſſion of the premiſes, of which he makes a profit, and has made an aſſignment to prevent reſponſibility; but even there, if the poſſeſſion be profitable, there will always be ſomething on the premiſes for the landlord to diſtrain; ſo that it is doubtful whether there can ever be ſuch a thing as a fraudulent aſſignment, and whether an iſſue on ſuch a point can ever be well taken: it is clear, that there is no fraud in aſſigning to a beggar (1), or to a perſon leaving the kingdom, provided the aſſignment be executed before his departure (2); the defendants had a right to diveſt themſelves of the intereſt by the mere form of an aſſignment, which drives the plaintiff to take poſſeſſion. Rule abſolute.

See alſo the title ACTION, head *Covenant*, and title LEASE.

Attachment for Contempt.

IF a defendant in a penal action obtain *a rule* to ſtay proceedings on paying a ſum agreed upon between him and the plaintiff, it is an undertaking by him to pay that ſum; and for the non-payment of it the Court will grant an attachment. King, *q. t. v.* Cliſton, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 257.

But, in this caſe, where the queſtion was, Whether the plaintiff, who had obtained the common rule to diſcontinue *on payment of coſts*, was liable to an attachment for non-payment of thoſe coſts? *the Court* thought that he was not, and diſcharged the rule for an attachment.. Stokes v. Woodeſon, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 6.

If an attorney, required to anſwer the matters of an affidavit, ſwear in his exculpation to a ſtory highly incredible, although he may be liable to an indictment for perjury, if The caſe of Croſsley Clarke, and Brierly, Tr.

(1) *Strange*, 1221. *Salk.* 81. 4 mod. 71.

(2) But *Buller*, J. on the argument of the rule for ſhewing cauſe, ſaid, "If they had executed to a nonentity it would have been no aſſignment." 1 *Pull. & Boſan.* 22.

Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 701.

the facts ſworn to be falſe, yet the Court will grant an attachment: for, *Per Cur.* It is not ſufficient to anſwer a charge in direct terms; for if a ſtory repreſented by the party be not credible, an attachment muſt be granted. Therefore, in this caſe, as the matters ſtated by theſe defendants appeared to the Court highly incredible, they granted an attachment, although the defendants had, by their affidavits, poſitively and pointedly denied the charges.

Walker *v.* the Earl of Groſvenor, Hil. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 171.

The Court will not grant an attachment againſt a peer for not paying a ſum of money awarded, notwithſtanding he may conſent on condition that the attachment ſhall lie in the office for a certain time: for, *Per Cur.* An attachment cannot be granted in this caſe, the defendant being a peer of the realm.

Catmur *v.* Knatchbull, bart. Mic. Ter 38 Geo 3 B.R 7 *Ter. Rep* 448.

Neither will the Court grant an attachment againſt a defendant for non-payment of a ſum of money under an award, if he be a member of the Houſe of Commons.

Fuller *v.* Prentice, Tr. Ter 28 Geo. 3. B.R. 1 *Hen. Black.* 49.

The whole of the neceſſary expences of witneſſes, as well of their going to the place of trial, as of their returning from it; and alſo during their neceſſary ſtay there, ought to be tendered to them at the time of ſerving the ſubpœna: and unleſs ſuch a tender has been made, the Court will not grant an attachment againſt a witneſs for not obeying a ſubpœna with which he has been ſerved.

The King *v.* Hall, Tr. Ter. 16 Geo 3 C.B. 2 *Black.* 1110.

The Court in this caſe, granted an attachment againſt the defendant for a contempt in cauſing one *Cameron* to be arreſted at his ſuit, *while he was attending arbitrators* on a reference under an order of *niſi prius*, made a rule of court; it being ſworn that this arreſt was on purpoſe to prevent him from being heard by the arbitrators, and thereby to obſtruct juſtice.

The King *v.* Phillips, Lucas, and Gibſon, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1564.

The Court granted a rule to ſhew cauſe why an attachment ſhould not iſſue againſt *Lucas* and *Gibſon* (who were two of Mr. Philips's clerks) upon affidavits which charged them with a moſt groſs miſdemeanor, in attempting to influence the jury, returned to try Mr. *Wilkes*'s cauſe, by ſending them ſeveral pamphlets and inflammatory papers, and actually preventing two of the jurors who had been ſummoned from appearing, by ſending an expreſs to them in the middle of the night preceding the day of trial, with a fictitious letter, ſigned, "Summoning Bailiff;" acquainting them "that the trial was put off," when in truth it was not put off, but did then come on.

The King, *v.* Wheeler, Mic. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1256. 1 *Black.* 311.

In this caſe, the defendant had referred a cauſe at *niſi prius* to arbitration, and conſented to abide by the award, and not to bring any bill in equity: after the award made, he moved the Court to ſet it aſide; but the Court thought there was no ground for this, but that it ought to be performed: afterwards he filed a long bill in chancery againſt the plaintiff in the

the original action, and alſo againſt the arbitrator; and the plaintiff thereupon moved for a rule to ſhew cauſe why an attachment ſhould not iſſue againſt him for bringing a bill in equity, contrary to the rule of court, and it was granted: the vacation then coming on, the defendant filed a ſupplemental bill, ſtating the motion for an attachment, and praying an injunction and relief, the plaintiff here (defendant in equity) pleaded in bar the rule of this court; which was allowed: upon ſhewing cauſe againſt the attachment, the Court, from abundant indulgence, heard a ſecond time, every thing which could be ſaid to impeach the award: but they continued of their firſt opinion in ſupport of the award, and made the rule for the attachment abſolute. He was taken up upon the attachment, and interrogatories were filed; he was examined; and the interrogatories and examination were referred to the maſter of the crown office: the maſter's report was moved for *upon the laſt day of the term*; and although it was objected that this was irregular, as it could not be moved on the laſt day of the term, without the previous leave of the Court, yet as the affidavit ſtated all the particular facts, *The Court* ſaid, that in a caſe ſo extraordinary as this, the contempt being every day increaſing, the Court would diſpenſe with the rule: however, as it appeared that the defendant was not ſerved perſonally with notice of this motion, the Court, for that reaſon only, refuſed the motion: afterwards the maſter reported him in contempt. Afterwards, upon his being driven to the brink of commitment, he was forced to ſubmit; and upon being brought up to receive the judgment of the Court, it was referred to the maſter to inquire, whether he had procured the bill in chancery to be diſmiſſed, and alſo to liquidate and aſcertain the coſts; and the Court adjourned the conſideration of the judgment for his contempt, until after the maſter ſhould have made his report; immediately after the rule, the defendant diſmiſſed the bill, and paid 87l. 4s. coſts. All this being now laid before the Court, nothing remained, according to the ordinary courſe of proceeding, but for the Court to have paſſed judgment upon him for his contempt. But THE COURT was unwilling to puniſh him further, by fine and impriſonment, as he had ſmarted ſeverely, and yet as his contempt was ſo obſtinate, they did not care that a ſlight ſentence ſhould ſtand upon their records; therefore they waived giving judgment, by conſent, and only made a rule that the recognizance ſhould be diſcharged.

In this caſe, the Court granted an attachment againſt a bailiff, for refuſing to make an affidavit of the ſervice of a ſubpœna upon one *H. L.* to appear and give evidence before a grand jury, in order to found a motion for an attachment for his not appearing: for, *Per Cur.* A bailiff is an officer

a The King v. Rudge, Tr. Ter. 3 Geo 3. B.R. 1 *Black.* 432.

of the court; and if ſuch refuſals were juſtifiable, and it was left to the bailiff's option to prove or not to prove the ſervice at his pleaſure, parties who apply for juſtice would be in a very unſafe ſituation.

Gordon *v.* Powis, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 781.

But the delivery of notice of action purſuant to a penal ſtatute is no commencement of a ſuit, ſo as to ſubject the plaintiff or his agent to an attachment for miſbehaviour previous to the ſuing out of the writ: in this caſe, an attachment was moved for againſt one *M. C.* for an attempt to compound an offence againſt a penal ſtatute, contrary to the ſtat. 18 *Eliz.* The motion was grounded on an affidavit, which ſtated, that *M. C.* gave due notice that the defendant would be ſued for certain penalties: and in a private letter added, that this might be prevented by paying 5l. *De Grey*, Ch. J. and the judges *Gould* and *Nares* (contra *Blackſtone*, J.) thought the attachment would not lie; becauſe when the letter was wrote, no action was commenced. Rule refuſed.

The King *v.* Lewis, Tr. Ter. 28 Geo. 3. B.R 2 *Ter. Rep.* 617.

The Court will not grant an attachment againſt a ſheriff for neglecting to take a replevin bond; becauſe the party injured may maintain an action; and it cannot by any means be conſtrued to be an abuſe of the proceſs of the Court, or a contempt, which are the ſole grounds for an attachment.

Andrews *v.* Sharp, Tr. Ter. 13 Geo. 3. C.B. 2 *Black.* 911.

The Court, in this caſe, granted an attachment, in the firſt inſtance, againſt the coroners of Middleſex for not attaching the ſheriff, againſt whom an attachment directed to the coroners had iſſued, for not bringing in the body of the defendant purſuant to a rule of this Court: and the attachment was ordered to be directed to *eliſors*, to be named by the plaintiff, and approved by the prothonotary.

The K. *v.* Peckham, Tr. Ter. 18 Geo. 3. C.B. 2 *Black.* 1218.

The like was alſo done in another caſe, purſuant to the precedent in the above caſe of *Andrews* v. *Sharp*.

Davies *ex dem.* Povey *v.* Doe, Ea. Ter. 13. Geo. 3. C.B. 2 *Black.* 892.

An attachment was granted in the firſt inſtance againſt a tenant in poſſeſſion, on affidavit that he had been ſerved with a rule of Court made abſolute for delivering up the poſſeſſion, and had refuſed ſo to do.

The King *v.* the Sheriff of Middleſex, Hil. Ter. 29 Geo. 3. B.R 3 *Ter. Rep.* 133.

In this caſe, it was held, that a motion for an attachment in the courſe of a civil ſuit, ought to go on the crown ſide of the Court, and the affidavits be intitled, "the king againſt the party to be attached."

Wood *v.* Webb, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 253.

But afterwards, on enquiring of the officers of the court, the practice was found to be otherwiſe: and in this caſe the Court declared the rule to be, that *till the attachment iſſues*, every thing muſt paſs on the civil ſide of the Court: and *afterwards* on the crown ſide.

The King *v.* Sheriff of Middleſex, Mic. Ter.

In this caſe, the affidavits to ſet aſide an attachment were intitled, "the *K.* v. the ſheriff Middleſex;" and it was objected,

ed, that as in point of fact *the attachment had not iſſued*, the af- 38 Geo. 3. B.R.
fidavits ought to have been intitled in the original cauſe, ac- 7 *Ter. Rep.* 439.
cording to *Wood* v. *Webb*. But *the Court* ſaid, that as the attachment had been granted, the affidavits were properly intitled.

The defendants being charged with a contempt, it was moved that they might come in perſonally and acknowledge the contempt; without anſwering the interrogatories which were exhibited againſt them. BUT the Court were clear that this motion ought not to be granted, if oppoſed (as it was by Sir *Fletcher Norton* and others). The attachment is meſne proceſs to bring the party into court, to anſwer to interrogatories to be exhibited: and there is no charge: there is nothing to plead guilty to till the interrogatories are filed: neither are they in contempt till reported ſo: when the interrogatories are filed, if you will then come in and confeſs the matter charged therein, you are at liberty to do ſo, but not before: if improper interrogatories are adminiſtered, the party may refuſe to anſwer them, but we give no opinion as to the mode of refuſal: there is a difference between an attachment for non-payment of coſts and the like, which is in the nature of an execution, and one for an actual contempt, which is only to compel an appearance. The King v. Edwards and Symonds, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2105. 1 *Black.* 637.

But the caſe of a reſcue differs from moſt other contempts; in this, that here the whole fact is acknowledged, and cannot be made more certain than it is by anſwering to any interrogatories: the caſe would be the ſame, if an attachment were to iſſue for a contempt in the face of the Court: the Court, in ſuch caſes, wants no farther information. In this caſe, therefore, which was an attachment iſſued againſt the defendant, of courſe upon the return of *a reſcue* by the ſheriff of Wilts, the Court gave the defendant leave to come in and ſubmit to a fine, without anſwering interrogatories: becauſe no denial by him, upon ſuch examination, could excuſe him, after having been returned guilty of a reſcue by the ſheriff, as it would be giving an opportunity to traverſe the return, which in the caſe of *a reſcue returned* cannot be allowed. The King v. Elkins, Mic. Ter. 8 Geo. 3. 1 *Black.* 640. 4 *Burr.* 2129.

However, when a defendant is brought up on an attachment for reſcuing perſons arreſted on a warrant for obſtructing exciſe-officers, it is the invariable practice of the Court to put the defendant to anſwer interrogatories, unleſs the proſecutor waive putting them, and in that caſe the Court will paſs judgment. The King v. Horſley, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 362.

It is contrary to the general courſe and practice of the Court to give coſts to perſons who purge themſelves of contempt upon their examinations, in conſequence of attachments which have been granted againſt them by the Court, on cauſe ſhewn; yet if it clearly appear to the Court, that the The King v. Plunkett, Ea. Ter. 2 Geo. 3. B R. 3 *Burr.* 1329.

the profecutor muſt, within his own knowledge, have been ſatisfied that his complaint is ill-founded and vexatious, they will order the profecutor to pay coſts.

The King *v.* Hall, Tr. Ter. 16 Geo. 3. C B. 2 *Black.* 1110.

The defendant being arreſted on an attachment, gave notice of bail for the following day: and it was objected that this was not ſufficient notice, not being two days, according to the rule of Court: BUT the Court held, that the rule did not extend to criminal caſes, but it was diſcretionary. Reaſonable notice is ſufficient, and theſe bail live in Holborn: nor in criminal caſes, is any juſtification neceſſary: the bail, therefore, *entered* into recognizances of 20l. each, and bailed the defendant.

The King *v.* Stokes, Tr. Ter. 14 Geo. 3. B.R. *Comp.* 136.

One in cuſtody upon an attachment for non-payment of coſts under the ſtat. 5 & 6 *W.* and *M.* c. 11. § 3. may be diſcharged under the Lords' Act, 32 *Geo.* 2, c. 28. § 13.—The defendant had been convicted of an aſſault, and ſentenced to four months impriſonment, which were expired; but he was continued in cuſtody on an attachment for non-payment of coſts taxed, purſuant to a recognizance entered into by him, on his removal of the indictment from the quarter-ſeſſions. It was moved, that he might be diſcharged under the Lords' act. *Per Cur.* It has long ſince been ſettled, that an attachment for non-payment of coſts is an execution in a civil ſuit; in the preſent caſe, the contempt has no relation to the offence committed by the defendant, which as far as public juſtice is concerned, has been ſufficiently purged by the impriſonment he has ſuffered; but it ariſes upon an act of parliament, 5 & 6 *W.* and *M.* c. 11. which directs "the coſts in theſe caſes to be taxed by the maſter, and unleſs paid within ten days after demand, an attachment to "iſſue." This ſtage of the cauſe is therefore merely of a civil nature, and a matter ſolely between party and party, unconnected with the offence itſelf: therefore as the attachment is an execution for the debt to the party, whether the coſts are taxed by the maſter of the crown-office, or on the civil ſide, the defendant is equally intitled to his diſcharge, if not the conſequence muſt be impriſonment for life, for a general pardon would not extend to him, becauſe the king cannot by a general pardon releaſe a civil debt; and no other alternative is open: the ſtatutes were made in favour of the liberty of the ſubject, and ought always to receive a liberal conſtruction.

The King *v.* Ireland, Mic. Ter. 30 Geo 3. B.R. 3. *Ter. Rep.* 512.

And as the words of the ſtat. 5 *W.* & *M.* c. 11. § 3. are *with ten days*, it has always been underſtood by the Court to mean that the ten days muſt elapſe before the attachment can be granted; otherwiſe, inſtead of the indulgence of the ten days ſuppoſed to be offered by the legiſlature, the party would be liable to an attachment immediately after a demand and refuſal.

Attachment, Foreign.

IN an action by an adminiſtratrix, for goods ſold and delivered by the inteſtate, on the general iſſue pleaded, the defendants gave in evidence, the payment of a ſum of money to one *J. Anſon*, in conſequence of a judgment obtained by him upon a foreign attachment in London, by producing a copy of the minutes of the proceſs on the foreign attachment by the officer who executed that proceſs: and there was a verdict, by conſent, for the plaintiff, with damages and coſts, ſubject to the opinion of the Court upon the report of the judge upon a motion for a new trial. The GENERAL QUESTION in this caſe was, Whether the evidence given by the defendants at the trial was a good and ſufficient defence to this action, which was brought by an adminiſtratrix for goods ſold and delivered by the inteſtate to the defendants? The defendant's whole evidence was no more than *the copy of minutes entered in a book* of the proceedings to judgment in the city-court on a foreign attachment, whereby *it did not appear that the plaintiff had any notice of the proceedings on the foreign attachment, or that ſhe was ever ſummoned to appear* in the city-court to anſwer to the plaint levied againſt her there by *J. Anſon*, or that ſhe had any notice thereof from the *Garniſhees*, the now defendants. From this GENERAL QUESTION, two particular points aroſe, 1ST, Whether in the caſe of an adminiſtrator, a debt due to the inteſtate can be attached by foreign attachment, by the cuſtom of London? or, Whether there is any ſuch cuſtom in fact? 2DLY, If there be ſuch cuſtom, Whether that cuſtom is good in point of law? or, Whether the *Garniſhees*, the defendants, can avail themſelves thereof, without notice given to the adminiſtrator to appear? The caſe was argued on two ſeveral days: on the firſt, *De Grey*, Ch. J. ſaid, cuſtoms of particular cities may deviate from the courſe of the common law, but a cuſtom contrary to the firſt principles of juſtice can never be good: ſo this cuſtom, *not to ſummon*, or give notice to a defendant in a ſuit commenced againſt him, is contrary to the firſt principles of juſtice, and (in my opinion, as at preſent adviſed) cannot be good. The colonies abroad cannot make a law contrary to the law of England, but they may make any law agreeable thereto, and to the

Fiſher v. Lane, Tr. Ter. 12 Geo. 3. C.B. 3 *Wiſ.* 297. 2 *Bl.* 834.

the principles of juſtice; but not contrary to the principles of juſtice. If an adminiſtrator be held to bail in London, he ſhall be admitted to a common appearance, upon removing the cauſe into this court by *habeas corpus*; but that creates expence and trouble. After the ſecond argument, *De Grey*, CH. J. delivered the opinion of the Court, after noticing the points made at the bar, as follows:—As to the cuſtoms of London, they may either be aſcertained by a jury, or certified to the Court by *the mouth of the recorder*; yet if the cuſtom be againſt law, it is void. But admitting there is ſuch a cuſtom in fact, as is now inſiſted upon by the defendants, and alſo that the ſame is a good and valid cuſtom in point of law, yet there is another queſtion in this caſe; and that is, whether there appears upon the ſtate of this caſe to be ſuch a judgment upon the foreign attachment as will authorize the payment of this money to *J. Anſon*; for if the judgment be erroneous, it will not warrant the payment: the now plaintiff reſiding in the city of London, is ſued in London by proceſs of which ſhe has no notice, and does not appear, whereupon the officer attaches the money of her inteſtate in the hands of the now defendants; that is to ſay, he attached the plaintiff by the debt owing to her by a third perſon; that is, the officer diſtrains her to appear: if ſhe appear, there is an end of the foreign attachment: it is like the proceſs in the courts at Weſtminſter, by way of diſtraining iſſues to compel an appearance. The evidence of this judgment on the foreign attachment, conſiſted only of minutes taken from a book kept for that purpoſe; and thoſe minutes, which the officer read from a paper in his hand, were the only evidence of the judgment: and this being all, the judgment is erroneous; it is ſaid to be for the default of the now plaintiff's appearance; but ſhe made no default, for it appears ſhe never was ſummoned, or had notice, which is contrary to the principles of juſtice. *Per Cur.* Judgment muſt be entered for the plaintiff.

Grant v. Hawding, Hil. Ter 7 Geo. 3. B R. 4 *Tur. Rep.* 313. (n. a.)

Where a cauſe had been referred to an arbitrator, by an order of *niſi prius*, who awarded a ſum to be paid by the defendant to the plaintiff on a certain day; and at that day ſome of the creditors of the plaintiff attached the debt in the defendant's hands, and he paid the money to the creditors: *the Court* reſolved, that the rule of *niſi prius* having been made a rule of Court, that this muſt be conſidered as a ſum of money ordered to be paid by the Court, and ſo could not be attached. Per LORD *Mansfield*, CH. J. The proceedings in the city-court are erroneous; and the defendant cannot be allowed any thing in reſpect of the ſums paid upon the city-proceſs, but he muſt pay the whole to the plaintiff, without prejudice to his recovering the money back again from the perſons to whom he has paid it.

So,

So, where it appeared on a motion for an attachment for not paying a ſum of money purſuant to the maſter's *allocatur*, that a judge's order had been made to tax the plaintiff's attorney's bill (the plaintiff undertaking to pay what was due), and that the maſter's *allocatur* amounted to 30l.: but before the attorney had demanded the money, a creditor of his attached it in the plaintiff's hands: *The Court* were clearly of opinion that it could not be attached; for this was a judicial act. Coppell *v.* Smith, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 312.

In an action for goods ſold and delivered, the defendant pleaded, 1ſt, non-aſſumpſit; 2dly, a plea of foreign attachment in the mayor's court of London: the plea ſtated the cuſtom to be, "*that if any perſon be indebted to any other perſon within the ſaid city, &c.*" and the allegation was, that one *W. L.* in the ſaid court (1) *affirmed a certain plaint againſt the ſaid* Samuel (the now plaintiff) *in a plea* of debt, &c.; and that the ſaid *W. L.* &c. [ſtating the ſubſequent proceedings.] To this plea there was a ſpecial demurrer, for that it amounted to the general iſſue. In ſupport of the demurrer it was argued that the plea was bad, becauſe it neither averred that the defendant in the foreign attachment was indebted to the plaintiff, nor that the debt aroſe within the city. In anſwer to the objection, that there was no averment of a debt due from the defendant, it was urged, that ſuch an averment is not material; where, as in the preſent caſe, there are three parties in the attachment; for the proper point to be put in iſſue then is, whether the *Garniſhee* has money or effects of the defendants in his hands: where indeed the plaintiff and the *Garniſhee* are one and the ſame perſon; then it is highly reaſonable, that he ſhould ſhew the conſideration of the judgment of which he himſelf is to have the advantage, by gaining a priority over other creditors. *The Court* ſeemed to admit the diſtinction made between the caſe of the *Garniſhee* being a third perſon, and that of the plaintiff attaching a debt in his own hands, as to the neceſſity of averring the exiſtence of the original debt: but they were clearly of opinion, as the defendant had ſtated the cuſtom to be, that "*if any perſon be or hath been indebted, &c.*" it ought to have been ſtrictly purſued; and therefore that the plea was bad for want of ſuch an averment: but leave was given to amend. Morris *v.* Lud. lam. Mic. Ter. 35 Geo. 3. C.B. 2 *Hen. Black.* 362.

(1) Without averring that the plaintiff was indebted to *W. L.*

Attorney.

Fletcher's caſe, Hil. Ter. 11 Geo. 3. C.B. 2 *Black.* 734.

What perſons may be admitted.

FLETCHER was, by an article *not ſtamped*, on 6th Auguſt, 1760, articled to an attorney of Yorkſhire (in whom the father, who was a tradeſman, entirely confided), for three years and an half, to ſerve him as a clerk, and to do his other work: on 6th February, 1764, he left his maſter, and lived as a clerk with an attorney in London for two years, but was not articled: from thence he went to another eminent attorney; and afterwards, from Trin. 1767, to Michaelmas 1768, lived as principal clerk to a Mr. *Search*, at a ſalary of ſixty guineas *per annum*, and was intruſted with all his buſineſs; 29th June, 1767, he was articled to an attorney for an year and an half, and ſerved the ſame. This caſe being fully verified by affidavits, THE COURT, viz. *De Grey*, CH. J. and *Gould*, *Blackſtone*, and *Nares*, Juſtices, thought there was ſomething ſo very ſpecial in the circumſtances, the eſſential parts of the duty required by the ſtatute being performed, that to deny an admiſſion would be puniſhing the ſon for the confidence repoſed in the firſt maſter by the father; and therefore though they declared that this ſhould be no precedent for ſupineneſs, they directed him to be admitted; the articles being previouſly ſtamped.

Carter's caſe, Tr. Ter. 14 Geo. 3. C.B. 2 *Black.* 957.

So, where one Carter was articled on 25th March, 1755, as a clerk to an attorney for five years: and an affidavit of the execution of thoſe articles was regularly filed, and now produced, the articles themſelves being loſt: and it further appeared, that at the end of a year and an half he left his maſter by conſent, on account of his inattention to buſineſs, and then ſerved another attorney, but without articles for nine months, after which he ſerved another attorney for ſeveral years, and then another, to whom he was at length, in 1771, articled for three years and an half, which he duly ſerved. THE COURT, conſidering that this man had been educated in the profeſſion for a courſe of nineteen years, had been regularly articled for five years originally, and afterwards for three years and an half to make up the deficiency of his firſt ſervice; and that the intermediate time had been ſpent in the ſame manner as if he had been under articles—thought it a caſe of equal hardſhip with that of *Fletcher*, and directed him to be admitted an attorney.

Blunt

Blunt had been fourteen years a writer to attornies, and had tranſacted the buſineſs of two attornies, Meſſrs. *K.* and *A.* as their third clerk, with great aſſiduity and ability: for the laſt five years, he was privately articled to *A.* and during that time received no wages from him, but continued to receive wages from *K.* to whom the articles were a ſecret: he uſually worked from fourteen to eighteen hours a day, and did all *A*'s buſineſs without any neglect of *K*'s, and lodged in his own houſe with his wife and family; after he was admitted, a motion was made to ſtrike him off the roll, as having been colluſively and irregularly articled to *A.* THE COURT were of opinion, That, upon all the circumſtances, the articles and ſervice were ſufficiently regular, and therefore diſcharged the rule. Blunt's caſe, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 764.

But in this caſe, where an application was made to ſtrike *Hill* off the roll, on the ground of his not having ſerved a regular clerkſhip; and upon ſhewing cauſe, the facts appeared to be theſe: previous to the year 1791, he ſerved as a writer to an attorney, living at Birmingham: in January, 1791, he articled himſelf to *Hughes*, an attorney, who then lived ſeven miles from Birmingham; but as *Hughes* was about removing thither, and as moſt of his buſineſs lay there, it was conſidered more convenient for *Hill* to remain where he was, till *Hughes* ſettled at Birmingham, which he accordingly did, and continued to write for his old maſter for ten months after he was ſo articled to *Hughes*; but during that time he alſo occaſionally did *Hughes*'s buſineſs in Birmingham; and at the end of the ten months, when *Hughes* removed to Birmingham, *Hill* went and reſided with him altogether. PER CUR. The act 2 *Geo.* 2, c. 23. prohibits any perſon to be admitted an attorney, unleſs he ſhall have been bound by contract in writing, to ſerve as a clerk to an attorney for five years, and ſhall have continued in ſuch ſervice for the ſaid term of five years; now if this kind of ſervice were deemed ſufficient within the act, why might not a ſervice with a perſon of any other occupation, by the conſent of the maſter to whom he was articled, be deemed ſufficient? It is true that in the preſent caſe, *Hill* might have been improving himſelf as much in his profeſſion, as if he had ſerved his own maſter, but as the act requires him to have ſerved the perſon to whom he was bound, and to *have continued in ſuch ſervice for five years*, he cannot be ſaid to have done ſo during ten months of the time, when he was ſerving another perſon at the diſtance of ſeven miles. However hard the caſe may preſs on this individual, we muſt not make the law bend to our wiſhes, but muſt ſee that there has been ſuch a ſervice as the act requires, but that does not appear to have been performed in this inſtance. Rule abſolute. *Ex parte Hill*, Hil. Ter. 38 Geo. 3. 7 *Ter. Rep.* 456.

As

Medowcroft v. Holbrooke, Tr. Ter. 28 Geo. 3. C.B 1 *Hen. Black.* 50.

As it is not neceſſary under the ſtat. 2 *Geo.* 2. c. 23. that an attorney ſhould be admitted in the ſame court in which he occaſionally acts; that ſtatute allowing an attorney admitted in one court of law, to act in another, by conſent of an attorney of that other: ſo alſo a ſolicitor admitted and inrolled in chancery, is in like manner entitled to practice on the equity ſide of the exchequer; but a conſent is unneceſſary in courts of equity, where the proceedings are in the names of clerks in court.

Cole's caſe, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 114.

If an attorney is ſtruck off the roll on his own application, and afterwards called to the bar, the court will not give him leave to be again put on the roll; there being no inſtance of a barriſter being admitted an attorney; he muſt firſt apply to his ſociety to be diſbarred.

Brounſall's caſe, Tr. Ter. 18 Geo. 3. B.R. *Cowp.* 829.

If an attorney be convicted of felony, the Court will ſtrike him off the roll, though he has been burnt in the hand, and ſuffered impriſonment purſuant to his ſentence. Per Lord *Mansfield*, We have conſulted all the judges, and they are unanimouſly of opinion, that the defendant's having been burnt in the hand, is no objection to his being ſtruck off the roll; and it is on this principle, that he is an unfit perſon to practice as an attorney; it is not by way of puniſhment, but the Court in ſuch caſes exerciſe their diſcretion, whether a man whom they have formerly admitted, is a proper perſon to be continued on the roll or not.

Ex parte Hill and Hargrave, Ea. Ter. 15 Geo. 3. C.B. 2 *Black.* 991.

On an affidavit of the due execution of certain articles, bearing date 10th October, 1769, whereby *Hill* was bound to *Hargrave*, and upon *Hill*'s affidavit of a due ſervice under ſuch articles, he was admitted an attorney: afterwards it appeared by the affidavit of another attorney, of the name of *Leiceſter*, that *Hill*, on 11th October, 1773, was an apprentice to a hatter, and then being releaſed from his apprenticeſhip, was articled to *Leiceſter* as his clerk, for ſeven years: that ſome time afterwards he abſconded from his ſervice, and procured himſelf to be admitted as above: on a rule to ſhew cauſe, why *Hill* ſhould not be ſtruck of the roll, and an attachment go againſt *Hargrave* for colluſion; *The Court*, after cauſe ſhewn, made both rules abſolute.

Macpherſon v. Roriſon, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 216, 217.

The authority of an attorney.] A party in a cauſe cannot change his attorney without the leave of the court, therefore in this caſe, the defendant having given eight notices of juſtification of bail, and four of them in this term by four different attornies, and without having obtained leave of the court to change his attorney: *The Court* (the juſtification being oppoſed on this ground) would not permit the bail to juſtify; but they refuſed to allow the coſts of enquiring after ſo many bail, though it were mentioned to be the rule in the common pleas to allow coſts in ſuch caſes.

So in the court of common pleas, where the defendant had changed his attorney without leave of the court, and gave notice of juſtifying bail by his new attorney; it was held irregular, and that the plaintiff was not bound to accept ſuch notice. Kaye *v.* De Mattos, Mic. Ter. 20 Geo. 3. C.B. 2 *Black.* 1323.

Payment of the debt to an agent in the country, employed to ſue the defendant, by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney is. This was an action on a note of hand; the plaintiff's attorney in town, ſent the note to an attorney at Coventry, to demand payment of the defendant; and on default, he ſent him down a writ, upon which the defendant was held to bail: the agent in the country afterwards got an aſſignment of the bail bond to the plaintiff, and ſome time afterwards recovered the debt, and all the coſts incurred: the agent in the country not paying the money over to the plaintiff or his attorney, the bail was ſerved with proceſs and notice of declarations on the bail bond: a rule was obtained, calling on the plaintiff to ſhew cauſe, why the proceedings on the bail bond ſubſequent to the payment of the debt and coſts by the defendant, ſhould not be ſet aſide with coſts, and all further proceedi gs ſtayed. *Per Cur.* (after cauſe ſhewn) An agent employed to ſue, is not, therefore, authorized to receive payment: it was formerly doubted, whether payment to the attorney was payment to the party, though it is now ſettled to be ſo. The agent not having made any exculpatory affidavit, an abſolute rule was made, that upon payment by the defendant of the debt and coſts (the coſts of this application excepted) to the plaintiff, all further proceedings ſhould be ſtayed: and that the agent ſhould pay the debt and coſts to the defendant, and alſo the plaintiff's coſts of this application to him, on or before the 1ſt of March, otherwiſe an attachment to iſſue againſt him. Yates *v.* Freckleton, Hil. Ter. 21 Geo. 3. B.R. 2 *Doug.* 622.

In what caſes compellable to give evidence.] A ſubpœna to appear before the grand jury, and give evidence upon an indictment for forgery, had been ſerved on the defendant (who was an attorney) with a *duces tecum* of certain papers belonging to his client *Peach*, who had produced them before a maſter in chancery as vouchers to his account, and which were returned to the defendant as his ſolicitor: the defendant did not appear before the grand jury in obedience to this ſubpœna, and a rule to ſhew cauſe, why an attachment ſhould not iſſue againſt him was obtained. *The Court* (after cauſe ſhewn) were clearly of opinion, That *Dixon* could give no other evidence, but of what had been communicated to him by his client *in confidence*; and therefore, he was not compellable to produce theſe papers againſt his client, in order to prove him guilty of a forgery: and that The K. *v.* Dixon, Ea. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1687.

inſtead of producing them againſt his client, he ought to have, immediately upon receiving the ſubpœna, delivered them up to his client.

Hooper v. Harcourt, Mic. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 534.

So, in this caſe, where the defendant had obtained a verdict; a rule was obtained to ſhew cauſe, why the plaintiff's attorney ſhould not inform the defendant's attorney of the place of abode of the plaintiff: but *The Court* were of opinion, That the application ought to have been made in a more early ſtage of the cauſe; and that it came too late after verdict: an attorney not being obliged to expoſe his client to be taken in execution. Rule diſcharged.

Doe *ex dem.* Jupp v. Andrews, Tr. Ter. 18 Geo. 3. B.R. *Coup.* 845.

But if a defendant's attorney, who is a ſubſcribing witneſs to an agreement upon which the plaintiff brings his ejectment, refuſe to give evidence of his atteſtation, upon being ſerved with a ſubpœna for that purpoſe, whereby the plaintiff becomes nonſuited, the court out of which the record iſſued, will on motion grant an attachment againſt him: for *Per* Lord *Mansfield*, by atteſting an inſtrument, a man pledges himſelf to give evidence of it whenever he is called upon; that he was attorney to the other ſide, is no reaſon for breaking his engagement with the plaintiff; an attorney has no privilege to refuſe to give evidence of material facts: an attorney has been obliged to prove his client's having ſworn and ſigned the anſwer, upon which he was indicted for perjury. The judge who tried the cauſe would have been warranted in committing this man, as he was preſent in court, and refuſed, though he has taken the more prudent method of leaving the matter to the Court.

Cobden v. Kendrick, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 431.

So an attorney is not reſtrained by any rule of law from giving evidence of a converſation between him and his client, touching the juſtice of his ſuit, after a writ of enquiry executed on an interlocutory judgment, and a compromiſe thereupon. An action had been brought ſome time before by the preſent defendant, as indorſee of a promiſſory note for 150l. againſt the preſent plaintiff as the maker; in which cauſe interlocutory judgment had been ſigned, and a writ of enquiry executed; after which the cauſe was compromiſed by *Cobden*'s paying part, and giving a warrant of attorney to confeſs judgment for the reſidue of the 150l. (1). Before this became due, *Kendrick* told *Allen*, who was his attorney in that ſuit, that he was glad it was ſettled, for that

(1) Another objection was taken at the trial, that this action was in effect to put the ſame ſum in litigation a ſecond time, which had been recovered in the former action by *Kendrick* againſt *Cobden*; but Lord *Kenyon* overruled it; on the ground that the money had been paid under a compromiſe, and not under the judgment of a court.

he

he had only given 10l. in caſh, and his promiſſory note for it, and that he knew it was a lottery tranſaction. This action was now brought to recover back the money ſo paid, on the ground of want of conſideration; and in proof that that was known to *Kendrick* at the time he took the note. *Allen* was called as a witneſs at the trial, and objected to; but Lord *Kenyon* admitted him; and a verdict paſſed for the plaintiff. Afterwards the ſame objection was taken on a motion for a new trial. *Per Curiam:* The difference is, whether the communication were made by the client to his attorney in confidence, as inſtructions for conducting his cauſe, or a mere *gratis dictum*. The former was not the caſe here; on the contrary, the purpoſe in view had been already obtained; and what was ſaid by the client was in exultation to his attorney, for having before deceived him as well as his adverſary, and for having obtained his ſuit. Rule refuſed.

But this privilege is confined to counſel, ſolicitors, and attornies, when acting in their reſpective characters, and cannot be extended to others though profeſſionally and confidentially employed. This action was brought againſt the defendant, to recover penalties upon the bribery-act, for bribing voters at the election for Newark-upon-Trent, by himſelf and his agents, among whom was one *W. Handley*. At the trial *W. Handley* was called as a witneſs, and examined as to certain letters which he had received from the defendant, which he had had notice to produce with his ſubpœna: he had them not, however, to produce, but gave this account of them; that as to part, he had reſtored them to the defendant before his ſubpœna; as to the reſt, he had given them to a Mrs. *Elizabeth Handley* at her deſire, with a direction to deſtroy them after ſhe had read them. That he had ſince endeavoured to procure them again, for the like purpoſe of deſtroying them, but ſhe had refuſed to give them up to him again; and he knew not whether they *were deſtroyed or not*. Two of theſe letters related to the ſubject of the election. The witneſs was then aſked the contents of theſe letters, but that was objected to, as the perſon in whoſe hands they were, might be called upon to produce the letters, or ſay what was become of them, and the objection was allowed. Mr. *B. Handley*, an attorney, was then called, who ſaid, that he had the letters in queſtion, which he had received from Mrs. *Handley*; and that Mr. *W. Handley* was at that time under a proſecution for bribery, and he wiſhed to render him what aſſiſtance he could. That Mrs. *H.* had deſired him to deſtroy the letters, but he ſtill kept them. That there was no action now depending againſt Mr. *W. H.* but the two

Wilſon v. Raſtall, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 753.

years were not yet expired. The letters were not (that he knew of) put into his hands with Mr. *W. H*'s privity; but he had kept them with his privity and consent. Mr. *W. H.* had indeed desired him to destroy them, but he had not done so, for the same reason as he had not complied with the like request from Mrs. *H.*; namely, that he had soon after the election stated, that Mr. *W. H.* acted only under the direction of Mr. *Rastall* in the election business. He further stated, that he was not then concerned in carrying on any suit for *W. H.* that he never was attorney in any action of indemnity, that he had been applied to by Mr. *W. H.* to be concerned, but had declined it, giving as a reason that he was under-sheriff and a material witness in the cause. That he had not employed *W. H.*'s attorney for him, but that *W. H. had consulted him in his profession as a confidential person; and had applied to him both before and after he had received the letters. He had desired the witness to consult with his attorney, which he had done, as well as with* W. H. *himself. The letters were communicated to him in consequence of the defendant's consulting him professionally.* The witness objected to produce the letters (1), and the learned judge thought he was not bound so to do. Mr. *W. Handley*, being then called up again, and asked as to the contents of those letters, refused to answer the question as tending to criminate himself, which objection was allowed by the judge. The plaintiff then went into other evidence (amongst which was parol evidence of those very letters) of the acts of bribery, which were strongly proved, and were not impeached by any contradictory evidence; the jury, however, found a verdict for the defendant. And a rule *nisi* was granted to shew cause, why there should not be a new trial, on the ground of mistake in the judge, in considering that *B. Handley* was bound by his character of attorney to withhold the letters required to be produced in evidence. Per Curiam (after argument), The doctrine of privilege was fully discussed in a case before Lord *Harwicke*. The privilege is confined to the cases of *counsel*, *solicitor* and *attorney*; but in order to raise the privilege, it must be proved, that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a *steward*, he may be examined. It is indeed hard in many cases, to compel a friend to disclose a confidential conversation, and it would be well

(1) It was understood and argued upon at the bar, and so assumed by the Court, that the objection made by the witness to the production of the letters, was on the foundation of his character of attorney, by which he conceived himself bound to withhold them.

it

if by law ſuch evidence could be excluded. It is a ſubject of juſt indignation where perſons are anxious to reveal what has been communicated to them in a confidential manner. The privilege of not being examined, is the privilege of the party, and not of the attorney, and that privilege never ceaſes at any period of time. In ſuch a caſe it is not ſufficient to ſay, that the cauſe is at an end; the mouth of ſuch a perſon is ſhut for ever. The diſtinction is now well ſettled, that the privilege extends to the three caſes enumerated at all times, but it is confined to thoſe caſes only. There are caſes to which it is much to be lamented, that the law of privilege is not extended; thoſe in which medical perſons are obliged to diſcloſe the information which they acquire by attending in their profeſſional characters. This point was very much conſidered in the Ducheſs of Kingſton's caſe, where Sir *C. Hawkins*, who had attended the ducheſs as a medical perſon, made the objection himſelf, but was overruled, and compelled to give evidence againſt the priſoner. The queſtion therefore here is, Whether *B. Handley* were privileged with reſpect to any perſon. As to *W. Handley*, he certainly was not; for he ſaid that the witneſs neither was, or could be his attorney, becauſe he was at that time acting as under-ſheriff. Neither was he privileged as to this defendant for the ſame reaſon; and though it was ſaid that the defendant (by *W. Handley*) conſulted him in his profeſſion as a confidential perſon, the meaning of that was, that as *B Handley* was more converſant with buſineſs of this kind, than thoſe who were not of his profeſſion, *W. Handley* conſulted him, but did not employ him as an attorney. But it was contended, on the part of the plaintiff, that ſuppoſing the witneſs were privileged in any action in which *W. Handley* was a party, the privilege did not extend to this action againſt *Raſtall*. But if he were privileged, ſo as not to be examined to particular points in any action againſt *W. Handley*, he could not prove the ſame facts in an action againſt any other perſon. For the nature of this kind of privilege is, that the attorney ſhall not be permitted to diſcloſe in any action that which has been confidentially communicated to him as an attorney. However, as *B. Handley* was neither the attorney of *W. Handley*, or of the defendant, he was improperly prevented from producing the letters in queſtion. Rule abſolute.

Privilege of an attorney in reſpect to liens.] Lord *Mansfield* in this caſe ſaid, That attornies cannot be compelled to deliver up the deeds and papers of their clients, till they are paid; but that the practice in that reſpect is not very ancient; that it was eſtabliſhed on general principles of juſtice, and that courts both of law and equity have now carried it ſo far, that an attorney or ſolicitor may obtain an

Wilkins *v.* Carmichael, Hil. Ter. 19 Geo. 3. B R. 1 *Doug.* 104.

order to ſtop his client from receiving money recovered in a ſuit, in which he has been employed for him, till his bill is paid. Sir *James Burrows* mentioned to the court, that the firſt inſtance of ſuch an order in this Court, was in the caſe of one *Taylor* of Eveſham, about the time of a conteſted election for that borough; and Lord *Mansfield* ſaid, he himſelf had argued the queſtion in the court of chancery.

Welſh v. Hole, Mic. Tr. 20 Geo. 3. B.R. 1 *Doug.* 238.

An attorney has a lien on the money recovered by his client, for his bill of coſts: if the money come to his hand, he may retain to the amount of his bill: he may ſtop it *in tranſitu*; if he can lay hold of it: if he apply to the Court, they will prevent its being paid over till his demand is ſatisfied: and Lord *Mansfield*, in this caſe ſaid he was inclined to go ſtill further, and to hold, that if the attorney gave notice to a defendant not to pay till his bill is diſcharged, a payment by the defendant after ſuch notice will be in his own wrong, and like paying a debt which has been aſſigned, after notice: but he thought that the Court could not go beyond theſe limits. Therefore, in this caſe, *where the plaintiff perſonally compromiſed the debt and coſts with the defendant for a leſs ſum, than was actually due*, and executed a releaſe: the defendant being called upon by a rule to ſhew cauſe why he ſhould not pay the plaintiff's attorney his bill of coſts: Lord *Mansfield* ſaid, the application went to the extent of controverting the validity of a payment of the whole debt and coſts to a plaintiff, without the privity of his attorney; and it would be too much to ſay, that a defendant ſhould not tranſact the buſineſs of a cauſe with the plaintiff himſelf, in a caſe, where there has been no notice not to do ſo, from the attorney, either expreſs or implied: nothing even like ſaying, "I have no ſecurity for my bill;" or "I ſhall never be paid unleſs the plaintiff recover in this action.—Rule diſcharged.

Griffin v. Eyles, Hil. Ter. 29 Geo. 3. C B. 1 *Hen. Black.* 122.

So alſo; an attorney has a lien for his bill of coſts, on money levied by the ſheriff, under an execution on a judgment, recovered by his client; and is entitled to have it paid over to him, notwithſtanding the ſheriff has had notice, from the party againſt whom the execution iſſued, to retain the money in his hands; and that the Court would be moved to ſet aſide the judgment for irregularity; and notwithſtanding a docket has been ſtruck againſt his client, who, after he recovered judgment, became a bankrupt.

Sir Richard Hughes v. Mayre. Ea. Ter. 29 Geo. 3. B R. 3 *Term. Rep.* 275.

A rule had been obtained, calling on *Mayre*, who was an attorney, to ſhew cauſe why he ſhould not deliver up on oath, to Sir *R. Hughes*, all the court rolls, deeds, papers, and writings, belonging to him or his eſtates; on Sir *R. Hughes giving ſuch* SECURITY *as the maſter ſhould approve of, to pay all money, that the maſter on reference to him, ſhould find to be due to* Mayre. It appeared that *Mayre* had been concerned for the

the original proprietor of theſe eſtates, in the character of ſteward and receiver; and had been continued in his employment by Sir *R. Hughes* to whom the original proprietor had deviſed them. This ſummary mode of proceeding was taken from the urgency of the caſe; for Sir *Richard Hughes* having been appointed to a command on the American ſtation, expected to receive ſailing orders every day, and was prevented from making any ſettlement of his affairs before his departure by the refuſal of *Mayre*; who refuſed not merely on account of his own demand, but alſo becauſe a Mr. *John Bedford* had a claim upon ſome part of theſe eſtates under the original proprietor's will. THE COURT ſaid, That the practice was not novel, as there was a caſe in *Strange* (*Strong* v. *Howe*, 1 *Stra.* 621. and 8 *Mod.* 339.) to the ſame effect; and that it was the practice of the common pleas to grant applications of this ſort. Accordingly, it was ordered, that the ſum of 300l. ſhould be paid into the maſter's hands by Sir *R. H.* out of which *Mayre*'s demands were to be ſatisfied, and that *Mayre* ſhould deliver the deeds, &c. into the maſter's hands at the ſame time: two days afterwards, on the maſter's report that the ſum of 300l. had been paid to him, and that the deeds, &c. had been depoſited in his hands, it was ordered, "that upon Sir "*R. H.*'s giving ſuch ſecurity as the maſter ſhould direct "to produce all ſuch parts of the title deeds, court rolls, and "other papers, now in the hands of the maſter, as relate to "the eſtates in which *John Bedford* is intereſted, to the ſaid "*John Bedford* or his attorney, for their inſpection, or in "any court, at the expence of the ſaid *John Bedford*, the "ſaid ſeveral deeds, &c. be delivered to the ſaid Sir *Richard* "*Hughes*, or his attorney."

In this action, the plaintiff recovered a judgment againſt the defendant for 182l. 10s. but the defendant having alſo recovered in another action againſt this plaintiff and another; obtained a rule to ſhew cauſe, why the debt and coſts in the latter ſhould not be ſet off againſt the judgment in the former action, ſuggeſting (among other reaſons) that *Mitchell* had abſconded: cauſe was ſhewn on behalf of *Mitchell*'s attorney in the firſt action; who contended, that as he was not continued as attorney in the other action, he had a lien for his coſts on the judgment obtained by his client. Lord *Kenyon*, CH. J. ſaid that this application did not depend on the ſtatutes of ſet-off, but on the general juriſdiction of the Court over the ſuitors in it; that it was an equitable part of their juriſdiction, and had been frequently exerciſed: as to the principal point, he obſerved, that the attornies and ſolicitors of the different courts have a lien on all papers in their hands, and judgments recovered, for their coſts; that in the court of chancery they were permitted to retain title-deeds for that

Mitchell v. Oldfield, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 123.

purpoſe; and he thought it right that the attorney in this caſe ſhould be ſatisfied for his coſts before the defendant was allowed to make the ſet-off. *Buller*, J. ſaid, that, though this Court have ſaid that they will not interfere on the behalf of the attorney, and prevent the plaintiff ſettling his own cauſe without firſt paying the attorney's bill: yet when the adverſe party, againſt whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is ſatisfied.—Rule abſolute, on defendant's undertaking to pay the attorney's bill, and on his entering a *remittitur* in the cauſe in which this defendant was plaintiff.

Morland v. Laſhly, Tr. Ter. 35 Geo. 3. B.R. 2 *Hen. Black.* 441. (n. a)

So, where there were two cauſes between theſe parties: and in the firſt the plaintiff obtained a verdict; and in the ſecond was nonſuited. A rule was obtained to ſhew cauſe why the coſts of the nonſuit ſhould not be deducted from the ſum given by the verdict in the firſt cauſe: on ſhewing cauſe, it was contended on the authority of *Mitchell* v. *Oldfield*, that the attorney for the defendant had a lien on the judgment for his coſts. In ſupport of the rule, the caſe of *Barker* v. *Braham*, which was decided in the Common Pleas (1) was cited; and it was attempted to diſtinguiſh the preſent caſe from *Mitchell* v. *Oldfield*, becauſe there were different attornies in the different cauſes in that caſe, but here the attorney was the ſame in both. But Lord *Kenyon* ſaid, that circumſtance made no difference between the caſes; and as to the caſe of *Barker* v. *Braham*, it did not there appear that any application was made on the part of the attorney: that an attorney had a lien on the judgment for his coſts, which it would be unjuſt in the Court to take from him. The rule therefore was made abſolute, with a reſervation of the attorney's lien.

Read v. Dupper, Tr. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 361.

So, in this caſe, the principal cauſe of action, which was for buſineſs done by the plaintiff for the defendant, was agreed to be referred to the maſter, who awarded a certain ſum to be paid to the plaintiff, together with coſts. The plaintiff afterwards threatened to take the defendant in execution, unleſs the money due to him was immediately paid; whereupon *the defendant's attorney, after notice from the plaintiff's attornies not to pay it to the plaintiff himſelf, becauſe their bill was not ſatisfied, paid the whole ſum to the plaintiff himſelf.* In conſequence of which, the plaintiff's attornies applied to this Court in the laſt term, and obtained a rule, calling on the defendant's attorney to ſhew cauſe why

(1) See page 714, infra.

it ſhould not be referred to the maſter to ſee what lien the plaintiff's attornies had upon the debt and coſts recovered in this action as againſt the plaintiff himſelf, and why the defendant's attorney ſhould not pay over that ſum to the plaintiff's attornies. *Per Cur.* (after cauſe ſhewn) The principle by which this application is to be decided was ſettled long ago, namely, that the party ſhould not run away with the fruits of the cauſe without ſatisfying the legal demands of his attorney, by whoſe induſtry, and in many inſtances, at whoſe expence, thoſe fruits are obtained. If indeed the money had been paid over *bona fide* to the plaintiff, before notice from his attorney of his lien, ſuch payment would have been good; but here the payment was made in violation of the notice, which cannot be ſuffered. In *Welch* v. *Hole*, Lord *Mansfield* compared this to the caſe of an aſſignment of a choſe in action, which indeed in legal ſtrictneſs cannot be done; but ſtill, according to the rules of equity and honeſt dealing, if the aſſignee give notice to the debtor of ſuch aſſignment, he ſhall not afterwards be ſuffered to avail himſelf of a payment to the principal in fraud of ſuch notice.—Rule abſolute.

So alſo, in this caſe, where a rule was obtained to ſhew cauſe why the maſter ſhould not, upon taxation of the coſts in this cauſe, ſet off the ſum of 37l. 3s. 6d. againſt ſuch coſts as ſhould upon taxation be found due from the defendant to the plaintiff; and if more ſhould be found due to the plaintiff than that ſum, then why upon payment of the balance execution ſhould not be ſtayed. This was founded upon an affidavit, ſtating, that the above-mentioned ſum was due from the plaintiff to the defendant upon a judgment in a former action; and that the plaintiff had already received part of his debt under an execution. *Cauſe was ſhewn upon an affidavit of the plaintiff's attorney, claiming a lien upon the coſts and damages recovered in the preſent action, and requiring to have ſuch lien, which amounted to more than the ſum demanded by the defendant to be ſet off, ſatisfied in the firſt inſtance*; and ſtating further, that the plaintiff had abſconded, and that the attorney had no other ſecurity for his bill than the coſts and damages recovered. In ſupport of the rule, the principle that has been laid down in the court of common pleas, in the caſes which will be hereafter noticed, viz. that the attorney has only a lien ſubject to the equitable claim againſt his client, was inſiſted upon: but Lord *Kenyon*, Ch. J. ſaid, It had been expreſsly determined in *Mitchell* v. *Oldfield*, that the attorney had a general lien on the coſts and damages recovered, without any ſuch reſtriction as was now attempted to be put upon it; and that upon the reaſon and juſtice of the caſe he could find no ground to impoſe ſuch a reſtriction. *That whatever might be the prac-*

Randle v. Fuller, Mic. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 436.

tice

tice in the Court of Common Pleas, he was glad to find that his opinion was warranted by the ſettled practice of this court.— Rule diſcharged.

BUT the eſtabliſhed rule laid down by THE COURT OF COMMON PLEAS, in a number of caſes decided there, is different from that in the court of king's bench, the court of common pleas having uniformly decided, that an attorney has only ſuch a lien on the coſts as is ſubject to the equitable claim of the parties in the cauſe.

Barker *v.* Braham, Hil. Ter. 13 Geo. 3. CB. 3 *Wilſ.* 396. 2 *Black.* 869.

Thus, in this caſe, the plaintiff having recovered a judgment for 106l. againſt the defendant: and the defendant in another cauſe having recovered againſt the plaintiff 102l. and both being entitled to execution: the Court was moved on the behalf of the defendant, that execution might be ſtaid in this cauſe, upon her being ready and willing to ſet off her judgment for 102l. againſt the plaintiff's judgment for 106l, and to pay to the plaintiff the balance. PER CUR. If *A.* owed *B.* 100l. and *B.* owed *A.* 100l. ſtoppage was no payment at law, nor in equity, unleſs under ſpecial circumſtances, and in caſe of mutual demands where the balance only was the debt, and then equity interpoſed to make ſtoppage a payment, to prevent circuity of action, and multiplicity of ſuits, which is not favoured at law, much leſs in equity. But there was not any legal interpoſition of this kind, till the 4 & 5 *Ann.* c. 17. § 11. 5 *Geo.* 1. c. 24. § 11. and 5 *Geo.* 2. concerning bankrupts: whereby mutual debts are allowed to be ſet one againſt another. The ſtat. 2 *Geo.* 2. c. 22. and 8 *Geo.* 2. c. 24. alſo relate to the ſet-off of mutual debts; and allow a ſet-off to be pleaded or given in evidence at the trial. The courts have gone a little further than the letter of the ſtatutes, by the rule of analogy, in caſes within their power: coſts have been long ſet off againſt coſts; and in *Barnes* and *Craſter*, the Court allowed coſts to be ſet off againſt debt and coſts. The preſent caſe goes a ſtep further, it is an application to us to reſtrain and narrow our own proceſs of execution, by the ſame equitable rule. Doubtleſs this judgment in the king's bench might have been pleaded or given in evidence: but that is no reaſon why we ſhould not allow it now; and no miſchief can follow from allowing it; no devaſtavit can happen unleſs the plaintiff *Barker*, who is an adminiſtratrix, knows of any ſuperior debt; and if ſhe knows it, ſhe might diſcloſe it, and ſhew it for cauſe: we are all therefore of opinion, that this application to the Court to narrow its own execution, is very reaſonable; and that there can be no real and ſolid objection to it in point of law, juſtice, or equity. There can be no claſhing of juriſdictions in this caſe, for we do not meddle with the proceſs of any Court, but our own. Therefore, let one judgment be ſet off againſt the other, and the rule be made abſolute

for

for that purpoſe, and for the defendant to pay the balance of £. due to the plaintiff.

So, alſo in this caſe, which was treſpaſs for breaking and entering the plaintiff's houſe, the defendants *Lett* and *Byrne* had ſuffered judgment to go by default, and the damages were aſſeſſed at one halfpenny each: *Noble* went on to trial, and obtained a verdict: on this a rule was obtained to ſhew cauſe why the coſts which might be taxed againſt *Lett* and *Byrne*, on the judgment by default, and damages aſſeſſed, ſhould not be deducted out of the coſts taxed to *Noble* on the *poſtea*, and allowed to the plaintiff; and in the mean time execution againſt them ſtayed; and *The Court*, after cauſe ſhewn, held that *the attorney could only have ſuch a lien on the coſts as was ſubject to the equitable claims of the parties in the cauſe*; and therefore made the rule abſolute. Schoole *v.* Noble, Lett and Byrne, Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 23.

So, where the plaintiff brought two ſeveral actions againſt the defendants *N. M.* and *H. M.* and other underwriters, on two policies of inſurance, both underwrote by the ſame parties, and the actions on each were conſolidated, *N. M.* being made defendant in one action, and *H. M.* in another: the plaintiff afterwards becoming intitled to coſts in the firſt action; and in the latter, liable to pay coſts: and the coſts of the firſt action having been taxed and allowed to the plaintiff, a rule was granted to ſhew cauſe why the prothonotary ſhould not review his taxation, and why the coſts which ſhould be taxed and allowed to the defendant in the ſecond action ſhould not be ſet off againſt thoſe taxed and allowed to the plaintiff in the firſt. It was urged that theſe coſts could not be ſet off conſiſtent with juſtice, as the defendants were different, and that the Court ought not to interfere, as it would tend to take away the attornies lien. *The Court* (ſtopping the other ſide) ſaid that it had been determined in *Schoole* v. *Noble*, that an attorney had only ſuch lien on the coſts as were ſubject to the equitable claims of the parties in the cauſe: that in this caſe it was conſiſtent with juſtice to allow the ſet-off, as the defendant *N. M.* was a party to both actions; in one being made defendant on the record, in the other being within the rule to conſolidate. Rule abſolute. Nunez *v.* Modigliani, Ea. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 217.

So, in this caſe, a rule was granted to ſhew cauſe why execution for the damages and coſts recovered by the plaintiff in this cauſe, amounting to 52l. ſhould not be ſtaid, the defendant *Hill* undertaking to ſtay all proceedings on the judgment by him obtained in another action brought by the plaintiff, wherein *Hill* had his coſts taxed at 43l. 19s. 3d.; and alſo undertaking to pay to the plaintiff, or his attorney, the ſum of 8l. 9s. 9d. being the balance due to the plaintiff, on an affidavit by *Hill*, that the plaintiff appeared to be inſolvent. Dennie *v.* Elliott, Hill and another. Mic. Ter. 36 Geo. 3. C. B. 2 *Hen. Black.* 587.

ſolvent. In oppoſition to the rule, an affidavit of the plaintiff's was produced ſtating, that *Hill* had told him, that one of the other defendants was to indemnify him: and the attorney for the plaintiff alſo made an affidavit that he had no ſecurity for his coſts, which the plaintiff was unable to pay, and which he believed he ſhould loſe if the ſet-off were allowed: under theſe affidavits, the practice of the court of king's bench was ſtated and relied on. On the other hand, the known practice of the court of common pleas, as it appears from the foregoing caſes, was inſiſted on. AND *The Court* held the practice here was clearly eſtabliſhed by thoſe caſes, *whatever might be the rule in the king's bench*: and therefore that it was not now to be diſputed.—Rule abſolute.

Pope v. Redfearn, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2027.

Privilege of an attorney as to ſuits.] If an attorney at law ſue *as plaintiff*, he may lay the venue in Middleſex, and keep it there; but when he is ſued *as a defendant*, he has no privilege of changing the venue into Middleſex: this has been long the rule in C.B. and was now finally ſettled in B.R. alſo in this caſe.

Yeardley v. Roe, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 573.

So, where it was moved to change the venue from Shropſhire to Middleſex, on the ground that the defendant being an attorney, had the privilege of having his cauſe tried in Middleſex. BUT the Court agreeing that the rule as eſtabliſhed in *Pope* v. *Redfearne* had been invariably obſerved ſince that time, thought that this was one attempt to ſubvert it, and therefore diſcharged the rule with coſts.

Danſer v. Berryman, Mic. Ter. 20 Geo. 3. C.B. 2 *Black.* 1325.

Where an attorney of one court ſues an attorney of another, that court which was firſt poſſeſſed of the cauſe ſhall retain the juriſdiction of it.

Barber v. Palmer, Hil. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 524.

An attorney plaintiff cannot ſue an attorney defendant by attachment of privilege, and hold him to bail: if he do, the defendant may plead his privilege in abatement, or the court will in a ſummary way, upon motion, ſtay the proceedings, but without coſts: for if the defendant purſue the ordinary mode of pleading in abatement, he will not be entitled to coſts: and there is no reaſon why he ſhould be in a better ſituation by making a ſummary application than by pleading his privilege in abatement.

Jackſon v. Barnard, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 35.

An attorney plaintiff may ſue by common proceſs, and indorſe his own name on the copy as the attorney; and he may afterwards alſo declare by another attorney.

Pearot v. Hele, Eaſ. Ter. 10 Geo. 3. C.B. 3 *Wils.* 58.

The plaintiff, who was an attorney, having ſued by his attachment of privilege, was nonſuited, and afterwards taken upon a *ca. ſa.* for the coſts returnable on a general return. On a motion on the behalf of the plaintiff to ſet aſide the *ca. ſa.* as irregular, not being returnable on a day certain, and another motion on the behalf of the defendant to amend:

The

The Court were clearly of opinion, that the *ca. ſa.* was well enough: the plaintiff being nonſuited, had no day in court, nor was he entitled to any privilege to have the *ca. ſa.* returned on a day certain: that he being nonſuited, ſeemed to have abuſed his privilege: beſides, it was ſaid by *Yates*, J. and agreed by the Court, that you cannot take any advantage of the irregularity of proceſs, without having it returned, and before the Court, which in this caſe it was not: that the Court in this caſe would not, on a motion to have the writ returned, have made any rule for that purpoſe. The reaſon why proceſs both for and againſt an attorney is made returnable on a day certain, is becauſe of his daily attendance in Court: but this attorney is out of court, and in cuſtody in execution, has no day in court, and ſo cannot attend; and therefore in this caſe he loſes his privilege to have this proceſs againſt him returnable on a day certain: ſo the writ is well enough, and there is no occaſion to amend it.—Both rules diſcharged.

A writ of attachment of privilege was quaſhed with coſts, as not being regularly iſſued, becauſe no proceſs was left with the prothonotary according to the rule of Court, Hil. 11 *Geo.* 2. § 2. Frogatt *v.* Tapſcott, Ea. Ter. 13 Geo. 3. C.B. 2 *Blak.* 919.

And when an attorney ſues by attachment of privilege, his name need not be inſerted on the writ, for the 2 *Geo.* 2. c. 23. § 22. which requires the name of the plaintiff's attorney to be indorſed on the writ, only extends to caſes where the attorney ſues for another perſon. Fields *v.* Lewen, Ea. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 275.

An attorney at law has no privilege againſt the court of conſcience in London. On a motion for an attachment againſt the commiſſioners of the court of conſcience in London, for proceeding notwithſtanding the ſervice of a writ of privilege: THE COURT held, that the writ of privilege did not lie, and conſequently that the commiſſioners had a power to proceed upon the complaint brought before them, notwithſtanding their being ſerved with one: for this court of conſcience has a mixed juriſdiction, as well equitable as legal, and privilege does not extend to courts of equity: they proceed *ſecundum æquum et bonum* (which the recorder atteſted), and as Lord *Mansfield* obſerved, the very principle upon which theſe courts of conſcience are founded is, "That it is not worth while for the plaintiffs to be at the "expence of bringing his action in a ſuperior court for ſuch "a trifling ſum."—Rule refuſed. Silk *v.* Rennet, Mic. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1583.

In an action of aſſumpſit there was a verdict for the plaintiff, with only 17s. damages, after which the defendant, who was an attorney, obtained a rule to ſhew cauſe why it ſhould not be ſuggeſted on the roll that he reſided in Middleſex at the time of the action brought, and was liable to be ſummoned Wiltſhire *v.* Lloyd, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 380.

moned to the county court, in order to entitle himſelf to double coſts againſt the plaintiff, under 23 *Geo.* 2. c. 34. § 19. *Per* LORD *Mansfield* (after cauſe ſhewn), We have ſpoken to the judges of the court of common pleas, and find that it was decided by the caſe in that court, *Gardner* v. *Jeſſop*, that an attorney is not liable to be ſued in the Middleſex court of conſcience, therefore the ſuggeſtion cannot be allowed.—Rule diſcharged.

Huſſey and another *v.* Jordan, Tr. Ter. B.R. 25 Geo. 3. 1 *Doug.* 382.

In this caſe it was determined, that where the plaintiff is an attorney, the defendant is not entitled to the benefit of 23 *Geo.* 2. c. 33. though reſident within the juriſdiction of the county court.

Goldſmith *v.* Baynard, Ea. Ter. 4 Geo. 3. C.B. 2 *Wiſ.* 228.

In aſſumpſit, the defendant *pleaded* his privilege as a 6oth clerk in chancery: *replication*, that the defendant was diſcharged out of priſon on the inſolvent debtors' act, and aſſigned his office to the clerk of the peace: to this the defendant *demurred* generally, and the plaintiff joined in demurrer: the caſe was twice argued: and *Per Curiam*, This ſort of plea is to be diſcouraged: we ſee the defendant is not *in actual ſervice and attendant* upon the court of chancery: the replication alleges, that the defendant put this office in his ſchedule, and has aſſigned it: this is confeſſed by the demurrer, and therefore the defendant is concluded to ſay he has not aſſigned it. This plea is a mere dilatory, and we look nicely into ſuch pleas; the defendant ought to have alleged that he is actually attendant on the office, for attendance is the ground and foundation of the privilege, *that they may not be drawn into other courts:* Serjeant *Mead* pleaded his privilege in B.R. that he ought to be ſued in C.B. after he had long retired from the bar; and for the reaſon that he was not attendant here, his privilege was diſallowed. So, where one *Maynard*, an attorney, had been arreſted, and given a bail-bond; it was moved to have the bail-bond given up, and that the proceedings ſhould be ſtayed; for that he was an attorney, and ought to have privilege: upon ſhewing cauſe, it appeared that he had left off practice, and was called Eſquire: ſo the Court refuſed the motion, and diſallowed his privilege. In the preſent caſe, therefore, the whole Court were of opinion that the plea was bad for the reaſons above; and gave judgment that the defendant ſhould anſwer over.

Some of the Court doubted whether the above office was aſſignable or not, and thought it could only be ſurrendered to the maſter of the rolls, who is bound to receive ſuch ſurrender, therefore they gave no opinion whether the replication was good or bad.

Brooke and others *v.* Bryant,

A rule was obtained calling on the plaintiffs to ſhew cauſe, why all the proceedings ſhould not be ſet aſide, and why

why the bail-bond executed by the defendant on his arreſt to the ſheriff of Surrey, ſhould not be delivered up to be cancelled, *on the ground that he was a practiſing attorney of this court, and as ſuch privileged from arreſt.* It appeared upon the affidavits, that the defendant, though he had been admitted an attorney many years ago, *had not practiſed as ſuch from December*, 1793, *to the 2d Auguſt*, 1796, *nor had taken out during that time any certificate*; but on the laſt mentioned day he had taken out ſuch a certificate, and ſince that time had in ſeveral inſtances acted as an attorney. The writ upon which he was arreſted and held to bail, iſſued on 14th June, 1796, but owing to his having kept out of the way, he could not be taken until the 31ſt of Auguſt. THE QUESTION was, *Whether the privilege of an attorney was confined to the time of iſſuing the proceſs, or might commence ſubſequently and protect him at the time of the arreſt?* PER CUR. The privilege muſt be confined to the time of ſuing out the writ. If the proceeding of the plaintiff be regular in the firſt inſtance, no voluntary act of the defendant afterwards can vacate it. The privilege of an attorney does not neceſſarily attach upon a perſon's inveſting himſelf with that character, but he muſt be a practiſing attorney. The rule of court in 1654, confines the privilege to attornies who have practiſed within a year. In order to preſerve the privilege therefore the party muſt continue to act as ſuch; for the very foundation of it is a preſumption that an attorney is already in court attending his duty, and therefore the iſſuing of proceſs merely to bring him there, is nugatory. That reaſon conſequently does not apply to an attorney who is not practiſing at the time. Rule diſcharged.

Mic. Ter 37 Geo. 3. B R. 7 *Ter. Rep.* 25.

There was another cauſe brought by *Fairman* againſt the ſame defendant, under ſimilar circumſtances, except that in that the *teſtatum capias* into Surrey, was teſted on the 27th Auguſt (which was after the defendant had obtained his certificate), on a writ teſted on the 2d of June. But *The Court* thought that circumſtance did not vary the caſe in favour of the defendant, becauſe the original writ muſt be conſidered as the commencement of the ſuit, of which the *laſt cap.* was merely a continuance.

So alſo in this caſe where it was moved, that the defendant, who was an attorney, might be diſcharged on filing common bail; it appeared that the defendant had, ſome time before he was arreſted, purchaſed a ſtamp with a view to obtain his certificate, but that from particular circumſtances he was prevented from obtaining it till after the arreſt. *The Court* ſaid, That there was a rule of Court (C.B.) of Michaelmas term, 1654, that an attorney ſhall not be allowed his privilege, if he has not attended his buſineſs for a year, and that the defendant ſhould therefore have ſtated

Dyſon *v.* Birch, Ea Ter. 37 Geo. 3. C B 1 *Pul. & Baſan.* 4.

ſtated in his affidavit, that he had practiſed within a year previous to the arreſt; and *Buller*, J. obſerved, That the defendant might as well alſo inform the court, whether he had taken out a certificate within the year, for if not, it would be a ſtrong preſumption againſt him.

Comerford v. Price, Hil. Ter. 20 Geo. 3. B.R. 1 *Doug.* 313.

A bill may be filed againſt an attorney in the vacation; for there has been a caſe before the court where it was determined, that it may be done to ſave the ſtatute of limitations.

Lane v. Wheat, Mic. Ter. 23 Geo. 3. B.R. 1 *Doug.* 313. (n. † 84.)

So where a rule had been obtained to ſhew cauſe, why the proceedings ſhould not be ſet aſide for irregularity, the defendant being an attorney, and the action, having been commenced by bill, filed in the vacation; it appeared that this was done to ſave the ſtatute of limitations: *The Court* ſaid, That in common caſes there is no occaſion to take this courſe, becauſe no time is gained by it; that the practice was to file bills againſt attornies in vacation; that actions are allowed againſt all the king's ſubjects, for the furtherance, but never for the hindrance of juſtice; and that an attorney ought not to be in a different ſituation from other perſons.

Waghorne v. Fields, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 173.

And though the deciſion of the Court in the laſt caſe, was upon the circumſtance of the bill having been filed to ſave the ſtatute of limitations, yet it is not to be conſidered as an exception to a general rule; for attornies are in the ſame ſituation as all other defendants, and may be ſued in the vacation; it is therefore now ſettled, that there is no irregularity in filing a bill againſt an attorney in any caſe.

Dodſworth v. Bowen, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 325.

And if a bill be filed againſt an attorney in the vacation, the day of filing it may be inſerted in the memorandum.—The plaintiff filed a bill of Michaelmas term, againſt the defendant, an attorney, as the acceptor of a bill of exchange, drawn 10th September, 1792, payable three months after date. The defendant demurred, and aſſigned for cauſe, that the declaration appeared to be exhibited in, and was entitled of Michaelmas term generally, whereas the cauſe of action appeared to have ariſen and accrued in a day ſubſequent to the ſaid term, and that the declaration by the memorandum thereof, appeared to have been exhibited before the cauſe of action appeared to have accrued. *The Court* (after argument) thought, That the plaintiff might amend the memorandum of the bill, by inſerting the day when it was filed; but as it was a point of great importance, they took time to conſider of the queſtion; and afterwards they gave the plaintiff leave to amend the bill as follows, on payment of coſts: "Michaelmas term, &c. be it remembered, that on the 14th day of December, 1792 (a day after the cauſe of action accrued), *A. D.* brought into the office of the clerk of the declarations of this court, according to the courſe and practice of the court, his certain

bill

" bill againſt *W. B.* gentleman, one, &c. and filed the ſame bill " as of Michaelmas term, in the 33d year, &c. which ſaid " bill follows in theſe words, &c."

Privilege as to offices.] An attorney is privileged from ſerving corporation offices, though reſident in the corporation town. This was an action of debt by the corporation of Norwich, for 48l. on a by-law, for not ſerving the office of ſheriff there, being duly elected; the defendant pleaded his privilege, as a practiſing attorney in the common pleas, and that by the cuſtom of that court no attorney ought to be drawn away to attend any other office than in the ſaid court; that the ſheriffs of Norwich upon their admiſſion, take an oath to be reſident within their bailwick; and that before his election, he brought a writ of privilege, of which the corporation had notice, and that therefore he refuſed to ſerve: the plaintiff replied, that the defendant for twenty years paſt had been, and ſtill was, an inhabitant of Norwich, 100 miles from the court of common pleas at Weſtminſter: the defendant demurred, and the plaintiff joined in demurrer. THE QUESTION was, Whether a corporator reſident in the corporation, and afterwards becoming and being admitted an attorney of one of the ſuperior courts in Weſtminſter Hall, and after ſuch admiſſion, duly elected a ſheriff of ſuch corporation, is privileged from ſerving the ſaid office? The caſe was fully argued, and Lord *Mansfield* at firſt thought it hard, that an attorney ſhould become a member of a corporation, and *enjoy all the benefits* and advantages accruing from his being a member of ſuch ſociety, and yet avoid the burthens and troubleſome offices which the other members of the ſame ſociety or corporation were obliged to ſubmit to and undergo; but upon looking into the caſes, and hearing the argument of the preſent caſe, his lordſhip ſaid, the attorney ought to have his privilege allowed. PER CUR. If he had left off his buſineſs, his mere remaining on the roll would be no exemption to him; but it appears upon this record, that he is, and has for twenty years continued an attorney of the court of common pleas; this is not a conteſt merely between the city of Norwich and this man, it is a conteſt between the city of Norwich and the court of common pleas; it is the privilege of the court that is here in queſtion, it has exiſted as long as the court, the privilege is inſtituted for the ſake of the ſuitor, that the attorney in his cauſe ſhall not be drawn away from his court which it is his duty to attend; and the crown could not by a charter granted to this corporation take it away; the court muſt have miniſters, the attornies are its miniſters: the general uſage of the kingdom, or the particular cuſtom of a town, ſhall not take away this privilege. By the charter, the corporation are to

Mayor of Norwich v. Berry, Tr. Ter. 7 Geo. 3. 4 *Burr.* 2109. 1 *Black.* 636.

chooſe a fit and proper perſon: this man is not ſo; the oath of the corporator to ſerve offices, muſt be confined to due elections, and to perſons not having a lawful excuſe; this man has a lawful excuſe; an attorney ſhall be exempt from all offices incompatible with his attendance in his court, the intereſt of the kingdom is concerned in this: the king cannot by a local charter take away this privilege; an attorney has this privilege, becauſe he is bound to attend the court of which he is a miniſter; he is entitled to this privilege as much as he is to that of not being called out of his court, by a ſuit brought againſt him in another court; and as he is obliged to this attendance on the court of common pleas, therefore he is not within the by-law which makes his attendance requiſite in another place; for he cannot be neceſſarily attendant in both places at the ſame time (1). Judgment for the defendant.

Gerrard's caſe, Hil. Ter. 17 Geo. 3. C.B. 2 *Black.* 1123.

But an attorney is not entitled to a writ of privilege, upon being drawn by ballot to ſerve in the militia, it not being under the militia acts *a perſonal ſervice*, except in exempted places; the party balloted having the liberty to commute the ſervice by the payment of a penalty, or finding a ſubſtitute: this was decided on a motion for a writ of privilege to exempt *Gerrard*, an attorney, and one of the ſecondaries of the court, from ſerving as a militia man, in the weſt regiment of the Middleſex militia, into which he had been drawn by ballot. The Court after cauſe ſhewn, and full conſideration of the ſubject, diſcharged the rule for the above reaſons.

K. v. Routlege, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 538.

But attornies are exempt from ſerving the office of conſtable, becauſe it is incompatible with their attendance on the courts of juſtice.

Anonymous, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 199. (n. a)

Attornies' bills.] Although part of an attorney's bill be for conveyancing, and parliamentary buſineſs, the maſter has power to tax the whole: in this caſe, it was moved, that the maſter might be directed to tax thoſe articles in an attorney's bill, which related to conveyancing and parliamentary buſineſs, the reſt being for the management of cauſes in this court. Lord *Mansfield* ſaid, There was no doubt but the maſter might tax the whole (2); that he recollected a caſe, where the fees paid to a proctor for buſineſs done in the eccleſiaſtical court made part of the bill, and it was determined, that as the whole bill had been referred to the maſter, he might tax that part of it.

---

(1) Barriſters are alſo conſidered as exempt from ſerving the office of ſheriff. Ld. *Mansfield.*

(2) But if the whole bill is for conveyancing, the maſter cannot tax it. *Barnes.* 4to ed. 41, 42.

So

So alſo an agency bill may be taxed by the maſter. In this caſe it was moved, that *Dixon*'s bill, as agent in town for *Plant*, might be referred to the maſter to be taxed: the Court were inclined to think, that the bill was not taxable by the maſter; the act of 12 *Geo.* 2. c. 13. § 6. having enacted that 2 *Geo.* 2. c. 23. § 23. for referring attornies' bills, "ſhould not extend to any bill due from any attorney "or ſolicitor, to any other attorney, ſolicitor, or clerk in "court." However, at the ſittings at Guildhall, after M. Ter. 19 *Geo.* 3. *Buller*, J. informed the bar, that upon enquiry it had been found to be the practice of the court of common pleas, confirmed by a caſe decided in that court, to make orders for the taxation of agents' bills, and he read a note of the caſe which had been lent him by *Gould*, J. and was as follows:

Dixon v. Plant, Mic. Ter 19 Geo. 3. B.R. 1 *Doug.* 199. (n. 1.)

It was moved that the bill of *Unwin*, an attorney, agent for *Bearcroft*, ſhould be referred to be taxed; and in ſupport of the rule it was urged, that although it was not within the ſtatute of 2 *Geo.* 2. by reaſon of that of 12 *Geo.* 2. yet that it might be taxed under the general juriſdiction of the court: THE COURT, after cauſe ſhewn, were of opinion, that the bill ſhould be taxed, and that they could order it under the general authority of the Court, that it might be ſeen that only due charges were made.—After the Court had declared this opinion, the ſecondary ſaid, he remembered before 2 *Geo.* 2. applications made to judges at their chambers, to refer agents' bills to be taxed, and that it was frequently done upon the county attorney's bringing the fees charged into court. Rule abſolute, upon condition that *Bearcroft* ſhould bring the money into court.

Ex parte Bearcroft, Ea. Ter. 7 Geo. 3. C.B. 1 *Doug.* 200.

Buller, J. then ſaid, That on being made acquainted with the caſe, he had conferred with *Willes* and *Aſhhurſt*, juſtices, and that they were all three of opinion, that *Dixon*'s bill ſhould be referred; that the practice of all the courts ought to be uniform; that queſtions on bills of this ſort, would be much better underſtood and ſettled by the maſter, than by a jury or judge, at *niſi prius*; upon this the counſel in the cauſe agreed, that the bill ſhould be taxed by conſent, the defendant bringing into court the ſum remaining due on the amount of the plaintiff's claim, and that what ſhould be deducted, if any thing, ſhould be afterwards repaid to him.

Dixon v. Plant, 1 *Doug.* 200.

After an attorney's bill has been delivered a month, and no application has been made to have it taxed by the maſter, the defendant will not be permitted to queſtion the reaſonableneſs of the items before a jury; for the client has a ſummary way of trying the reaſonableneſs of the items in an attorney's bill by a reference to the maſter, and if he waive that method, and put the attorney to his action,

Williams v. Frith, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 197.

the court will never ſuffer him to go into a diſcuſſion of the items at the trial.

Hooper *v.* Till and wife. Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 198.

So alſo, in an action on an attorney's bill, in which there had been judgment by default on a writ of enquiry executed; it was moved that the verdict might be ſet aſide, and the bill be referred to the maſter, grounded on an affidavit, that the ſheriff would not hear evidence to impeach the reaſonableneſs of the charges. PER CUR. (after cauſe ſhewn) The bill of an attorney cannot be taxed *at the trial of an action brought upon it, nor after verdict.* If there has been an account ſettled between the attorney and his client, the bill ſhall never afterwards be taxed as of courſe, particular caſes may be pointed out; the client may, by affidavit, ſhew that the buſineſs charged was never performed, or that the charges are fraudulent; but if the buſineſs was really done, the delay of the defendant for more than a month in objecting to the *quantum* is an admiſſion that he thinks that reaſonable.

Shaw *v.* Pickering, Mic. Ter. 30 Geo. 3. B.R. 1 *Doug.* 198.

But an attorney's bill may be taxed after action brought, and at any time before verdict or judgment, unleſs the money has been paid.

Martin *v.* Winder, Ea. Ter. 23 Geo. 3. B.R. 1 *Doug.* 198.

And an attorney may ſet off the amount of his bill, although it may not have been delivered a month; for in this caſe it having been moved on the part of the defendant, who was an attorney, for a rule to ſhew cauſe why the proceedings ſhould not be ſtaid till his bill ſhould be paid, or till a month from the delivery of it ſhould expire, that he might be enabled to ſet it off: the Court held, that though an attorney cannot bring an action on his bill till it has been delivered a month, that circumſtance is not neceſſary to enable him to ſet it off; that he muſt not produce it at the trial by ſurpriſe, but that it is ſufficient in ſuch caſe to deliver it time enough for the plaintiff to have it taxed before the trial: upon hearing this opinion of the Court, the motion was withdrawn.

Ex parte Williams, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 124.

So upon a motion that an attorney's bill for fees, all of which were due for carrying on a proſecution by indictment at the quarter-ſeſſions, ſhould be referred to the maſter to be taxed: *The Court* ſaid, That they could not interfere, the whole of the buſineſs having been carried on in an inferior court; but that if any part of the attorney's demand had ariſen from the conduct of buſineſs in the ſuperior court, they would have referred the whole bill; the motion was therefore refuſed.

Ex parte Williams, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 496.

But Lord *Kenyon* afterwards, in Michaelmas term, 32 *Geo.* 3. ſaid, That on enquiry from the officers of the crown-office, he underſtood that there were ſeveral inſtances, in which this court had referred an attorney's bill to be

be taxed, though the whole buſineſs *had been carried on at the court of quarter-ſeſſions.*

Buller, J. was in this caſe of opinion, that it is not neceſſary to deliver a bill for buſineſs done at the ſeſſions, the ſtatute only preſcribing it in the caſe of buſineſs done in a court of record, wherein attornies are admiſſible and ſworn. Stephenſon v. Taylor, at York ſummer aſſiz-s, 1786, 4 *Ter. Rep.* 124. (n. c.)

But in this caſe, which was an action brought by an attorney againſt his client, for the amount of a bill for buſineſs done at the quarter-ſeſſions, a doubt aroſe at the trial, *Whether it was neceſſary for the plaintiff to have delivered his bill ſigned before the action brought?* there being no ſignature to the bill which had been delivered. Upon this a verdict was entered for the plaintiff, with liberty for the defendant to enter a nonſuit if the court ſhould deem it neceſſary to deliver ſuch a bill ſigned; afterwards a rule having been obtained for that purpoſe, THE COURT ſaid, That there muſt be judgment of nonſuit; for upon enquiry it was found to have been the practice of the Court to tax bills for buſineſs done altogether at the ſeſſions, and there was no reaſon for reſtraining the general words of the firſt part of the clauſe, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount. Rule abſolute. Clarke v. Donovan, Tr. Ter. 34 Geo. 3. 5 *Ter. Rep.* 694.

So in this caſe, on the trial it appeared that the action was brought by the plaintiffs, who were attornies, for buſineſs done to the amount of 10l. And the only queſtion was, *Whether either of the four following items, conſtituting part of the demand, were charges which made it neceſſary for the plaintiffs to deliver in a bill one month previous to the commencement of the action?* it being admitted, that if any part of the bill ought to have been ſo delivered, the action could not be ſuſtained. The articles were theſe, "Attending and taking inſtructions to commence an action, 6s. 8d.; drawing and engroſſing affidavit of debt, and duty, 6s. 7d.; attending you to get ſworn thereto, 3s. 4d.; paid for oath 1s. A verdict was taken for the plaintiffs, with liberty to the defendant to move to enter a nonſuit: and a rule having been obtained for that purpoſe, *The Court* were clearly of opinion that this bill ought to have been delivered to the defendant a month before the action was brought, according to the act of parliament, in order that he might have had an opportunity of referring it to the proper officer to ſee whether or not the charges were reaſonable. That the charges for making the affidavit and for ſwearing were for proceedings in the court, as the oath muſt either be adminiſtered by the Court itſelf, or by ſome authority delegated by the Court. And that the act of parliament being beneficial to the ſubject, ought to receive a liberal conſtruction.—Rule abſolute. Winter v. Payne, Ea. Ter 36 Geo. 3. B.R. 6 *Ter. Rep.* 645.

Brocks *v.* Maſon, Mic. Ter. 30 Geo. 3 C.B. 1 *Hen. Black.* 290.

In this caſe, the plaintiff, who was an attorney, had delivered the bill in due time to the defendant, who acknowledged the debt, and ſaid he would pay it, but that he did not know what to do with the bill: *upon which the plaintiff took it back again.* THE COURT were of opinion that the bill was not properly delivered, ſaying that *the bill ought to have been left with the defendant*, as it was the intention of the ſtatute, that the client ſhould have due time to examine the charges made by the attorney, and take advice upon them if neceſſary.

Ford *v.* Maxwell, Hil. Ter. 36 Geo. 3. C.B. 2 *Hen. Black.* 589.

To maintain an action by one attorney againſt another, for buſineſs done by the plaintiff for the defendant *before the defendant became an attorney*; it is not neceſſary for the plaintiff to leave his bill ſigned with the defendant, according to the directions of 2 *Geo.* 2. c. 23. § 23. For the object and ſpirit of the ſtat. 12 *Geo.* 2. c. 13. is, that the reſtrictions of the 2 *Geo.* 2. c. 23. ſhall not be applied where both parties are attornies, *when the action is brought*; becauſe in ſuch caſe, the defendant muſt be taken to be fully competent to underſtand the nature of the charges in the bill, and to reſiſt them if exorbitant or improper.

Loveridge *v.* Botham, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul. & Poſan.* 49.

And the delivery of a former bill is concluſive evidence againſt an increaſe of charge on any of the items contained in it, and ſtrong preſumptive evidence againſt any additional items; but if errors or real omiſſions in the former bill can be proved, they ought to be allowed for: and the Court will order the officer in ſuch a caſe to review his taxation on this line of diſtinction.

Evans *v.* P——. Tr. Ter. 8 Geo. 3. C.B. 3 *Wiſ.* 382.

Miſdemeanor.] An attorney cannot practiſe in an inferior court, if he is not an attorney of a ſuperior court, and that is the reaſon why the ſuperior court will interfere: where deeds are put into an attorney's hand (who happens to be concerned for the adverſe party), and not redelivered, the Court will interfere: and if an attorney doth any thing wrong *any where*, *quatenus attorney*, the Court will interfere.

Barker *v.* Buther, Tr. Ter. 11 Geo. 3 C.B. 2 *Black.* 780.

But the Court will not upon motion in a ſummary way compel an attorney who has made a fatal miſtake to indemnify his client: the client muſt take his ordinary remedy by action.

Marſhall's Caſe, Tr. Ter. 13 Geo. 3. C.B. 2 *Black.* 912.

In this caſe, the Court made a rule upon a motion in a ſummary way for *Marſhal*, an attorney of the court, who had been deputy to the late principal ſteward of Earl *Spencer*, to deliver up the court books, to the now principal ſteward: for the Court will always interfere to oblige its own attornies to conduct themſelves with fairneſs and propriety.

Award.

AN award may be good in part, though bad in part. In an action of debt upon a bond to perform an award, the defendant, after praying *oyer* of the condition, and ſetting it forth, pleaded that the arbitrators made no award between the parties, according to the form and effect of that condition. To this the plaintiff replied, that on a certain day, before the day in the condition mentioned, the arbitrators made their award in writing, under their hands, &c. and thereby awarded the defendant to pay to the plaintiff, at a certain day then to come, 16l. 10s. and all ſuch coſts, charges, and expences, as he had been put to in a certain cauſe then depending between the parties; and then the plaintiff aſſigned a breach in the non-payment of the 16l. 10s. Upon arguing a general demurrer to this replication, three objections were taken. 1ſt, That no certain coſts, charges, and expences were ſet down and averred. 2dly, That the award did not mention any cauſe between the parties, in any certain court, and it might be in an inferior court. 3dly, That although the award was good for the 16l. 10s. being a ſum certain, yet the coſts, charges, and expences of the ſuit were totally uncertain; ſo that the award, as to that part of it, was void, and could never be performed. After hearing counſel on both ſides, THE COURT ſaid, If the award be good in that part, whereof the breach is aſſigned, the defendant having admitted the breach by his demurrer, the plaintiff muſt have judgment. The firſt objection goes too far; a liberal conſtruction of awards hath taken place in modern times, though formerly courts of juſtice looked nicely and critically into them. We will intend, that by coſts, charges, and expences, are meant ſuch coſts, charges, and expences, as courts take notice of by their officer: it might indeed be ſaid, that all coſts between the attorney and client are thereby meant, but we will take the words of the arbitrators to have the ſame meaning as if they had been the words of the Court. As to the ſecond objection, we will preſume that the cauſe was in a ſuperior court; and the rather, becauſe the defendant might have ſhewn, by pleading, that it was in an inferior court. And as to the third objection, a recovery in this action will be a bar to any future action brought upon this bond, for the non-payment of the coſts, after they are aſcertained.

Fox *v.* Smith, Mic. Ter. 6 Geo. 3. C.B. 2 *Wilſ.* 97.

Addiſon v. Grey, Hil. Ter. 6 Geo. 3. C.B. 2 *Wilſ.* 293.

The ſame point, that an award may be good in part, and bad in part, was alſo determined in this caſe.

Langman v. Holmes, Ea. Ter. 15 Geo. 3. C.B. 2 *Black.* 990.

An indorſement on an award is a ſufficient authority for a third perſon to demand the money awarded. An attachment was moved for againſt the plaintiff, for the non-payment of money purſuant to an award. The defendant, by an unſtamped indorſement on the award, had authoriſed one *Townſend* to receive the money awarded, and he accordingly demanded it. The Court at firſt doubted whether this was a ſufficient authority, without a warrant of attorney for that purpoſe. But it being alleged by the ſecondaries and other practiſers, that this was the uſual method, a rule to ſhew cauſe was granted. But as the matter never came on again, the money was probably paid.

Pickering v. Watſon, Mic. Ter. 17 Geo. 3. C.B. 2 *Black.* 1117.

An award of *general* releaſes on a ſpecial reference is good for the matters referred, and void as to the reſt. The court of C.B. was moved to ſet aſide two awards. The firſt was dated, and duly publiſhed, on the 28th of Auguſt, 1776, whereby the defendant was awarded to pay the plaintiff 316l. 1s. 10d. with coſts, and each party was to give *general* releaſes: but it being objected to, that the reference was only of the matters in queſtion *in this cauſe*, and not of *all diſputes* between the parties, the arbitrators apprehended they had exceeded their powers; and therefore on the 6th of November following, they made a ſecond award, to the ſame effect with the firſt, except ordering *ſpecial* releaſes of all matters in difference in that cauſe, inſtead of *general* ones. To the firſt award it was objected, that the arbitrators had exceeded their powers; and if the Court ſtruck out that part only which related to general releaſes, then there would be no mutuality, but every thing to be done by the defendant only. To the ſecond award it was objected, that the arbitrators, by making the firſt, were *functi officio*, and all their authority was at an end; for if debt and treſpaſs be referred, and the award extends only to the debt, the arbitrators cannot afterwards make another award as to the treſpaſs. After this caſe had been fully argued, The Court were of opinion, that the firſt award might be ſupported, either by conſtruing the releaſe thereby directed, to be only ſo far good as fell within the authority of the arbitrators, and rejecting the reſt; or if the releaſe ſhould be ſuppoſed to be one entire thing, and not to be rejected in part, then by rejecting it *in toto*; and therefore the rule was diſcharged.

Freame v. Pinneger, Hil. Ter. 14 Geo. 3. B.R. *Coup.* 23.

A motion to ſet aſide an award muſt be made before the laſt day of the next term after ſuch award is publiſhed; otherwiſe it is too late; and an attachment for the non-performance of it may iſſue. On ſhewing cauſe againſt a rule, why an award ſhould not be ſet aſide, the Court was at the ſame time moved to grant an attachment for the non-

performance

performance of it. The grounds againſt ſetting it aſide were, 1ſt, That the application was too late, the award being a ſubmiſſion within the ſtat. 9 & 10 *Will.* 3. c. 15. § 2. which provides, "That any arbitration procured by corrupt or undue means, ſhall be adjudged void, &c. ſo as complaint of ſuch corruption, &c. be made in the court where the rule is made for ſubmiſſion to ſuch arbitration, before the laſt day of the next term after ſuch arbitration is made and publiſhed to the parties." And in this caſe, the application was not originally made till *after* the expiration of that time. 2dly, Upon the merits, but they were not entered into. Lord *Mansfield*, after ſtating the clauſe and proviſo in the ſtatute, obſerved, that though the firſt clauſe was inaccurately penned, yet the meaning of it was ſufficiently explained by the proviſo in the ſecond; and he ſaid that he was extremely clear, from the words of the proviſo, that the time of objecting to an award is expreſsly limited to the laſt day of the term next after it is publiſhed. He was equally clear, that where no objection is made within ſuch limited time, the other ſide may apply for an attachment to enforce the performance of the award. That in the preſent caſe, the impeachment of the award being ſubſequent to the time preſcribed by the ſtatute, it came too late, ſo that the motion for an attachment was clearly regular. The Court therefore ordered the rule for ſetting aſide the award to be diſcharged, but without coſts; and that the attachment ſhould lie in the office for a month, after bringing in the money before the maſter.

So, where the Court was moved, that the arbitrator to whom this cauſe had been referred, ſhould reconſider the award which he had made, becauſe ſufficient materials were not laid before him in time, and which could not be procured till now, The Court, upon referring to the act of parliament, 9 & 10 *Will.* 3. c. 15. were of opinion, that the motion ought to have been made before the laſt day of the term next after the award; and therefore the rule was refuſed. Zachary *v.* Shepherd, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 781.

But, upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award *for any illegality apparent upon the face of it*, although the time limited by the ſtatute for applying to the Court to ſet aſide the award is expired. Two rules had been obtained, the one for *an attachment againſt the defendant for not performing an award:* the other, a croſs-motion *to ſet aſide the attachment, on the ground that the award was bad on the face of it, not being final.* The arbitrators awarded, that there was due from the defendant to the plaintiff 147l. 3s. 3d. *(in caſe the ſum of* 25*l.* 11*s. therein aftermentioned was paid to the defendant)*, over and above the dividends therein after ſet forth; and that the defendant ſhould pay that ſum to the plaintiff on Pedley *v.* Goddard, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 73.

on or before the 14th of December, 1795. The award then ſet forth that doubts had ariſen in the minds of the arbitrators, whether the ſum of 25l. 11s. for which a bill of exchange, dated in February, 1792, was drawn at the inſtance of the plaintiff on one *A. Carew*, payable to the defendant on demand, had ever been paid to the defendant; and alſo, whether any dividends over and above the ſum of 12l. had been received by the defendant for the uſe of the plaintiff in reſpect of a certain other bill of exchange for 49l. either drawn, accepted, or indorſed by one *Elliot*. Then the arbitrators awarded that the defendant ſhould, within twenty-one days from the date of the award, by an affidavit, declare on oath what ſum had been received by him, or for his uſe, by virtue of the bill ſo drawn on *A. Carew*; and if the whole or any part of the ſum of 25l. 11s. had not been paid, they awarded and authoriſed the defendant to deduct from the 147l. 3s. 3d. ſo much of the ſum of 25l. 11s. as ſhould appear by the affidavit not to have been received. And further, in caſe it ſhould within twenty-one days from the date of the award be made to appear by an affidavit to be made by any perſon whomſoever that any further dividend or ſum over and above the ſum of 12l. had been paid by any perſon to the defendant or for his uſe, in reſpect of the bill of exchange for 49l. then they awarded that the defendant ſhould, on or before the ſaid 14th December, 1795, pay to the plaintiff ſuch further ſum over and above the ſaid 12l. as ſhould be ſo proved to have been received. PER CUR. (after argument), The award does not appear to be final. The caſe that moſt reſembles this is, the common caſe of leaving coſts to be taxed by the officer of the court, which does not vitiate the award. But *here the arbitrators, inſtead of determining the points in diſpute between theſe parties, have left one ſum in diſpute to be decided by the perſon who of all others was the leaſt qualified to decide, the defendant himſelf.* In *Freame* v. *Pinneger*, Lord *Mansfield* ſaid, "that where no objection is made to an award within the time limited by the ſtatute, the other ſide may apply for an attachment to enforce the performance of the award." Now that is very correct when applied to the caſe then in judgment: but it was not meant as a general rule; or if it were, it was extrajudicial, and we are not bound by it. This is an authority given by the legiſlature to the Court to be exerciſed in a ſummary way; the act directs, that in caſe of diſobedience to an award made under the ſtatute, the party neglecting or refuſing to execute the ſame ſhall be ſubject to all the penalties of contemning a rule of court, &c. unleſs the award be procured by corruption or other undue means; in which caſe, the ſecond ſection ſays, the arbitration ſhall be judged

and

and esteemed void; so as complaint of such corruption or undue practice be made in the court, &c. *before the last day of the next term after such arbitration made, &c.* When a party therefore wishes to set aside an award, on account of extrinsic circumstances, it is proper that the application should be made to the Court recently after the award is made, and while the facts are in the memory of the parties concerned: *but when the award is bad on the face of it, it carries with it those circumstances which go to its destruction; and in that case it seems reasonable that the objection may be taken to the award at any time whenever the adverse party endeavours to enforce it*; and certainly this is the case when the attempt to enforce the award is by action. However, this does not depend on reason, or on the good sense of the thing alone; for it is supported by great authorities. In a case cited from *Andr.* 297. the Court said, that "an award could not be set aside, unless it be for fraud or corruption in the arbitrators, because to these cases only the statute extends." And *Lee*, CH. J. added, "that he remembered this distinction to be made by Mr. *J. Powell*, that the Court will not set aside an award for defects appearing on the face of it; but this is a good reason against granting an attachment for refusing to perform it. Therefore, after the best consideration, we are of opinion, that the sound construction of the act of parliament is, that *if a motion be made to set aside an award for extrinsic matter, it must be made within the time limited by the act, namely, before the end of the next term: but that an application for an attachment for not performing an award may be resisted at any time for defects appearing on the face of the award itself.* If the party has a right to enforce the award, he may bring his action, and then the adverse party may take advantage of any objections appearing on the award by pleading or demurring; and either party may carry the record to another tribunal by writ of error. Both rules discharged.

And if an award be made on an improper stamp, and no application be made to enforce the award, the Court will not hear any motion to set it aside, for the award may be rendered a valid instrument, by procuring the proper stamp, and paying the penalty for it: and the award in such a state may be considered as a nullity, and so not the object of any motion at all. Preston v. Eastwood, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 95.

On shewing cause against a rule, why an attachment should not issue against the defendant for a contempt in not performing an award; it appeared, that a submission to arbitration between the parties had been made a rule of court, but the arbitrator not having proceeded within the time limited, one *John Hurd*, and the defendant *Robert Hurd*, who were the real parties in the cause, *Owen* being only a nominal Owen v. Hurd, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 643.

minal plaintiff, had agreed to a ſecond arbitration, which was not made a rule of court; and it was for not obeying the award made by the ſecond arbitrator, that the attachment was moved for. But the Court held this ſecond award to be a mere nullity; the reference not having been made by the parties on the record, who ſhould both have conſented to the rule; and even if it had been ſo, there ſhould have been a ſecond application to the Court, under ſuch circumſtances, to make the ſubmiſſion to the ſecond award a rule of court; and the order muſt have been made by the Court itſelf, for this was an application for an attachment, as for a violation of a rule of court, when in truth no rule of court had been violated.

Malcolm and another, aſſignees *v.* Fullarton, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 645.

A ſubmiſſion to arbitration of *all matters in difference between the parties in the cauſe* is not confined to the ſubject-matter in the particular action then depending, but will extend to croſs-demands between the parties, though not pleaded by way of ſet-off; and the coſts being to abide the event, makes no difference: but a reference of *all matters in diſpute in the cauſe* between the parties is confined ſolely to the matters in diſpute in that trial.—On a rule to ſhew cauſe, why an award ſhould not be ſet aſide, it appeared, that there had been accounts between Meſſrs. *Mayne* and *Graham*, who were bankrupts, and the defendant, and that the latter had paid 1500l. after the bankruptcy, to the plaintiffs, as aſſignees, which was only part of the ſum they demanded. That the preſent action had been brought to recover a further ſum, claimed to be due from the defendant to the eſtate of the bankrupts, to which the general iſſue only had been pleaded; and that, pending the ſuit, it was agreed to refer *all matters in difference between the parties in the cauſe*, to the determination of an arbitrator, who, upon examining all the accounts, had awarded 700l. to be paid by the plaintiffs to the defendant, on a particular day. To this award ſeveral objections were now taken. 1ſt, That the terms of the reference only included all matters in diſpute *in that cauſe*, and that therefore the arbitrator had exceeded his authority, in awarding a ſum to be paid by the plaintiffs to the defendant, no croſs-demand having been ſet off in that ſuit. 2dly, That the plaintiffs, who were the aſſignees of the bankrupts, had no power to refer any other matter, than the particular cauſe in queſtion, without the conſent of the creditors. 3dly, That the arbitrator had awarded a *certain ſum to be paid by the aſſignees, on a certain day*, which he had no power to do; for at all events, the defendant could only prove his debt under the commiſſion, and entitle himſelf to a proportional ſhare of the bankrupts' effects, with the reſt of the creditors. After theſe objections had been argued, the counſel on the other ſide were

ſtopped

ſtopped by the Court; and Lord *Kenyon* gave his opinion, to the following effect.—The firſt objection which has been raiſed againſt this award, namely, that the arbitrator has exceeded his authority, would, if it were well founded, be deſtructive of it. But that is anſwered, by reading the terms of the reference; by which it appears, that all matters in difference between the parties in this cauſe were referred. "*The parties in this cauſe*," is merely a deſcription of the *perſons*, and not of the *ſubject-matter* in diſpute. And indeed this is the conſtant form of theſe ſubmiſſions to awards, which are intended to include all matters in diſpute between the parties. With reſpect to the latter objection, that the arbitrator has awarded a particular ſum to be paid *in ſolido*, on a certain day, inſtead of directing him to go before the commiſſioners to prove this debt; if this had been a debt due from the bankrupt to the defendant, the objection would have holden; but this debt was not contracted before the bankruptcy, for the defendant inadvertently paid a ſum of money to the aſſignees after the bankruptcy, which it now appears was not due to them. That ſum therefore could not be proved under the commiſſion, and the arbitrator could only award, that the ſum which was overpaid to the aſſignees, ſhould be paid by them to the defendant *in ſolido*. The other judges being of the ſame opinion, the rule was diſcharged.

But an award made upon a reference of *all matters in difference* between the parties, does not preclude the plaintiff from ſuing upon a cauſe of action ſubſiſting againſt the defendant at the time of the reference, upon proof that the ſubject-matter of ſuch action was not laid before the arbitrators, nor included in the matters referred.—In an action for money had and received, to recover the value of eighteen bags of *red Dutch clover*, the defendant pleaded, *inter alia*, an award; to which the plaintiff replied, that the ſubject-matter of the preſent action was not included in that reference; at the trial of the cauſe, the plaintiff called one of the two arbitrators to prove, that on the former reference this matter had never been laid before them by the parties; and that they had not taken it into their conſideration in forming their award: but the defendant's counſel objecting to evidence of this nature, on the ground, that the ſubmiſſion to arbitration included all matters in difference between the parties; the learned judge who tried the cauſe, thought himſelf bound by the terms of the reference, and therefore rejected the witneſs; upon which the plaintiff was nonſuited. But the Court having ſet aſide the nonſuit, and granted a new trial, the witneſs was upon the ſecond trial admitted, and the plaintiff obtained a verdict. The court was afterwards moved to ſet this verdict aſide, and grant another trial; on the ground, that

Ravee *v.* Farmer, Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 146.

that the terms of the reference being of *all matters in difference*, was concluſive upon the parties, as to all cauſes of action ſubſiſting between them prior to the ſubmiſſion, of which the ſubject-matter of the preſent action was one. But the Court thought there was no colour for the motion, for the plaintiff might undoubtedly ſhew, that this matter was not in difference between him and the defendant at the time of the ſubmiſſion, nor referred by them to the arbitrators; and therefore the rule was refuſed.

Anſell *v.* Evans, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 1.

The Court have no authority under the ſtat. 9 & 10 *W.* 3. c. 15. which gives juriſdiction in this caſe, to make a verbal agreement by the parties to refer all matters in difference, a rule of court; for that ſtatute requires, that where the parties agree that their ſubmiſſion to the award ſhall be made a rule of court, ſuch their agreement ſhall be inſerted *in their ſubmiſſion, or the condition of the bond or promiſe, &c.*

Ridoat *v.* Pye, Mic. Ter 38 Geo. 3. C.B. 1 *Pul. & Buſan.* 91.

It was moved for a rule to ſhew cauſe, why an award ſhould not be ſet aſide, on the ground, that *the arbitrator had not examined the witneſſes on oath*; but as the affidavit did not ſtate, whether the arbitrator was deſired at the time by either of the parties to examine on oath, the rule was refuſed.

Hall *v.* Lawrence, Ea. Ter. 32 Geo. 3. B.R. 4 *T.r. Rep.* 589.

So in this caſe where the parties having referred all matters in difference to the award of two arbitrators, and in caſe of their diſagreeing, to an umpire, *the arbitrators regularly heard all the evidence, but differing in their concluſions from it, they ſtated this evidence to the umpire, upon which he made his award, without re-examining the witneſſes.* After he had made the award, the party againſt whom it was made, applied to him to hear the evidence himſelf, and on his refuſal moved the Court to ſet the award aſide. But the Court thought, that as no application was made to the umpire to examine the witneſſes before he had made his award, it was too late to do it afterwards, and therefore diſcharged the rule with coſts.

Atkinſon *v.* Abraham, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul. & Buſan.* 175.

And it is no ground for ſetting aſide an award, that one of the defendant's witneſſes was re-examined by the arbitrator after the evidence was cloſed on both ſides, and the plaintiff's attorney gone, though the witneſs gave a teſtimony different from that which he gave before, and by which the arbitrator confeſſed his judgment was influenced; for if an arbitrator think proper to aſk a witneſs a queſtion for his own information after the evidence is cloſed, that circumſtance will not induce the court to ſet aſide the award: if, however, it appear, that there was any ſurpriſe in it, that the ſecond examination was brought about through the management of the oppoſite attorney, that may be a ground of objection.

If

If the arbitrators join with an umpire in his deed of umpirage, it is only ſurpluſage and ſtands good. A bond was given, conditioned to perform the award of two arbitrators, and in caſe they ſhould differ, of a third perſon as umpire. All three of them joined in one inſtrument, purporting to be an umpirage. This was objected to as bad, upon the authority of a caſe in 1 *Bulſtrode*, 184. But the Court held the caſe cited to be abſurd, and that the joining of the arbitrators was ſurpluſage, and did not vitiate the act of the umpire. Soulſby v. Hodgſon, Ea. Ter. 4 Geo. 3. B.R. 1 *Black.* 463.

If two partners refer all matters in difference between them, the arbitrator may diſſolve the partnerſhip. On a motion to ſet aſide an award, it appeared, that, on a diſpute between two partners, all matters in difference were referred to the award of *A. B.* in common form. The arbitrator, *inter alia*, directed the partnerſhip to be diſſolved; and therefore it was objected, that in ſo doing he had exceeded his power. But the Court were of opinion, that when *all* matters in difference were referred, the arbitrator had clearly a power to diſſolve the partnerſhip. If a difference between a maſter and his apprentice were referred, the arbitrators would have a power to order the indentures to be delivered up. And in the preſent caſe, it was ſworn, that at the trial, after the juror was withdrawn, and the rule of reference thus generally drawn up, the plaintiff openly declared, he would not have it underſtood, that the arbitrator had a power to diſſolve the partnerſhip, which Lord *Manſfield* obſerved, was ſufficient evidence, *ex ore ſuo*, that the diſſolution of the partnerſhip was then a matter in difference. Rule diſcharged. Green v. Warring, Ea. Ter. 4 Geo. 3. B.R. 1 *Black.* 475.

Several objections were taken to an award made in a cauſe, referred to arbitration by rule of court; FIRST, that *the umpire had awarded coſts without an expreſs power ſo to do*; in ſupport of which was cited, 1 *Rol. Abr.* 254. SECONDLY, That *the two arbitrators, who had the power of naming an umpire, had named one before they had entered into the examination of the ſubject at all.* But theſe, as well as the other objections upon the merits, were overruled by THE COURT; and they held, FIRST, That the power of awarding coſts, was neceſſarily conſequent on the authority conferred upon the arbitrator of determining the cauſe; and that the reaſon why, in references of this ſort, a proviſion was frequently inſerted, that the coſts ſhould abide the event of the award was, that the arbitrator might not have it in his power to withhold coſts from the party who was in the right. But that was to be conſidered as the reſtriction of a power, which he would otherwiſe neceſſarily have, of allowing coſts at his election. Neither was there any ground for the ſecond objection, for it rather ſeemed to be the faireſt way of chooſing an umpire. And they ſaid, that it had been Roe *ex dem.* Wood v. Doe, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 644.

ſolemnly

ſolemnly determined (1) in this court, about thirty years ago, that arbitrators might elect an umpire the inſtant they began to take the matter into conſideration. Rule diſcharged.

Manſell v. Burredge and Roberts, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 352.

In an action upon promiſes, the declaration ſtated, that on the 23d of March, 1792, and for the ſpace of three years before that time, the defendant *Burredge* rented a farm called Llwydiarth Farm, and that the defendant *Roberts* rented it for the two following years, and quitted it on the 25th of March, 1794. That afterwards the plaintiff rented and occupied it until the making of the agreement hereafter mentioned. That diſputes had ariſen between the defendants and the plaintiff, reſpecting the ſtate of the repair of the fences, &c. at the reſpective times when the defendants ſeverally quitted the farm, and that doubts had ariſen whether the defendant *Burredge* left the ſame in proper repair; and alſo whether the defendant *Roberts* left it in repair; whereupon it was agreed, on the 13th of April, 1796, between the defendants and the plaintiff, to refer all ſuch diſputes to the award of *T. Simcocks*; that accordingly by an agreement in writing of that date, between the defendant *Burredge* of the firſt part, the defendant *Roberts* of the ſecond part, and the plaintiff of the third part, *the ſaid parties jointly and ſeverally agreed to refer all matters in diſpute between them, or any or either of them, to the determination of T. Simcocks*; and the defendants thereby for themſelves, their executors, &c. *jointly and ſeverally* undertook, promiſed, and agreed to and with the plaintiff, that they, and their, and each of their executors would on his and their reſpective parts abide by, perform, and keep the award of *T. Simcocks*, &c.; and the plaintiff undertook and promiſed to and with the defendants jointly and ſeverally, and their reſpective executors and adminiſtrators, to perform the award on his part. The declaration then ſtated, that *Simcocks* made his award, &c. in which he directed the defendant *Burredge* to pay 11l. 4s. to the plaintiff on the firſt of Auguſt then next, and the defendant *Roberts* to pay him 13l. 1s. 6d. but that they refuſed, &c. The defendant *Roberts* pleaded the general iſſue, and the plaintiff recovered a verdict againſt him; the defendant *Burredge* ſuffered judgment by default, and a writ of enquiry was executed againſt him. A motion having been made in the laſt term, to arreſt the judgment, on the ground, that this was not a joint promiſe by the defendants to anſwer for each other, but ſeveral only, each being to anſwer for himſelf. After cauſe ſhewn againſt the rule, THE COURT ſaid, that this was rather a hard caſe on theſe two tenants. Perhaps if it had been ſtated to them at the

(1) 28 *Geo.* 2. B.R.

time

time of the agreement, that each was to become anſwerable for the other, they would have heſitated before they ſigned the agreement; but that the words of the agreement were too ſtrong to be got over. It was reaſonable that each ſhould make ſatisfaction for the time each occupied; but by the terms of this agreement they had promiſed jointly and ſeverally, which makes them reſponſible the one for the other. Rule diſcharged.

Higginſon *v.* Neibitt, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Boſan.* 97.

The Court will on a motion, in the firſt inſtance, without a rule to ſhew cauſe, give leave to enter up judgment, on a verdict reduced by an award.

Badley *v.* Loveday, Tr. Ter. 37 Geo. 3. C.B. 1 *Pul.* & *Boſan.* 81.

But the Court will not grant an attachment for non-performance of an award, pending an action brought on the award, nor allow the plaintiff to waive the action, in order to apply for the attachment; for by bringing an action the party has made his election.

Hicks *v.* Richardſon Mic. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Boſan.* 93.

If an arbitrator award among other things, that each party ſhall pay a moiety of the coſts of the arbitration, and of making the ſubmiſſion a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment againſt the other party, if he refuſe to pay his moiety.

Marder *v.* Cox, Tr. Ter. 14 Geo. 3. B.R. *Cowp.* 127.

"Coſts of ſuit, on a rule of reference, are *common coſts*." By an order of *niſi prius* referring this cauſe to arbitration, it was ordered, that "all matters in difference between the "parties, *together with the coſts of this action and reference*, "be referred to the award of, &c." The arbitrator as to the coſts awarded as follows: "that the defendant ſhall pay "to the plaintiff his full coſts and charges of this action, "ſuch coſts to be taxed as between attorney and client, by "the proper officer, &c.;" on a motion to ſet aſide this award, *The Court* ordered that ſo much of the award as directed the maſter to tax the coſts as between the attorney and client ſhould be ſet aſide, and the reſt to ſtand: holding the award to be wrong in this; viz. becauſe the arbitrator had exceeded his power in directing the coſts to be paid, as between attorney and client: the words of the reference clearly meaning coſts in a technical ſenſe, which are legal coſts.

Barker *v.* Tibſon, Tr. Ter. 14 Geo. 3 C.B. 2 *Black.* 953.

So, in this caſe, where the arbitrator ordered the defendant to pay coſts of ſuit *as between attorney and client*, and alſo the coſts of reference *as between attorney and client*, it being his intent that the plaintiff ſhould be reimburſed his full expences: *The Court*, on motion, made a rule for the prothonotary to tax the coſts of the ſuit only, *as between party and party*, as there was no agreement or order of *niſi prius* to vary the general rule, that coſts of ſuit in an award ſhall only be the common coſts.

Bradley v. Tunſtow, Ea. Ter. 37 Geo. 3. C.B. 2 *Pul. & Boſan.* 34.

But the general term *coſts*, in a rule of reference, does not include the coſts of that reference. In this caſe there had been an order of *niſi prius*, for referring the cauſe to arbitration; and it was ordered, *inter alia*, "that the plaintiff "ſhould be at liberty to enter up his judgment, and ſue out "execution for ſuch ſum as the arbitrator ſhould find due, "*together with his coſts*;" the arbitrator awarded 140l. 14s. for the debt, and coſts to be taxed by the prothonotary; his taxation amounted to a certain ſum, and included the coſts of the reference; judgment being entered upon the prothonotary's *allocatur*, the defendant applied to him to ſtrike out the coſts of reference, and, on reconſidering the matter, the prothonotary diſallowed them: it was afterwards moved on the behalf of the defendant, to ſet aſide the judgment for this irregularity; BUT *The Court* held it impoſſible to ſay, that the judgment was irregular, as it followed the *allocatur* of the prothonotary: that a reference is made for the convenience of both parties, and therefore the expences ought to be ſuſtained by both, unleſs it is provided in the order of *niſi prius*, that the arbitrator ſhall have power to give the coſts of the award: that a proviſion of the coſts of reference being generally made in the rules, but omitted in the preſent inſtance, was a ſtrong argument to ſhew that they were not here intended to abide the event of the arbitration: *Per Cur.* The plaintiff muſt therefore now move, to reform his judgment by conſent, and reduce it to the proper amount; but as the judgment was ſtrictly ſpeaking regular, and the plaintiff was under the neceſſity of oppoſing this motion, we ſhall not allow the coſts of his application.

The prothonotary having in the above caſe been directed to enquire concerning the practice of the king's bench, reported that he had been informed by the maſter, that though no caſe had occurred within his knowledge, where this queſtion had ariſen, yet it was generally underſtood, that an arbitrator had no power to give the coſts of the award, unleſs under a proviſion inſerted in the rule of court.

Biſſex v. Biſſex, Tr. Ter. 5 Geo 3. B.R. 3 *Burr.* 1729.

In an action of debt, on a bond dated 28th March, 1764, conditioned to perform an award to be made and delivered *on or before the 21ſt of May* then next following: the defendant pleaded, "that the arbitrators *did not make any award on or before 21ſt May*;" to this the plaintiff replied, "that the arbitrators after making of the ſaid writing obligatory, and before the exhibiting of the bill of the plaintiff, TO WIT, on the 21ſt day of May, &c. did make their award:" the defendant demurred ſpecially to this replication, and the plaintiff joined in demurrer; upon the argument it was objected for the defendant, that it did not appear that this award

award was made *within the limited time*, for that the time of making it was not positively, directly, and precisely alleged, but only came under a *videlicet*; and that it was not alleged with sufficient certainty for the defendant to have taken issue upon, and that it was bad on a special demurrer. PER CUR. The award was in fact made on the 21st of May, and the averment is sufficiently positive; the time of making the award is material, and therefore this allegation of it shall be taken affirmatively, and the date of the award appears to be so; the defendant might have taken issue upon it. Judgment for the plaintiff.

See also the Titles AFFIDAVIT, ATTACHMENT, and BAIL.

Bail.

K. v. Wilkes, Hil. Ter. 10 Geo. 3. C.B. 2 *Burr.* 2527, 2537, 2545.

In what cases bail may be taken, by whom, and in what manner. A PERSON in custody upon a *capias utlagatum* after conviction of a criminal misdemeanor cannot be admitted to bail, without the consent of the prosecutor: for he is in execution. In this case there were two informations against the defendant for two several misdemeanors, 1st, For having published and caused to be published, *a seditious and scandalous libel* (the North Briton, no. 45.). 2dly, For having printed and published, and caused to be printed and published, *an obscene and impious* libel (an Essay on Woman). On the trial, verdicts were found against him, upon both informations. After which, judgment was duly signed against him in each cause, and writs of *capias* were awarded and issued against him, as in ordinary cases of convictions upon informations for misdemeanors: upon his non-appearance, the proceedings were carried on to proclamation and exigents: and upon his not appearing on the fifth time of being exacted, he was *outlawed:* afterwards, having surrendered himself to the sheriff of Middlesex upon a *capias utlagatum*; and being brought into court by *habeas corpus*, a writ of error in each cause was delivered into court, and allowed. It was then prayed by the attorney-general that the defendant might be committed to the Marshal, which was ordered. It was then prayed on the behalf of the defendant that he might be admitted to bail. Lord *Mansfield*, CH. J. This defendant is in custody *after conviction*; if he had been present in court, he might have been committed: if not present, he might have been taken by a *capias*. It is indeed in the discretion of the Court to bail a person so circumstanced: but discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful, but legal and regular. This defendant was not present when convicted: he afterwards withdrew from justice, and was outlawed; and a *capias utlagatum* has now issued; and he is

is in cuſtody upon it. If a perſon convicted be taken upon a *capias pro fine*, he is liable to be committed, unleſs the proſecutor conſents to his being bailed. This is the common courſe of proceeding: though it is uſual to admit to bail upon the proſecutor's conſenting to it. In the caſe of the journeymen taylors, and again in that of the weavers, the defendants were by conſent bailed, and by conſent were not to appear till called upon: but I do not remember any caſe where ſuch a perſon has been bailed *without* conſent. When a perſon ſo convicted is committed, ſuch commitment ſhall be taken into conſideration by the Court when they come to pronounce their ſentence upon him, and ſhall go as part of his puniſhment. Here the defendant is in cuſtody under the conviction: for he is in cuſtody upon the *capias utlagatum*, which iſſued upon his conviction. Now whatever doubts there may be about what is within the act of parliament, 4 & 5 *W.* and *M.* c. 18, "for the more eaſy and ſpeedy reverſing of outlawries," it is moſt certain, that a perſon convicted of a miſdemeanor is not within it, becauſe it is not *a bailable caſe:* nothing therefore can be clearer, than that ſuch a perſon is not within an act of parliament that relates only to bailable caſes: this act relates to caſes where *no ſpecial bail* is required, and to caſes where *ſpecial bail is* required; and the ſheriff is directed what to do in either caſe. Where the caſe is bailable, the defendant is to be diſcharged upon the ſecurity-bond: but even in civil actions he could not be bailed, where he was not bailable: he is only to be put into the ſame condition as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was not bailable before the outlawry, the act did not make ſuch defendant bailable, who was not ſo before the outlawry. *Yates*, J. was alſo clear in the ſame opinion. It is ſaid, "that miſdemeanors of all kinds are within the words of this act, as well as within the ſcope and meaning of it; but miſdemeanors are here connected with debts and treſpaſſes, which are deſcriptions of civil actions; and ſo may the word miſdemeanor be. This act might, on the general words of the preamble, have a view to actions of conſpiracy, deceit, or popular actions upon penal ſtatutes (on which an outlawry was given by 21 *Jac.* 1. c. 4.) and taking the whole of the act together, there can be no doubt about it: for it muſt be conſtrued of thoſe caſes where the clauſes of the act are practicable, which in the preſent caſe they are not. A conviction in a criminal caſe cannot be within this act; the ſheriff is directed by it "to take ſecurity for the perſon outlawed in the penalty of double the ſum for which ſpecial bail is required:" but the ſheriff cannot take bail of a perſon after his being convicted of a crime. The ſheriff cannot

form his own idea of the offence, or ſettle a ſum wherein he ſhould take the bail of ſuch a perſon: nor can he require bail in double the fine, or any more than what the fine ſhall be fixed at; which is uncertain and future: the concluding words of the ſecurity-bond, "and to do and perform ſuch things as ſhall be required by the ſaid court," mean putting in bail to a new action, pleading within a limited time, putting the plaintiff in the ſame condition, and ſuch like matters; and it ſhould be conſidered how the law ſtood in civil caſes, before this act of parliament: and that no bail could then be taken on a *capias utlagatum:* what I have been ſaying may throw ſome light upon this act of parliament. But I confine my opinion to its being an *outlawry after conviction in a criminal caſe*; which cannot be a caſe within the act of parliament. If a defendant is taken upon a *capias pro fine*, (or *pro redemptione*), it is an execution; and no ſheriff can take bail of him: it is a favour if the court does it. By 5 *Ed.* 3. c. 12. no pardon for an outlawry ſhall be granted, till the chancellor is certified that the plaintiff is ſatisfied of his damages. In a criminal caſe, if the party be convicted, and a *capias ad ſatisfaciendum* iſſues, and he is taken upon it, he is in execution, to make ſatisfaction; and the ſheriff can never foretell, before the Court have given the final judgment, what that ſatisfaction is to be, on which he ſhould admit the defendant to bail, on the *capias utlagatum:* he has nothing to direct him by. No clauſe of this act can be put in execution, on an outlawry upon a conviction in a criminal caſe. *Aſton*, J. of the ſame opinion: I think this act of parliament relates only to civil actions; this is evidently the true ſpirit of it. It cannot be imagined that the act can mean to allow of a defendant's appearing by attorney, in caſes where the defendant is obliged to appear perſonally, and cannot appear by attorney at all: neither can it extend to take bail in caſes not bailable: but ſurely it cannot extend to caſes of criminal miſdemeanors, *after conviction*; becauſe in ſuch caſes a defendant is not entitled to be bailed at all. Outlawries after conviction are very different from the caſe of outlawries for non-appearance upon meſne proceſs. After conviction, there is no caſe where it has been holden that the defendant has *a right* to be admitted to bail. In an outlawry after conviction for a miſdemeanour, no ſheriff could take bail; and conſequently this act could not have any ſuch caſe in view, or be meant to extend to it. *Willes*, J. It is clear that the defendant has no right to demand being admitted to bail: this is an outlawry *after conviction:* if it ſhould be granted that he is entitled to be bailed upon the outlawry, yet as he ſtands convicted of the crime, he muſt be committed upon the conviction. This ſtatute is indeed as obſcure as any in the

the ſtatute-book; it is difficult to aſcertain its true meaning. Therefore, I do not chooſe to give any direct opinion about its extent; unleſs it ſhould become abſolutely neceſſary for me to do ſo: as the preſent caſe ariſes upon an outlawry *after conviction*, it is clearly not a caſe within this act of parliament. In treaſon and felony, outlawries were convictions of the fact; and therefore they are particularly excepted out of this act. But outlawries in caſes of miſdemeanor are not convictions of the fact: yet after actual conviction of a miſdemeanor, the defendant is not entitled to bail; whether he be or be not outlawed; even in a civil action, a perſon outlawed after judgment could not have a pardon, till payment of the debt: in the preſent caſe, it would be merely nugatory to diſcharge the defendant upon giving bail to proſecute his writ of error upon the outlawry, when we muſt immediately commit him upon the conviction. How can the ſheriff know at the time of the defendant's being taken upon the *capias utlagatum*, whether the Court will admit of ſpecial bail or not? or if they ſhould, how ſhall the ſheriff know in what ſum it ſhall be? or, if he ſhould be fined, what will be the amount of his fine? Clearly an outlawry after conviction of a miſdemeanor is not within the act, whatever elſe may be within it. THE COURT, having thus declared their unanimous opinion, "that the defendant ſtanding con-"victed of a criminal miſdemeanor, had *no right to demand* "being admitted to bail under this act of parliament." His counſel moved, that he might be bailed upon the foot of the general diſcretion of the Court. PER LORD *Mansfield*. I have ſaid, that I know "no caſe where a perſon convicted "of a miſdemeanor has been admitted to bail without the "conſent of the proſecutor." We cannot therefore do it, if the attorney-general does not conſent: for we muſt act alike in all caſes of this nature: and what we do now, ought to be agreeable to former precedents, and will become a precedent in future caſes of a like kind. THE COURT, declining to bail without the conſent of the attorney-general as proſecuting for the crown, he was committed to the marſhal.

In this caſe Lord *Baltimore*, who was charged with having committed a rape, and the women who were alſo charged as acceſſaries before the fact, and againſt whom warrants had been iſſued, came into court, and ſurrendered themſelves: it was then moved to admit them to bail (which was admitted to be of courſe with reſpect to the acceſſaries), and the Court, accordingly, on the reading of ſeveral ſpecial affidavits ſtating ſome very ſtrong circumſtances in favour of the application, ordered the principal to be bailed by four manucaptors, in 1000l. a-piece, and himſelf in 4000l. and the women in 400l. each, and their ſecurities (all of them together) in the like ſum. The condition of

The King *v.* Lord Baltimore, Ann Darby, and Elizabeth Grieſſenburgh, Hil. Tr. 8 Geo. 3. B.R. 4 *Burr.* 2179. 1 *Black.* 648.

the recognizances was, "to appear at the next aſſizes and "general gaol-delivery for the county of Surrey."

Bengough and another v. Roſiter, Hil. Ter 32 Geo. 3. B.R. 4 *Ter. Rep.* 505.

The ſheriff has no authority to take *a bond* for the appearance of perſons arreſted by him under proceſs iſſuing upon an indictment at the quarter-ſeſſions for a miſdemeanor: in ſuch a caſe he can only take a *recognizance* for their appearance.—In debt on bond, the defendant, after craving oyer of the bond, by which he and two others became jointly and ſeverally bound to the plaintiffs *as ſheriffs of Briſtol*; and of the condition, which was for the defendant to appear at the next general quarter-ſeſſions to be holden, &c. to anſwer, &c. touching a certain treſpaſs and aſſault whereof he was indicted, PLEADED, that at the time of making the ſaid writing obligatory, he had been indicted for the treſpaſs and aſſault in the condition mentioned, and that a *capias* was iſſued out of the court of ſeſſions, directed to the then ſheriffs of Briſtol, commanding them to take the ſaid defendant, and him ſafely keep, ſo that they might have his body before the ſaid juſtices in the condition mentioned at the next general quarter-ſeſſions, &c. then and there to anſwer, &c. The plea then ſtated the delivery of the writ to the plaintiffs as ſheriffs, and the arreſt of the defendant by virtue thereof, and that the defendant executed the ſaid bond with the ſaid condition, *in order to obtain his diſcharge* from out of the cuſtody of the plaintiffs, who thereupon ſet him at liberty; *the ſaid indictment in the ſaid condition of the ſaid writing obligatory mentioned, then being pending and wholly undetermined*; and that the defendant did not upon or at any time before or after the making of the ſaid writing obligatory, or before the exhibiting of the plaintiff's bill, *enter into any recognizance or other ſecurity whatſoever to our lord the now king, for his appearance at the ſaid ſeſſions*, in the condition of the ſaid writing obligatory mentioned, or at any other court or ſeſſions whatſoever, to anſwer the ſaid indictment, &c. or in any other manner whatſoever touching the ſaid treſpaſs, &c. nor was any ſuch recognizance or ſecurity entered into or given to our ſaid lord the king in that behalf. The ſecond plea was the ſame as the former, except that it ſtated, that the defendant, while in cuſtody upon the arreſt, executed the bond, *in order to obtain, and in conſideration of then and there obtaining, his diſcharge out of cuſtody*; which bond the plaintiffs accepted on the occaſion, and for the cauſe and conſideration aforeſaid, and thereupon, then, and there ſet at liberty, and permitted the defendant *to eſcape* and go at large, &c; the ſaid indictment being then pending and wholly undetermined, &c. The third plea was alſo the ſame as the firſt, as far as the averment of the plaintiff's having ſet the defendant at liberty after having executed the bond, in order

order to obtain his diſcharge: and then was added this further averment, that no writ of *venire facias* iſſued or was ſued out againſt the defendant, upon the ſaid indictment mentioned, &c. previous to the iſſuing of the ſaid writ of *capias* againſt the defendant; nor was he thereby, or by any other writ or proceſs whatſoever, ſummoned to appear or anſwer to the ſaid indictment, before the iſſuing of ſuch writ of *capias*. To each of theſe pleas there was a general demurrer, and joinder. In ſupport of the demurrer, two points were made: 1ſt, *that the ſheriffs were juſtified in executing the* capias, *although no* venire *had previouſly iſſued*; *and, ſecondly, that the ſheriffs, having arreſted the defendant under the ſeſſions' proceſs, were not only juſtified, but bound to take an* obligation *for his appearance at the return of the writ*. But the Court deſired the counſel to confine himſelf to the laſt point, as they had not any doubt upon the firſt: and this, he ſaid, depended on the ſtat. 23 *Hen.* 6. c. 9.; by which ſheriffs are enjoined, "to let out of priſon all perſons by them arreſted, or being "in their cuſtody, by force of any writ, bill, or warrant, "in any action perſonal, or *by cauſe of indictment of treſpaſs*, "upon reaſonable ſureties, where ſuch perſons be ſo let to "keep their days *in ſuch place as the ſaid writ, bill, or warrant ſhall require*," *&c.* And, "that no ſheriff, &c. "ſhall take, &c. any obligation for any cauſe aforeſaid, or "by colour of their office, *but only to themſelves*, of any per-"ſon, which ſhall be in their ward by the courſe of the "law, *but by the name of their office*, and upon condition "written that the priſoners ſhall appear at the day contained "in the ſaid writ, bill, or warrant, and in ſuch places as "the ſaid writ, bill, or warrant, ſhall require; and if any "of the ſaid ſheriffs, &c. take any obligation *in other form* "by colour of their offices, that it ſhall be void." PER CUR. Whatever power the ſherff might have had in this reſpect under the ſtatute 23 *Hen.* 6. c. 9. the queſtion is, Whether it is not taken away by a ſubſequent act paſſed in the next reign; 1 *Ed.* 4. c. 2. It is clear, that at common law the ſheriff could not bail any perſons indicted before juſtices of the peace (1), though he might bail thoſe indicted before him at his torn (2). Now the ſtat. 23 *Hen.* 6. was not paſſed to enable the ſheriff to take bail in caſes where he could not bail before, but in order to compel him to take bail in thoſe caſes where he might have taken bail, and neglected ſo to do. Before this ſtatute, the ſheriff might bail thoſe indicted before him: but the ſtat. 1 *Ed.* 4. c. 2. manifeſtly ſhews, that the legiſlature would not truſt to the ſheriff in ſuch caſes; for the act requires him to return all indictments

(1) 2 *Hawk.* P. C. c. 15. § 26. (2) Ib. ſ. 27.

taken

taken before him at his torn to the juſtices at the next ſeſſions; and *Hawkins* (1) expreſsly ſays, that that ſtatute takes away the ſheriff's power of bailing in ſuch caſes. In the 25th ſection of the ſame chapter he ſays, "it is holden by ſome, that by the common law the ſheriff might, by virtue of his office, as principal conſervator of the peace, bail any perſon arreſted on ſuſpicion of felony, or for any other offence which is bailable." In the next clauſe (2), he ſays, "but it ſeems that the ſheriff had no power, *ex officio*, to bail any perſon indicted of *any* crime before juſtices of peace." And in the 27th, "it is holden that at this day the ſheriff has loſt his power by reaſon of 1 *Ed.* 4. c. 2.; by which it is enacted, "that the ſheriff ſhall not proceed on any ſuch indictment, but ſhall remove it to the next ſeſſions of the peace." Therefore there was a caſe before the ſtatute of *Hen.* 6. in which he might have taken bail. Theſe paſſages in *Hawkins* perfectly explain the meaning of the ſtat. *Hen.* 6.; and are confirmed by the ordinary courſe of juſtice, which is conformable to his opinion; *and it was the ſheriff's duty to have taken a recognizance.* Judgment for the defendant.

Rengough *v.* Roſſiter, Hil. Ter 38 Geo. 3. In the Exch. Cham. in error, 2 *Hen. Black.* 418.

The court of king's bench having given judgment for the defendant as above, a writ of error was brought, which was twice argued. Afterwards, the opinions of the judges were delivered in the following manner: "Mr. J. *Rooke*, Mr. B. *Thompſon*, Mr. J. *Heath*, Mr. B. *Perryn*, Mr. B. *Hotham*, and the Lord Ch. Bar. *Macdonald* held, that the judgment of the court of king's bench ought to be affirmed for the following reaſons, (contra *Eyre*, Ch. J. who was of opinion that it ought to be reverſed). The queſtion in this caſe is, whether the ſheriffs of Briſtol were enabled by the ſtat. of 23 *Hen.* 6. to take the obligation mentioned in the pleadings? Now, though the words of the ſtatute are ſufficiently large, taken in their literal ſenſe, to give ſheriffs the power of bailing an indictment of treſpaſs before juſtices: yet the interpretation of this as well as other ancient ſtatutes muſt be made, not merely according to the literal ſenſe, but according to the ſubject-matter; the interpretation of other ſtatutes made in *pari materia*; precedents; the authority of text writers; and long and conſtant uſage. At common law, the ſheriff might bail either on writ, or *ex officio*: the latter power only appertains to the preſent inquiry. This power of bailing *ex officio* was incident to his power of awarding proceſs, and giving judgments on indictments. The principle on which it is founded demonſtrates its extent: the firſt ſtatute which limits its power is the ſtat. Weſtm. 1. 3 *Ed.* 1.

(1) 2 *Hawk.* P. C. c. 15. § 27. (2) Ib. § 26.

c. 15.

c. 15. which was a remedial and declaratory law: in the declaratory part, it ſtates, that, except in three caſes therein ſpecified, it was doubtful in what caſe the ſheriff ought to replevy priſoners in his cuſtody: and it proceeds to mention the caſes in which he is commanded to let them on mainprize, adding theſe material words: "*Sans rien donner de leur biens*;" by which he is forbidden, by neceſſary inference, to take an obligation for money. This clauſe will ſerve to interpret that of 23 *Hen.* 6. as will hereafter be ſhewn. It is evident that this ſtat. Weſtm. 1. does not extend to perſons indicted before juſtices of the peace, who did not exiſt at the time when it was paſſed. They were created by virtue of a ſubſequent ſtat. 4 *Ed.* 3. c. 2. which firſt gave them a power of taking indictments, which were afterwards to be tried by the judges of gaol-delivery, and which expreſsly enacts: "that "ſuch as ſhall be indicted, or taken, by the ſaid keepers of "the peace, ſhall not be let to mainprize by the ſheriffs, nor "by none other miniſters, if they be not mainpernable by "the law; and that ſuch as ſhall be indicted, ſhall not be "delivered but at common law." This ſtatute ſhews the policy of the legiſlature, which expreſsly prohibits the ſheriff from bailing, *ex officio*, perſons indicted before juſtices; for that ſeems to be the true conſtruction of this ſtatute: it evinces the decided preference given to the juriſdiction of the juſtices, and the jealouſy entertained by the legiſlature, leſt the authority of the ſheriffs ſo corruptly exerciſed, ſhould interfere with the new and favourite juriſdiction; as at the time of making the ſtat. 23 *Hen.* 6. c. 9. ſheriffs had a moſt extenſive criminal juriſdiction in their tourns, and incidentally a power of bailing perſons indicted before them, the queſtion is, Whether the power given to them of bailing by obligation is to be reſtrained to indictments for treſpaſs taken in their tourns, or to be extended to indictments for treſpaſſes before juſtices. If the latter interpretation were to take place, it would follow, that the legiſlature would by the ſame words modify an exiſting power, and create a new one in the ſame ſubject-matter, without announcing ſuch an intention. But it ſeems to be a good rule of conſtruction, that where a ſtatute modifies an exiſting power of a known officer, it ſhall not be conſtrued to give a new power, unleſs ſuch intention be clearly expreſſed, or may be collected by neceſſary legal inference: and this would be the more extraordinary in the preſent caſe, where the miſchief to be remedied is the abuſe of the then exiſting power confided to the ſheriffs. If all the ancient ſtatutes be examined from *Mag. Char.* to the 1 *Ed.* 4. both incluſively, a period of two hundred years, relative to the criminal juriſdiction of ſheriffs, and to the abuſe of their power by bailing, they will be

be found moſt ample in the detail of the extortions, perjuries, and oppreſſions, of the ſheriffs and their officers. One grievance is ſtated in all the ſtatutes; they bailed for money ſuch as ought not to be bailed, and they extorted money from thoſe who were entitled and demanded to be bailed: their juriſdiction was become moſt odious: the legiſlature in every reign abridged ſome part of their power, and increaſed the juriſdiction of the juſtices, until at laſt they were deemed ſo incorrigible, that their whole criminal juriſdiction was expreſsly, and the power of bailing for offences in their tourns incidentally, taken away, and transferred to the juſtices of the peace, by the ſtat. 1 *Ed.* 4. c. 2. Theſe obſervations may ſerve as an anſwer to an argument that has been uſed on the part of the plaintiff in error, in conſidering this ſtatute, namely, that as it gives a new power in civil caſes, therefore it may be conſtrued to give a like power in criminal caſes; and that the one ſhould be conſidered co-extenſively with the other. But the caſes are alſo in themſelves different. Before the paſſing the ſtatute 23 *H.* 6. ſheriffs had no power *ex officio* to bail without writ perſons in their cuſtody on civil proceſs; they could only do ſo on the writ *de homine replegiando*; but in criminal caſes they had a power of bailing perſons indicted before them in their tourns. In reſpect to civil proceſs, the power of bailing given to them was totally new; in reſpect to criminal proceſs, it was only new as to the mode of taking an obligation; for *the ſheriff without writ, before the ſtatute, might have let out on mainprize ſuch perſons as were indicted in his tourn.* This ſtatute being in *pari materia* with the ſtatute of Weſtminſter 1. the true expoſition of the one may be found by comparing it with the other. By the expreſs terms of the ſtatute *Weſtminſter* 1, ſheriffs are reſtrained from taking any thing of thoſe they let to bail, whether they be indicted for felony or treſpaſs. This by neceſſary implication reſtrained the ſheriffs from taking bonds of thoſe whom they bailed. The ſtat. of 23 *H.* 6. in fact repeals as much of the ſtatute of *Weſtminſter* 1. as prohibits ſheriffs from taking bonds of thoſe who were indicted of treſpaſſes in their tourns; but as the ſtatute of *Weſtminſter* 1. does not extend to juſtices of peace, the ſubſequent ſtatute which in part repeals it, ought not to receive a more extenſive conſtruction. *A contrary conſtruction of the ſtat.* 23 Hen. 6. *would be inconvenient in another reſpect, that the ſheriff cannot judge what bail he ought to require of perſons indicted before juſtices, for offences not appearing in the* capias; *but he was under no ſuch difficulty in bailing thoſe who were indicted in his tourn, for he might ſee the indictments.* And no miſchief can ariſe to the public from the conſtruction contended for, ſince the party

in

in priſon may be bailed at preſent by the juſtices of the peace. It can ſcarcely indeed be imagined, that the uniform policy of the legiſlature, manifeſted in all the other ſtatutes from *Magna Charta* to the 1 *Edw.* 4. and the conſtant preference given to the juriſdiction of the juſtices, ſhould in this ſtatute alone, which equally condemns the exceſſes of the ſheriffs, be changed and altered. The ſtatute of 1 *Edw.* 4. is clearly a virtual repeal of 23 *H.* 6. ſo far as reſpects indictments taken in the ſheriff's tourn, becauſe it takes away his power of awarding proceſs, and giving judgment on ſuch indictments. From thence the inference was probably drawn, that it was a virtual repeal *in toto*; for it would be a whimſical conſtruction of the ſtatute of 1 *Edw.* 4. to make it abrogate the power of bailing by the ſheriffs, in reſpect to their own juriſdiction, and to let it ſubſiſt in reſpect to the juriſdiction of the juſtices. Suppoſe that the ſheriff, as conſervator of the peace, ſhould have committed a perſon to gaol for a breach of the peace, and that an indictment in his tourn had been found againſt the perſon for the offence, the ſheriff could not have bailed him: but if the arguments on the other ſide be well founded, as ſoon as the indictment had been delivered to the juſtices of the peace, he might have bailed him. Again, the ſheriff could not bail on indictments in his tourn, where he could apportion the bail to the magnitude of the offence; but he could bail on indictments of treſpaſs before juſtices, where he had no rule to guide his diſcretion. For theſe reaſons, and from theſe apparent incongruities, it is evident, either that indictments before juſtices are not within the purview of the ſtatute 23 *H.* 6. or that the ſtatute is virtually repeated *in toto* by the ſtat. 1 *Edw.* 4. It has been alleged, that the ſtat. of 1 *Edw.* 4. could not have been conſidered as a repeal of the ſtat. 23 *Hen.* 6. becauſe the practice of bailing, by the ſheriff, priſoners for treſpaſs by obligation, ſubſiſted after the 1 *Edw.* 4. and the year-book 7 *Edw.* 4, 5. is inſiſted on. In that caſe, the obligation was taken to a ſtranger. The ſtat. 23 *Hen.* 6. was pleaded, and *Cateſby*, a ſerjeant of counſel with the plaintiff, objects to the concluſion of the plea, which objection is allowed. The reporter ſeems to have no other object in view, than to give the opinion of the court as to the plea, for the report is very ſhort, and only to one point; what became of the cauſe afterwards does not appear. No concluſion can be drawn from this caſe of uſage; it ſhould rather ſeem, that the ſheriff, in taking the bond in the name of a ſtranger, was conſcious that he could not take it in his own name, and meant to elude the law. The authority of the text-writers is next to be conſidered, and the uſage ſince the ſtat. of 1 *Edw.* 4. was paſſ-

ed.

ed. The counſel for the plaintiff have inſiſted on the paſſages in *Fitz. Nat. Brevium*, 564, and 565, Tit. *Mainprize*, where it is laid down, that the ſheriff is bound by the ſtat. of 23 *Hen.* 6. to let to bail perſons indicted before juſtices in treſpaſs, if they be not condemned. But in the ſame chapter, and in the next paragraph, it is likewiſe ſaid, that the ſheriff, upon a writ ſued out of chancery, may bail perſons condemned in treſpaſs before juſtices, which is clearly not law. This ſhews the inaccuracy of the author, and invalidates his firſt propoſition, ſo far as it depends upon his authority. The firſt propoſition, relative to the ſtat. of 23 *Hen.* 6. has nothing to do with the writ of mainprize, which is the ſubject of the chapter; and there is a manifeſt contradiction between that and the ſubſequent paragraph, in reſpect to perſons condemned by juſtices. From the inconſiſtency, therefore, of the paragraph relied on with the next that follows, and from its irrelevancy to the ſubject, there ariſes a ſuſpicion, that it is an interpolation by ſome injudicious perſon. Streſs has alſo been laid on what is ſaid by *Hale*, 2 P. C. 132, and 136. In the former paſſage he obſerves, that perſons in cuſtody by writ or proceſs iſſuing from other courts, although bailable by ſuch courts, were not bailable by the writ *de homine replegiando*, nor by the ſheriff *virtute officii*, till the paſſing the ſtatute 23 *Hen.* 6. c. 9. From this *dictum* it ſhould appear, that he thought the power of the ſheriff was enlarged by the ſtatute; and in p. 136. he expreſsly ſays, that in ſome reſpects the ſheriff's power of bailing in offences not capital, was enlarged by the ſtatute, and that there is not only power, but command to the ſheriff, to let out by ſufficient ſureties, parties arreſted in perſonal actions, and upon indictments of treſpaſs. But Lord *Hale* does not furniſh us with the grounds on which his opinion, as far as it can be collected from theſe *dicta*, is founded in that accurate and ſatisfactory manner which is uſual with him. It does not appear, that he any where conſidered the effect which the ſtat. 1 *Edw.* 4. c. 2. might have upon the 23 *Hen.* 6. c. 9. admitting the ſheriff's power to have been thereby extended. To this authority of *Hale* may be oppoſed that of *Hawkins*, who ſays, b. 2. c. 10. § 74, "there is not the leaſt "intimation of an intent to enlarge the ſheriff's power in "taking indictments, but the whole purport of it (the "ſtat. 1 *Ed.* 4.) is to reſtrain him from proceeding upon "them. It has alſo been held, that this ſtatute takes away "the power which ſheriffs had by the common law and "the ſtatute 23 *Hen.* 6. c. 9. of bailing perſons indicted "before him in his tourn, and obliges him to return ſuch "indictments to the juſtices at the next ſeſſions." And,

b. 2.

b. 2. c. 15. § 27. "It ſeems certain, that by the common "law, the ſheriff might bail any perſon who was indicted "before him at his tourn, for felony, or any other crime "that is bailable, becauſe he might both award proceſs, "and alſo give judgment againſt the perſon ſo indicted; "and it is a general rule, that whoſoever is judge of the "offence may bail the offender. But it is holden, that at "this day the ſheriff has loſt his power by reaſon of 1 "*Edw.* 4. c. 2."

To the authority alſo of *Hale* may be oppoſed the ſilence of Lord *Coke* (1), and *Staunford* (2), who make no mention of the ſtat. 23 *Hen.* 6. though each of them has written expreſsly on the ſubject of bail. *Dalton* (3) indeed mentions it, without the leaſt comment, and takes no notice of 1 *Edw.* 4. On the whole, therefore, it appears that no great weight can be laid on the authority of text-writers, who have conſidered the ſtat. 23 *Hen.* 6. in reſpect to this point, as an exiſting law; for they do not ſeem to have paid much attention to the ſubject, nor to have taken into their conſideration the ſeveral ſtatutes *in pari materia*. It is ſufficient to warrant the judgment of the court of king's bench, if, for the reaſons already given, this conſtruction of the ſtatute ſhall only appear to be probable, ſince the main ground on which that judgment will reſt is the univerſal uſage that has taken place throughout the kingdom, except in the city of Briſtol. Such uſage muſt now be underſtood to have prevailed from the time of the ſtat. 1 *Edw.* 4. Suppoſing then the conſtruction of the 23 *Hen.* 6. to be doubtful, and that the authorities cannot be reconciled, conſtant uſage would in ſuch caſe be the beſt expoſitor of an antient ſtatute. For theſe reaſons, it ſeems that the judgment ought to be affirmed.

A bail-bond given to the ſheriff of Durham, under a writ iſſued immediately from this court *to him* inſtead of the biſhop of Durham, is not void. This was an action of debt by the aſſignee of the ſheriff of Durham of a bail-bond. The declaration was in the common form; but it ſtated that the original writ was a *teſtatum* ſpecial *capias* out of this court, *directed to the ſheriff of Durham*, and did not ſtate the intervention of the biſhop of Durham. To this declaration there was a general demurrer. In ſupport of the demurrer it was contended, that the original writ being iſſued from this court *immediately to the ſheriff of Durham*, Jackſon *v.* Hunter, Mic. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 71.

(1) 2 *Inſt. Weſt.* 1. c. 15. 4 *Inſt.* c. 31. *Mainprize.* (2) *B.* 2. c. 18. tit. (3) Cap. 96.

without

without the intervention of the biſhop as count palatine, was bad; and the arreſt being conſequently illegal, the bail bond was alſo illegal and void. PER LORD *Kenyon*, CH. J. The biſhop of Durham is unqueſtionably entitled to the franchiſe now contended for, namely, that writs iſſuing out of this court ſhall be directed to his officer, who is to make his mandate to the ſheriff, and if the ſheriff miſconduct himſelf in the execution of ſuch a mandate, he is amenable to this court. But in the preſent caſe, when the writ came to the ſheriff, he was bound to execute it, though the biſhop of Durham might have interpoſed and claimed his privilege. It ſeems therefore that this writ was not abſolutely void, but merely informal, in breaking in upon the privileges of the biſhop of Durham: with reſpect to the defendant in the original ſuit, no injury was done to him by it; but on the contrary it was rather advantageous to him, becauſe it is a leſs expenſive mode of proceeding; for if there had been a mandate to the ſheriff, he muſt have borne the expence of that as well as of the other proceedings in the cauſe. It is not neceſſary to determine whether the defendant in the original cauſe could or could not have ſet aſide the proceſs for irregularity by motion; for even if he could, it is a mere irregularity, and every irregularity is not erroneous; and I think we are not warranted to ſay, that that which the ſheriff has done in this caſe is abſolutely void. *Aſhhurſt*, J. The caſes of *Needham* v. *Bennet*, Sir *T. Raym.* 171. and *Chapman* v. *Maddiſon*, 2 *Str.* 1089, are much ſtronger than the preſent, for in thoſe this court granted attachments againſt the ſheriffs of Cheſter and Lancaſter, for not returning writs directed *immediately to them* by this court; and in the latter, "the court on conſideration declared, that whatever might be the caſe when the queſtion came properly before them upon a claim of conuſance, or plea to the juriſdiction, yet they would never endure that the officer ſhould refuſe to receive their proceſs." At all events this was only an irregularity. And as there was no claim of privilege by the biſhop, or plea to the juriſdiction, and as the ſheriff arreſted the defendant in obedience to the writ, we cannot ſay that the bail-bond given upon that arreſt is void. Judgment for the plaintiff.

Owen v Nail, Tr Ter 36 Geo. 3. B.R. 6 *Ter. Rep.* 702.

Under an original writ IN A PLEA OF TRESPASS ON THE CASE on promiſes, the ſheriff took a bail-bond conditioned for the defendant's appearance, &c. in A PLEA OF TRESPASS; and on an action of debt on a bail-bond, brought by the plaintiff as aſſignee of the ſheriff. The declaration ſtating this, the defendant pleaded that *no ſuch plea of treſpaſs* was depending; by reaſon whereof the defendant could not nor can appear. The plaintiff demurred, and the queſtion

queſtion was, whether the bail-bond was void? PER CUR. (after argument) If the defendant were put under any diſadvantage by this bail-bond, we ſhould have liſtened more favourably to the objection he has made; but ingenuity cannot ſuggeſt that this will be attended with any inconvenience to him. The bail-bond need not diſcloſe the nature of the action: this is neither required by the ſtatute nor by any of the authorities; it is ſufficient that it ſets forth the parties, and the time and place of appearance: the caſe of *Gardiner v. Dudgate*, in 2 *Shower* 51. is an authority againſt the objection. With regard to the difference between the actions of treſpaſs and treſpaſs on the caſe, it is perfectly immaterial for the purpoſe for which the bail-bond was given. The defendant's argument is built on a ſuppoſition, that we muſt neceſſarily intend that the action mentioned in the condition of the bail-bond is different from that in the original writ. But that is aſſuming too much; a plea of treſpaſs does not neceſſarily mean a plea of treſpaſs *vi & armis*, it may as well mean an action of treſpaſs on the caſe; for the words "plea of treſpaſs" apply as well to the one as to the other. The mode of proceeding in both is the ſame, namely, by attachment, and the judgment is the ſame, a *capiatur*. In *Fitz. N. B.* 196. it is ſaid, "if the writ of treſpaſs be returnable, then the writ ſhall be of another form, for then theſe words *vi & armis* ſhall be in the writ; and if it want thoſe words the writ ſhall abate, if they be not writs of treſpaſs on the caſe, which writs of treſpaſs (conſidering it as treſpaſs) have not theſe words "*vi & armis.*" Therefore there is no reaſon why we ſhould not underſtand the plea of treſpaſs in the condition of the bail-bond, as a plea of treſpaſs on the caſe agreeably to the original writ. Judgment for the plaintiff.

A rule was obtained, calling on the plaintiff to ſhew cauſe why the proceedings ſhould not be ſet aſide for irregularity, or why a common appearance ſhould not be entered, and the bail-bond be delivered up to be cancelled, on two objections, *firſt*, That the defendant was arreſted by the name of *Weſton*, and the plaintiff filed a declaration *de bene eſſe*, againſt *E. Waſon*, *ſued by the name of Weſton*; which it was contended could not be done on bailable proceſs, unleſs warranted by the defendant putting in bail above in a different name from that by which he was arreſted. *Secondly*, The *jurat* of the affidavit on which the defendant was held to bail, omitted to ſtate the place where it was ſworn. BUT the Court over-ruled both objections, and diſcharged the rule.

Symmers *v.* Waſon, Mic. Ter. 38 Geo. 3. C.B. 1 *Pull. & Boſan.* 105.

In this caſe, it was moved for a rule to ſhew cauſe why the defendant ſhould not be diſcharged out of cuſtody on entering a common appearance, on the ground of irregularity in

Hollis *v.* Brandon, Ea. Ter. 37 Geo. 3. C.B. 1 *Pull. & Boſan.* 36.

in the affidavit, by which he was held to bail. The affidavit was intitled *E. H.* plaintiff, and *W. B.* defendant, PER CUR. (after cauſe ſhewn, and time taken to conſider) We have conſidered this queſtion, and have found, upon enquiry, that it is the ſettled practice of the king's bench, that on a motion for an information, if an affidavit be intitled in a cauſe, it is rejected: we think the rule ſhould be univerſal; for the only ground on which it is founded is, that it would be difficult, if not impoſſible, to indict for perjury upon ſuch an affidavit. We think alſo that the practice of both courts ſhould be uniform.—Rule abſolute without coſts.

Clarke *v.* Cawthorne, Tr. Ter 37 Geo. 3. B.R. 7 *Tr. Rep.* 321

Afterwards, in this caſe, in the court of king's bench, the defendant obtained a rule, calling on the plaintiff to ſhew cauſe why he ſhould not be diſcharged out of cuſtody, for the inſufficiency of the affidavit on which he had been arreſted. *The affidavit was entitled in the cauſe*, and ſtated that, "*the defendant has, or lately had, in his poſſeſſion a certain bill of exchange, &c. which the ſaid defendant, on demand thereof, refuſed to deliver to the plaintiff, but on the contrary has converted and diſpoſed of the ſame to his own uſe.*" The firſt objection was, that *the affidavit was entitled in the cauſe*. But *The Court* thought, that as the practice (1) had obtained ſo long of adding a title to affidavits of this kind, it would be too much now to determine that ſuch practice had been erroneous, particularly as this was a mere queſtion of form, and did not interfere with the juſtice of the caſe: and that the conſequences of ſuch a determination would be, that it might occaſion an infinity of actions for improperly holding to bail in thoſe caſes in which the affidavits had been entitled: *but that, for the regulation of future practice, they would make a rule of court, ordering, that affidavits to hold to bail ſhould not be entitled after this term* (2).

---

(1) In the laſt term, ſimilar rules were obtained in two cauſes, *Lee* v. *Roſs*, and *Gaunt* v. *Marſh*, on a ſimilar objection. On enquiry, it then appeared that it had been the practice for a great length of time to uſe affidavits to hold to bail that were and that were not entitled indiſcriminately; that there were nearly as many in the office of the one kind as of the other. The *Court*, thinking it a point that concerned the practice of all the courts, ſaid that they ſhould defer giving any opinion until they had had an opportunity of conſulting the judges of the other courts. But as ſoon as the above caſe of *Clarke* v. *Cawthorne* was diſpoſed of, they diſcharged the rules in both theſe caſes. In ſupport of theſe rules were cited, *Bevan* v. *Bevan*, p. 524, ſupra: *R.* v. *Harriſon*, p. 524, ſupra.—Againſt the rules was cited *King*, *q. t.* v. *Cole*, p. 513, 524, ſupra.

(2) And a rule was made accordingly, ordering, that ſuch affidavits ſhould not be entitled for the future. See Title RULES OF COURT.

But

But ANOTHER OBJECTION was then taken to the affidavit, that it ought to have ſtated a cauſe of action to the extent ſuggeſted in the affidavit: whereas here, conſiſtently with what was ſworn, the defendant might not have converted any thing to his uſe of the value ſtated; for though it was ſtated that the bill of exchange purported to be of a certain amount, it did not appear but that the bill might have been paid. And *The Court* being of opinion that this objection was fatal, made the rule abſolute.

But in this caſe, where it was moved to diſcharge the recognizance of bail, on account of two objections, which it was alleged were apparent on the face of the affidavit, on which the defendant had been holden to bail, viz. 1ſt, Becauſe the affidavit was not entitled "*In the king's bench*;" 2dly, Becauſe it only appeared to have been taken before "*J. M. a commiſſioner, &c.*" without ſaying by what court he was commiſſioned to take affidavits. THE COURT, after cauſe ſhewn, were at firſt inclined to diſcharge the rule on the firſt ground only: but afterwards they ſaid they were ſatisfied that the objections to the affidavit were unfounded, as the affidavit was poſitive with regard to the debt, and as an indictment for perjury might be found on it, if the contents were not true. Kennet and Avon, & an Co. v. Jones, Mic. Ter. 38 Geo. 3. B.R. 7 Ter. Rep. 451.

In an action on 26 *Geo.* 2. c. 21. § 3. for a forfeiture of 200l. for having unſealed wrought ſilks found in his poſſeſſion; it was ſhewn for cauſe againſt the defendant's being diſcharged on common bail, that the ſtatute expreſsly gives a *capias* in the firſt proceſs, ſpecifying therein the amount of the penalty ſued for, and directs, "that the defendant ſhall be obliged to give ſufficient bail, &c." It was then objected, that the affidavit on which the defendant was held to bail was not ſufficiently poſitive, it being that the proſecutor "*had cauſe of action againſt him for* 200l. *forfeited by him &c.* SED PER CUR. It is poſitive enough: beſides, the act does not require any affidavit at all. The King v. Rebord, Mic. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1569.

In this caſe, the affirmation of the plaintiff, on which the defendant had been held to bail was, "that the defendant was juſtly and truly indebted to him in the ſum of 5000l. for ſo much money had and received of this affirmant:" adding, "and for which he has not accounted." *The Court* held, that theſe laſt words rendered it not poſitive, and therefore the defendant was diſcharged on common bail. Champion v. Gilbert, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2126.

In this caſe, the affidavit on which the defendant was held to bail was, "that the defendant was indebted to the plaintiff (who was an aſſignee) in the ſum therein mentioned, *as appears* by the bankrupt's books, and as the plaintiff verily believes; and it was moved that the defendant might be diſcharged on common bail. BUT PER CUR. It is not reaſonable to put it upon the aſſignee, to procure an affidavit: the Tonna v. Edwards, Hil. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2283.

the bankrupt might perhaps refuſe to make ſuch an affidavit; beſides, it has been ſolemnly ſettled in *Barclay* v. *Hunt* (1), "that ſuch an affidavit as this is ſufficient;" it is as certain as the nature of the thing will bear. And the whole Court agreed it to be a ſettled point, that ſwearing to belief in this manner, was ſufficient for an executor or adminiſtrator, or an aſſignee under a commiſſion of bankruptcy.

Hatfield v. Linguard, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 217.

A party cannot be held to bail for a penalty, but only for the ſum ſecured by the penalty. And, therefore, where the affidavit to hold to bail was, "that the defendant was indebted to the plaintiff in 1000l. under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. *which ſaid balance is ſtill due and unpaid*," without ſtating that the balance was 1000l. it was moved that the defendant might be diſcharged on filing common bail. *Per Curiam.* The plaintiff ſhould have ſhewn what the balance was, and have ſworn that that was ſtill due and unpaid; whereas he has ſworn to the whole ſum mentioned in the articles of agreement, which was inſerted as a penalty for ſecuring the balance. *A defendant cannot be held to bail for a penalty, but only for the ſum ſecured by the penalty.* The argument in ſupport of the affidavit is merely an inference that ſo much is the balance: that may or may not be the fact, moſt probably it is not: but an affidavit to hold to bail muſt be poſitive and certain, and not merely argumentative.—Rule abſolute (2).

Houſin v. Barrow, Hil. Ter. 33 Geo. 3. B.R 6 *Ter. Rep.* 218.

Although in general a defendant cannot be held to bail twice for the ſame cauſe; *yet if he be diſcharged out of cuſtody the firſt time for ſome act for which the plaintiff is not anſwerable*; as for inſtance, an alteration in the warrant to arreſt by the ſheriff's officer without the plaintiff's knowledge: in ſuch caſe, the defendant may be again held to bail for the ſame cauſe of action.—In this caſe, after the rule was made abſolute for diſcharging the defendant out of cuſtody (for an alteration of the warrant, as ſtated in p. 676, ſupra), the plaintiff diſcontinued, and then ſued out another writ for the ſame cauſe of action, on which the defendant was again held to bail. And it being moved that the defendant might be diſcharged. The Court held, That it was an exception to the general rule; for the defendant was diſcharged out of cuſtody the firſt time for ſome act over which the plaintiff had no control, and for which he was not anſwerable.—Rule diſcharged.

---

(1) See this caſe in p. 523, ſupra.

(2) See *Stinton* v. *Hughes*, in p. 521. ſupra.

But

But if a defendant, on being informed that a writ has been issued againſt him, voluntarily give a bail-bond, he cannot afterwards object to the inſufficiency of the affidavit. In this caſe, the defendant voluntarily gave a bail-bond, on being informed that a writ had been taken out againſt him; and afterwards moved to have the bail-bond delivered up to be cancelled, on the ground that the affidavit did not ſtate, "that no offer had been made by the defendant to pay the debt in bank-notes," according to the bank indemnity-act, 37 *Geo.* 3. c. 45. (3). PER CUR. If any error appeared on the proceedings of the Court, the defendant could not waive any objection without giving a releaſe of errors; and it has been doubted how far an error in law can be confeſſed: but the affidavit to hold to bail is only proceſs to bring the party in; and if he chooſe to waive any objection to that, he may do it; and in this caſe we think he has waived taking advantage of this objection. If indeed the defendant had been actually under arreſt at the time, his conſent to give a bail-bond would not have been binding on him, becauſe it might be conſidered as given under dureſs: but here he voluntarily gave this bail-bond; and upon that ground only our opinion is founded.—Rule diſcharged. Norton *v.* Butler Danvers, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 375.

And the length of time that may have elapſed ſince the taking the bail-bond was in this caſe holden to be no waiver of the above objection. Fenwicke *v.* Hunt, 7 *Ter. Rep.* 376.

However, in another caſe, it was ruled, that the defendant could not take advantage of the objection after he had pleaded. Levy *v.* Duponte, 7 *Ter. Rep.* 376.

A defendant alſo, by putting in and perfecting bail above, waives all objections to the ſufficiency of the affidavit, on which he was held to bail.—In this caſe, it was moved that an *exoneretur* might be entered on the bail-piece, and a common appearance allowed; the affidavit of the debt having omit- Chapman *v.* Snow, Mic. Ter. 38 Geo. 3. C.B. 1 *Pull. & Boſan.* 132.

---

(3) See the caſe of *Crooks* v. *Holditch*, in p. 677, ſupra.

Alſo in the caſe of *Neſbitt* v. *Pymm*, Mic. Ter. 38 *Geo.* 3. where the affidavit to hold to bail was made in Ireland, and omitted to negative the tender, *The Court* held, That as the affidavit, though made in Ireland, was made for the purpoſe of being uſed in this country, it ought to contain all thoſe requiſites that are eſſential to an affidavit made in England to hold to bail; and they accordingly diſcharged the defendant on common bail, 7 Ter. Rep. 376.

So alſo in another caſe, in C.B. *Stewart* v. *Smith*, Mic. Ter. 38 *Geo.* 3. where it was ſtated that the affidavit was made in Ireland, only two days after paſſing the act. *The Court* diſcharged the defendant on common bail; and ſaid, that though it was a hard caſe, they could do nothing, for the act was poſitive. Upon this it was applied for leave to file a ſupplemental affidavit: but the Court ſaid they had conferred with the judges on the conſtruction of the act, and thought that a ſupplemental affidavit could not be allowed, 1 *Pul. & Boſan*, 132.

ted to negative a tender in bank-notes, according to the directions of the bank-indemnity-act. But it appearing that the defendant had put in and perfected bail above, and that a plea had been demanded; *The Court* held, That the defendant had waived the irregularity, and was too late to make the application.

Preters and another, *v.* Luytjes, Ea. Ter. 37 Geo. 3. C.B. 1 *Pull. & Bo-ſan.* 1.

In this caſe, it was moved, that the defendant might be diſcharged on filing common bail, and that all further proceedings might be ſtayed: the affidavit was made by a *third perſon*; and ſtated, that the defendant was indebted to the plaintiffs, who were reſident at Amſterdam in Holland, in a ſum of money for goods ſold and delivered: the objection was, that by the French correſpondence-act, 34 *Geo.* 3. c. 9. § 7. it is enacted, "That if any action ſhall be commenced for the recovery of any debt, contrary to the proviſions of that act (viz. by any perſon within any of the dominions of France, or any country, territory, or place under the government of the perſons exerciſing the powers of government in France), the Court may, in a ſummary way, diſcharge the defendant arreſted on meſne proceſs, and ſtay proceedings." And it was inſiſted, that Amſterdam was under the dominion of the perſons exerciſing the powers of government in France. *Sed Per Curiam.* Can we take notice that Amſterdam is under the dominion of France? The Court will hardly receive evidence of *the influence* of France over Holland: actual poſſeſſion, as of Flanders, might bring a caſe of this kind within the act; but in Holland there is a government *de facto*; however that government may be influenced by French counſels, there is no ground for the application. Neither is it neceſſary for any connection to appear on the face of the affidavit, between the deponent and the parties to the ſuit. The deponent ſwears poſitively to the debt, and that is ſufficient.

Say *v.* Ellis, Tr. Ter. 14 Geo. 3. C.B. 2 *Black.* 955.

In this caſe, the plaintiff, who was the bailiff of a liberty, had taken a bail-bond from the defendant for the appearance of another man, to anſwer a contempt in the court of chancery: on this bail-bond being put in ſuit, the defendant demurred, and it was inſiſted for the defendant that it did not appear that the plaintiff had authority to take bail, nor what the contempt was: and *Gilb.* 84. *H.* 9 *Ann.* was cited to ſhew that the party was not bailable upon a contempt: But the Court held, That on a demurrer to a declaration on a bail-bond, they cannot preſume that the officer had no authority to take bail: for if there be any real ground of exception, it muſt be ſtated in pleading facts ſufficient to bring the queſtion before the Court.

Studd *v.* Acton, Tr. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 468.

This was an action on the caſe againſt the ſheriff, on the ſtat. 23 *Hen.* 6. c. 9. for refuſing to take bail; there was a general demurrer to the declaration, and the queſtion was, Whether

Whether the ſheriff is bound by the ſtat. 23 *Hen.* 6. c. 9. to take *bail on an attachment iſſuing out of chancery?* the words of the ſtatute are, "that the ſaid ſheriffs and all other "officers and miniſters aforeſaid, ſhall let out of priſon all "manner of perſons by them or any of them arreſted, or "being in cuſtody by force of any *writ, bill, or warrant,* "*in any action perſonal, or by cauſe of indictment of treſpaſs,* "upon reaſonable ſureties, &c." The caſe was fully argued; AND *Per Cur.* We have taken this caſe into full conſideration, and have conferred with the other judges on the ſubject, and the reſult is, that we are all of opinion, that the action as laid cannot be maintained. It being the caſe of proceſs iſſuing out of the court of chancery, we think it does not come within the ſtat. 23 *Hen.* 6. c. 9. which directs that ſheriffs ſhall let all perſons out of priſon by them arreſted, or being in their cuſtody "*by force of any writ, bill, or warrant, in any action perſonal,*" which words are confined to actions at law. A ſubſequent ſtat. 13 *Car.* 2. ſt. 2. c. 2. which was made on the ſame ſubject, is diſtinctly confined to actions in the king's bench and common pleas, and it does not appear to have been the intent of the legiſlature to interfere with the proceſs of a court of equity: it is extremely clear, that the uſage has been for the ſheriffs to take a bail-bond in 40l. on an attachment, *Danby* v. *Lawſon, Eq. Cas. Abr.* 351.; but it does not appear that he is obliged to take it by the ſtatute: the firſt proceſs in the court of chancery is a ſubpœna, and if the party does not appear, then an attachment of contempt iſſues. If on this attachment he cannot be taken, and the ſheriff returns *non eſt inventus*, they go on to a ſecond attachment, and if the party be not taken on that, the next proceſs is a commiſſion of rebellion, on this the commiſſioners ought in all caſes immediately to bring the party up into court: there is an inaccuracy therefore of expreſſion in *Harriſon*'s *Chancery Practice*, 315, where it is ſaid, that the commiſſioners ought to take bail, and not keep the party lingering in priſon in their houſes. They certainly have no right to keep the perſon arreſted in priſon; their duty is to bring him up without delay to the court of chancery; there are caſes, indeed, where they may not take bail, but in the preſent caſe, if the ſheriff has done wrong, it is for that court to interfere out of which the proceſs came. We do not mean to ſay, that there are no caſes of this kind where it would be right for the ſheriff to take bail, but the queſtion for us to determine is, Whether he is bound to do it by the ſtatute? and, for the reaſons ſtated, we are all of opinion, that he is not bound to do it, and therefore there muſt be judgment for the defendant.

The King *v.* Dunn, Tr. Ter. 10 Geo. 3. B R. 3 *Burr.* 2640.

In this caſe, the defendant was brought up by *habeas corpus*; and it appeared from the return, that the defendant was in cuſtody under a warrant of commitment, for *forcibly reſiſting, hindering, affronting, abuſing, beating, and wounding*, a cuſtom-houſe officer, *in the execution of his office.* This commitment was founded upon the ſtat. 13 & 14 *Car.* 2. c. 11. whereby the next juſtice is authorized to commit offenders of this deſcription to priſon, *there to remain till the next quarter-ſeſſions, &c.* The only queſtion therefore was, "Whether the defendant was bailable or not?" AND *The Court* were unanimouſly of opinion to remand him. They obſerved, that this was not an application to their diſcretion: but a demand to be bailed, as of right: and they were clear, that a perſon committed under the words of the above act, *till the next quarter-ſeſſions*, could not claim to be bailed as of right: for that the letter and meaning of the act were, both of them, plain and manifeſt, *that the offender ſhould remain in priſon*, "*in actual cuſtody*," *till the next quarter-ſeſſions.* It was not neceſſary to uſe the technical terms *without bail or mainprize.* The import of the words uſed in the act is ſufficiently plain.

Bolland *v.* Pritchard, Hil. Ter. 12 Geo. 3. C.B. 2 *Black.* 759.

In this caſe, the bail was objected to, becauſe one of them had formerly been a ſheriff's officer for ſerving writs and making arreſts, and was now *the ſummoning officer to the ſheriff of Middleſex.* It was contended, that the rule of 6 *Geo.* 2. *prohibiting ſheriffs-officers* from becoming bail, extended only to officers concerned in arreſt. BUT the Court ſaid, The rule was founded upon principles of prudent jealouſy: that the *ſummoning officer* was within the letter of it: and therefore he was rejected.

Hawkins *v.* Magnall, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 466.

So, where one of the bail was oppoſed on the ground of his being the keeper of the Poultry Compter; and it was contended, that the rule extended only to the officers of the Court where the action is: THE COURT ſaid, There was no ſuch diſtinction: and though the objection was afterwards waived, they declared that they muſt reject the bail to preſerve the uniformity of practice.

Bologne *v.* Vautrin, Tr. Ter. 18 Geo. 3. B R. 2 *Doug.* 466. [n. 1.] *Cowp.* 828.

By the rules and orders of B.R. and C.B. Mic. 1654, "it is ordered, that no *attorney* be leſſee in an ejectment, nor *bail* for a defendant." In this caſe, the clerk to the defendant's attorney was tendered as bail, and objected to, as being within the reaſon, though not the words of the rule: and the Court being of that opinion, he was rejected.

Laing *v.* Cundale, Mic. Ter. 29 Geo. 3. 1 *Hen. Black.* 76.

So alſo, by a rule of the court of C.B. Mic. 6 *Geo.* 2. it is alſo ordered, that "no attorney of that or any other court, or any practiſing as ſuch, ſhall be bail in any ſuit or action;" and on the conſtruction of that rule, *The Court* held, that it extends to the articled clerks of attornies.

So

So alſo, in *C.B.* a perſon who was going to juſtify himſelf as bail, was objected to becauſe he was a clerk to an attorney, but as he was not an articled clerk, it was contended, that he did not fall within the rule: *Buller*, J. obſerving, that in the king's bench the rule comprehended clerks who were not articled, as well as thoſe who were, the bail was rejected. Comiſh *v.* Roſs, Mic. Ter. 35 Geo. 3. C.B. 2 *Hen. Black.* 350.

But in a criminal caſe, the defendant's attorney may be bail for him: in this caſe, *Bowes* was carried down, under a rule of court, to give bail on articles of the peace: one of the bail was objected to as being his attorney; but *Aſhburſt*, J. held, that the rule does not apply in criminal caſes. K. *v.* Bowes, 22 Bedford ſumm. aſſ. 1787. 2 *Doug.* 466.

So alſo, if an attorney do, notwithſtanding the rule, become bail, yet, though he cannot be allowed to juſtify, yet he is ſufficient bail to ſurrender the principal without juſtification. Jackſon *v.* Trinder, Hil. Ter. 18 Geo. 3. C.B. 2 *Black.* 180.

And if a perſon, who by the rules of the Court is not permitted to become bail, ſhall be put into the bail-piece, and not excepted to, the plaintiff cannot take an aſſignment of the bail-bond, and proceed upon it, as if no bail had been put in. For the bail-piece is not void, and to take an aſſignment under ſuch circumſtances, is irregular; for although the officer ought not to have been bail, and is puniſhable by the Court, yet he becomes liable to the plaintiff, who by not objecting, has accepted his ſecurity. Thomſon *v.* Roubell, Ea. Ter. 22 Geo. 3. B R. 2 *Doug.* 466. [n. 1.]

So, where a *teſtatum capias* into Briſtol was ſued out, and the defendant put in ſpecial bail at Briſtol, inſtead of Middleſex, which was erroneous: and the plaintiff waiving the ſpecial bail, entered a common appearance for the defendant, and filed a declaration in the office *de bene eſſe*: the defendant being afterwards ſerved perſonally at Briſtol, with a notice to plead; the defendant, for default of plea, ſigned judgment, and it was now moved to ſet that judgment aſide as irregular. But the Court, after cauſe ſhewn, held the judgment to be regular: for the bail put in at Briſtol was as no bail, and could not be conſidered as an appearance entered by the defendant: that the plaintiff having entered a common appearance for the defendant, and waived the ſpecial bail, he was entitled by the courſe of the court to give notice of the declaration to the defendant in perſon. Rule diſcharged. Fiſher *v.* Levi, Ea. Ter. 16 Geo. 3. C B. 2 *Black.* 1064.

The original demand was only 3l. 13s. 6d. the plaintiff brought an action for it, and obtained judgment with coſts: the debt and coſts amounted to above 10l.: the plaintiff then brought an action of debt upon this judgment, and held the defendant to ſpecial bail: on a rule to ſhew cauſe why the bail-piece ſhould not be diſcharged, and common bail be accepted, The *Court* were very clear, that as the original debt was under 10l. the inhancement of it by adding the coſts, Palmer *v.* Needham, Ea. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1389.

costs, and so raising the total to above 10l. was not sufficient to oblige the defendant to give special bail; the intention of the act being only that special bail should be required where the original debt amounted to upwards of that sum; and they were equally clear, that as special bail ought not to have been at all required, the bail-piece ought to be discharged (though actually taken), and common bail accepted (1).

Belither *v.* Gibbs, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2117.

So also, in this case the question was, "Whether the plaintiff in an action of debt upon a judgment for upwards of 10l. can hold the defendant to special bail, where the original cause of action was under 10l. but the judgment, by the addition of costs, exceeds 10l.?" And it was observed, that the two courts of B.R. and C.B. differ in their practice, C.B. hold to special bail in such cases, and B.R. accept common bail. PER CUR. It is pity that the two courts should differ in their practice upon an act of parliament (2); there should be an uniformity between the two courts, for the subject will get nothing by this court's not holding to bail, because the plaintiff will bring this action in the court where he can hold the defendant to bail; so that the defendant will not be at all relieved from finding special bail, when the suit may as well be brought in the court which does require it, as in that which does not: CUR. It is settled in this Court (B.R.) "that common bail should be accepted," and we must keep to our own rule. Lord *Mansfield* afterwards said, that he had laid this matter before all the judges; they all think our practice (B.R.) to be the more reasonable, and more agreeable to the act of parliament; and I believe the court of common pleas will alter their practice.

Bush *v.* Bates, Mic. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2660.

And the Court will order a defendant to be discharged upon common bail, where the action is brought upon a judgment of nonsuit, merely for costs.

Blandford & *al.* *v.* Foot, Ea. Ter. 14 Geo. 3. B.R. *Cowp.* 72.

A defendant who has been *superseded* for want of being charged in execution within two terms after judgment, cannot *be held to special bail* in an action brought upon such former judgment; although he may be *charged in execution* after judgment obtained in the second action. This was a rule to shew cause, why the writ of *ca. sa.* issued in this cause should not be set aside for irregularity, and why the defendant should not be discharged out of the custody of the sheriff as to this action: the defendant had been superseded for want of being charged in execution within two terms after judgment; eight years after, the executors of

(1) See also an anonymous case from *Cowp.* 128, in p. 293, supra.
(2) 12 *Geo.* 1. c. 29. § 1.

the

the original plaintiff brought an action of debt on the former judgment; and having obtained judgment in this ſecond action, cauſed the defendant to be taken on the *ca. ſa.* mentioned in the rule: after cauſe ſhewn, and time taken to conſider, *The Court* ſaid, they had looked into authorities, and were of opinion, that in this caſe the rule ought to be diſcharged; that the reaſon of the thing was, that the defendant had never been charged in execution, that the benefit of common bail might be reaſonable before judgment; but that it was no reaſon why after judgment he ſhould not be charged in execution. Rule diſcharged.

In this caſe, the practice of C.B. alluded to in the above caſe of *Belither* v. *Gibbs* was conſidered. Here there was a judgment of nonſuit, and the coſts of the defendant amounted to upwards of 10l.; he brought an action on this judgment, and held the plaintiff in the original action to bail: on a motion to diſcharge the now defendant on common bail, the foregoing caſes in B.R. were cited, and relied on. *Sed per Curiam*, No inſtance has been ſhewn where *this Court* (C.B.) has refuſed to hold to ſpecial bail, where the whole or part of the demand (upon which the action upon the judgment) ariſes from the recovery of coſts, but a multitude of caſes the other way, and we ſee no reaſon to depart from the practice of the court: *coſts recovered for a groundleſs proſecution, are as fair a debt as for any other conſideration.* Nightingale *v.* Nightingale, Ea. Ter. 19 Geo. 3. C.B. 2 *Black.* 1274.

And the practice of the court of king's bench in this reſpect is now conformable to that of the court of common pleas. In this caſe, the debt in a former action between theſe parties was under 10l. but being encreaſed by the coſts in that action, in which the plaintiff recovered, the defendant was held to bail in an action brought on that judgment: on a rule to ſhew cauſe, why the defendant ſhould not be diſcharged on filing common bail; the preceding authorities were mentioned, and Lord *Kenyon*, CH. J. ſaid, that as a different practice had prevailed in the different courts, it was proper that a conference ſhould be had with the judges of the common pleas, in order to make the practice in future uniform. And accordingly, on another day, he ſaid, that the judges of this court had conſulted with thoſe of the common pleas, and that the reſult of it was, that they had agreed to conform to the practice of the other court, by which a perſon under ſimilar circumſtances with the defendant, may be held to ſpecial bail. Rule diſcharged. Lewis *v.* Pottle, Hil. Ter. 32 Geo. 3. B R. 4 *Ter. Rep.* 570.

If a defendant be held to bail in this country, on an inſtrument entered into in a foreign country, and by which inſtrument his property only, and not his perſon, was according to the law of that country made liable, the court, on motion, Melan *v.* Duke de Fitzjames, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul. & Be. fin.* 138.

motion, will discharge him on filing common bail. In this case, a rule had been obtained, calling on the plaintiff to shew cause, why the bail-bond given for the appearance of the defendant in this cause, should not be delivered up to be cancelled, on the defendant's entering a common appearance: the affidavit of the debt stated, "that the defendant was justly "and truly indebted to the deponent, in the sum of 10001. "and upwards, on a certain deed, &c. made and executed in "France, according to the laws there in force, &c." And an affidavit was produced, sworn by a person who had been a counsellor of the parliament of Paris during twenty-five years, who stated, that by a law of that country, which was in full force when this deed was made, not only the person of the contractor or grantor was not engaged or liable, but it was not even permitted to the party contracting, to stipulate that his body should be arrested or imprisoned by reason of a deed of that sort; and that the only case where a person could be arrested or imprisoned by the laws of France for debt, was upon a bill of exchange, or a commercial engagement, and that in every other case, the property only was liable to be seized. PER CUR. (*Eyre*, Ch. J. and *Rooke*, J. contra *Heath*, J.) In causes originating in this country, and wholly governed by the laws of this country, this Court rarely interferes in a summary manner to discharge a party on a common appearance, provided the affidavit of debt is conceived in positive terms; nor will the Court do it in any case unless it sees distinctly that an ill use has been made of the power of holding to bail; the Court does not mean to try the question between the parties on these preliminary motions. But it is a very different case, when the ground of the debt is a transaction in a foreign country; it does not then originate in our law, but in the laws of that country which creates the obligation; that law must be laid before us by evidence, since we do not take notice of it of course: when it is sworn that a party is indebted on a bond or a promissory note, we know what the nature of these instruments is, and the law concerning them: or if for goods sold and delivered, we know that goods sold and delivered may create such a debt: but if the plaintiff swear positively to a debt in this country, and refer to something which renders it ambiguous whether there be a debt or not, the party ought not to be held to bail. Suppose we were to refer to some contract which had the appearance of being equivalent to a bond, and the defendant were to shew that it raised a demand for damages unliquidated, *the Court would say, the defendant may be held to bail upon a special order*, but not by the mere force of the affidavit. Now, in the present case, the defendant is held to bail on a contract made in France, the nature of which we must

muſt learn, not from the force of the inſtrument, but from evidence; there is no reference in it to the laws of this country, it muſt therefore be ſhewn what the laws of France are, and that they create an obligation which the laws of England will enforce; what would be a defence there, will be a defence here; the whole therefore turns on the laws of a foreign country. No general rule can be laid down; for whether there be a debt or not, does not come within our knowledge, nor indeed that of the party himſelf, who may be miſtaken with reſpect to the law. We do not know that we have ever done what is now deſired of us before: but if it appears that this contract creates no perſonal obligation, and that it could not be ſued as ſuch by the laws of France; (on the principle of preventing arreſts ſo vexatious, as to be an abuſe of the proceſs of the Court) there ſeems to be fair ground on which the Court may interpoſe, to prevent a proceeding ſo oppreſſive as a perſonal arreſt in a foreign country; at the commencement of a ſuit, in a caſe which, as far as we can judge at preſent, authorizes no proceeding againſt the perſon in the country in which the tranſaction paſſed: if there could be none in France, there can be none here; it cannot be conceived that what is no perſonal obligation in the country in which it ariſes, can ever be raiſed into a perſonal obligation by the laws of another; if it be a perſonal obligation there, it muſt be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is, muſt be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it. Mr. Juſtice *Heath*, who differed in opinion from the two other judges, ſeems to have aſſigned ſeveral very cogent reaſons for that difference in opinion.—" This affidavit, ſaid the learned judge, ſwears as ſtrictly as poſſible to a debt due on a written contract: the inſtrument which has been produced, ſeems to me to be a perſonal contract; and if it be ſo, I have not the leaſt doubt that the defendant ſhould be held to bail. In conſtruing contracts, we muſt be governed by the laws of the country in which they are made, for all contracts have a reference to ſuch laws. But when we come to remedies, it is another thing; they muſt be purſued by the means which the law points out where the party reſides; the laws of the country where the contract was made, can only have a reference to the nature of the contract, not to the mode of enforcing it; whoever comes into a country, voluntarily ſubjects himſelf to the laws of that country, and therein to all the remedies directed by thoſe laws, on his particular engagements. If an Iriſh peer comes over to this country, he may be arreſted on a

contract

contract intered into in Ireland, though his privilege would have protected him in that country: it would be hard if it were otherwiſe, ſince the advantage would not be mutual between the contracting parties: ſuppoſe the defendant in this caſe might have been arreſted by the law of France, and that he could not by our law, in that caſe he would have had the advantage; as it is, the plaintiff has obtained an advantage, and ought not to be deprived of it.

Bates v. Barry, Tr. Ter. 8 Geo. 3. C.B. 2 *Wilſ.* 381.

Where the defendant was arreſted in a former action, and the cauſe being at iſſue, the plaintiff diſcontinued upon payment of coſts (his attorney having diſcovered that he ought to have declared in covenant, inſtead of caſe) and he afterwards brought this ſecond writ for the ſame cauſe of action; the defendant was again arreſted, and it being moved that he might be diſcharged upon common bail, upon the ground, that the ſecond arreſt was oppreſſive: *The Court* ſaid, this was a mere miſtake, and not done with any intent to oppreſs or haraſs the defendant; that if any ſuch intent had appeared, the Court would certainly have diſcharged the defendant upon entering a common appearance, but that it would be too much to ſay, the plaintiff in this caſe ſhould loſe his bail by a mere ſlip in his attorney.

Hally v. Tipping, Ea. Ter. 10 Geo. 3. C.B. 3 *Wilſ.* 61.

So the plaintiff ſhall loſe his ſpecial bail where he declares differently from his writ; as if the writ is in his own right, and he declares as executor: for in this caſe the plaintiff having declared in this cauſe as executor, and not in his own right; *the Court*, on motion, ordered the bail to be vacated and diſcharged, and a common appearance entered.

Echlin v. Hartop, Ea. Ter. 13 Geo. 3. C.B. 2 *Black.* 886.

And the Court will examine whether a cauſe be bailable, though it be removed from an inferior court by *habeas corpus*; but they will not diſcharge on common bail, unleſs the caſe is manifeſtly vexatious: in this caſe, an action was brought in the marſhalſea court, in the name of *Sir Harry Echlin*, againſt the defendant, an officer in the Auſtrian ſervice; the affidavit was made by Lady *Echlin*, who was ſeparated from her huſband, to hold the defendant to bail for 120l. for board and lodging, money lent and laid out, and goods ſold and delivered to the wife when ſole: the cauſe being removed by *habeas corpus*, it was moved to diſcharge the defendant on common bail, on an affidavit made by the wife, ſetting forth certain facts which were in many particulars contradicted by Lady *Echlin*'s affidavit; the motion was founded on an objection, that the defendant only came over to England on accidental buſineſs, and was ſued and arreſted by Lady *Echlin*, without the participation of her huſband, in whoſe name the action was brought: on the other hand it appeared, that this defendant's accidental buſineſs in England was to receive his wife's fortune, half of which he had

had already got, and was preparing to leave England. PER CUR. The Court never interferes in these matters, but where it is a case of manifest vexation, which this does not appear to be, but deserving of a most solemn discussion; and the circumstance of the defendant's being a foreigner, and coming here merely for his wife's fortune, is an additional reason why he should not be discharged from his present security.

In debt on an *indemnity* bond; it appeared on a motion for a rule to shew cause, why the defendant should not be discharged upon filing common bail, to be for the indemnification of a parish against a bastard child, and that the penalty was 50l.; the plaintiff in his affidavit to hold to bail, had sworn that the defendant was justly indebted to him in that sum, and the defendant now swore that only 3l. and some odd shillings were really due. *The Court* said, the conduct of the plaintiff was altogether unjustifiable, and that he was liable to an action; that in the case of a bond conditioned for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages, for the breach of the condition. Kirk *v.* Strickland, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 449.

Where a cause in which the defendant has been holden to bail is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10l. the defendant may be holden to bail again in an action upon the award; for this is not like the case of actions brought on judgments recovered, which are generally litigious, and therefore not considered in a favourable light in courts of justice. But the present is the common case, where a debt is sworn to be due, which entitles the party to hold the defendant to bail; for the reference puts an end to the first action, and a new cause of action arises by the arbitration. Collins *v.* Powell, Mic Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 756.

If two actions be brought by the same plaintiff at the same time, for causes of action which might have been comprized in the same declaration, and the defendant be holden to bail in both actions, *The Court* will compel the plaintiff to consolidate them, and to pay the costs of the application: for it is an oppression to sue out two writs at the same time: that the possibility of this rule being attended with any inconvenience to the plaintiff, is no answer; because if any special reason why the two actions should not be consolidated exists, the plaintiff ought to shew it: and no inconvenience would arise, even though all the plaintiff's witnesses might not be ready at the assizes, because he may apply to put off the trial on that ground. Cecil *v.* Briggs and Idem *v.* Idem Tr. Ter. 38 Geo. 3 B.R. 2 *Ter. Rep.* 639.

The Court, in this case, refused to interfere in a summary way, and order a bail-bond to be cancelled, *on an affidavit* Salter, *q. t. v.* Shergold, Hil. Ter. 30 Geo. 3.

B.R. 3 *Ter. Rep.* 572.

fidavit of the defendant that he was not the perſon; and they left him to his plea in abatement.

Kernot *v.* Norman, Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 390.

And the Court will not diſcharge a defendant out of cuſtody on filing common bail, on the ground that he has *become inſane ſince the arreſt.*

Nutt *v.* Verney, Mic. Ter 31 Geo. 3. B.R. 4 *Ter. Rep.* 121.

Nor will the Court diſcharge a defendant out of cuſtody on filing common bail, on the ground that he was inſane *at the time of the arreſt.*

Ibbotſon *v.* Ld. Galway, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 133.

Neither will the Court permit an *exoneretur* to be entered on the bail-piece, on an affidavit, ſtating that *ſince the commencement of the action a commiſſion of lunacy had iſſued againſt the defendant*, under which he had been found a lunatic: for *Per Curiam*, There is no inſtance in which ſuch an application has been granted, and it was once (1) refuſed after argument.

Holland *v.* Johnſon, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 695.

Only one defendant can be included in a bailable writ.—In this caſe there were *four ſeparate affidavits* by the plaintiff againſt *four ſeveral defendants*, for ſeparate offences againſt the lottery-act. The original writ included all the defendants, though the *ac etiam* part was ſeveral againſt each; and a ſeparate *alias capias* was ſued out againſt each. On a rule to ſhew cauſe why the proceedings againſt this defendant ſhould not be ſet aſide, THE COURT at firſt (after conſulting with the maſter) ſaid, That in caſes in general, the plaintiff may join four defendants, for ſeparate cauſes of action, in one affidavit and one writ; and ſever the ſubſequent proceedings againſt them; and diſcharged the rule. But in the Trinity Term following, *Buller*, J. ſaid, that the maſter had miſled the Court, with reſpect to the practice of joining four perſons in one affidavit; for that it was holden in *Gilby* v. *Lockyer* (2) (which was not cited by either ſide when this caſe came before the Court), after a conference with all the judges, that *only one defendant could be included in one affidavit.* That it was therefore neceſſary to take the earlieſt opportunity of correcting this miſtake: and that the Court had again conſulted all the judges on this occaſion, who were of opinion that *a plaintiff could not join diſtinct defendants for diſtinct demands either in the ſame writ, or in the ſame affidavit.* And that therefore the caſe of *Gilby* v. *Lockyer* ought to regulate the practice in future.

Holland *v.* Richards, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 697.

The above queſtion was again agitated in the preſent caſe. *Sed Per Curiam*, In *Holland* v. *Johnſon*, we conſulted all the judges upon this queſtion, who agreed in the opinion delivered by us, that *ſeveral defendants for ſeparate cauſes of action*

(1) Trin. Ter. 13 *Geo.* 3. B.R. (2) See p. 520, ſupra.

cannot

cannot be joined either in the same writ or in the same affidavit. And this is founded on the old practice by original, which only included one defendant: and if that writ only issued against one defendant, the *latitat*, in which the plaintiff is permitted to add the *ac etiam*, to save expence, ought to be confined to one.

But where the writ is not a bailable one, it is otherwise.— A rule was obtained, calling on the plaintiff to shew cause why the proceedings should not be set aside, because *four defendants for distinct causes of action were included in one* latitat, *which was not bailable*; but on shewing cause, *The Court* said, That the rule laid down in *Holland v. Johnson*, and *Holland* v. *Richards*, only extended to bailable writs; and therefore they discharged the rule. Yardley *v.* Burgess. Tr. 32 Geo 3. B. R. 4 *Ter. Rep.* 697.

So where the defendants were held to bail on an affidavit which stated a joint cause of action; and there was also one *ac etiam* in the writ, as on a joint debt; and afterwards the plaintiffs declared against the defendants severally. A rule was obtained to set aside the proceedings for irregularity, on the authority of *Holland* v. *Johnston*, and *Holland* v. *Richards*. And *The Court* said, they were of opinion, on looking into the cases cited from the *Term Reports*, that they ought to govern the present; and that the proceedings must be set aside. And they added, that they thought this a beneficial rule for the suitors. Moss and another *v.* Birch and another. Tr. 1 er 34 Geo 3. B.R. 5 *Ter. Rep.* 722.

But where a defendant has been holden to bail, and afterwards discharged on common bail, on account of the plaintiff having declared against him on a different cause of action from that mentioned in the writ and affidavit; he may, in an action on the judgment, be again holden to bail; for *Per Cur.* The plaintiff having lost his bail in the original action, though by declaring in a different form of action, was in the same situation as if he had not holden the defendant to bail at all, and therefore he may hold him to bail in an action on the judgment. De la Cour *v.* Read, Hil. Ter. 37 Geo. 3. C.B. 2 *Hen. Black.* 278.

Bail in error.] No bail is requisite on bringing a writ of error on a judgment in debt, obtained upon a prior judgment. In this case, the question was, "Whether the plaintiff, in "a writ of error brought upon a judgment obtained in an "action of debt, commenced upon a former judgment, ob"tained in an action of debt upon a bond conditioned for "payment of money only (which former judgment was "confessed by warrant of attorney), was or was not ob"liged to put in bail on suing out such writ of error, upon "the statute of 3 *Jac.* 1. c. 8.?" The words of the statute are, "that no execution shall be stayed or delayed upon or by any writ of error or supersedeas thereupon to be sued, for reversing any judgment in any action or bill of debt upon any Biddleson *v.* Whytel, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1545. 1 *Black.* 506.

ſingle bond, or upon any obligation with condition for the payment of money only, or upon any action or bill of *debt for rent*, or upon *any contract*, ſued in any of the courts of record at Weſtminſter, &c. *unleſs ſuch perſon in whoſe name ſuch writ of error be brought*, with two ſufficient ſureties, &c. *ſhall firſt be bound, &c. by recognizance, &c.* to proſecute with effect, &c. and alſo to ſatisfy, &c." THE COURT, after the caſe had been fully diſcuſſed at the bar, ſaid it appeared to be a *vexata quæſtio*, and had been differently determined; they therefore declared that they intended to conſult all the judges, *becauſe* it was a very wrong thing to have different rules in different courts upon the ſame act of parliament. CUR. ADVIS. VULT. Afterwards Lord *Manſfield* delivered the opinion of the Court upon this caſe; declaring at the ſame time, that the opinion of *all the judges* had been taken upon it. He premiſed, that there was no doubt but that, in the preſent caſe, the original action required bail: but, *whether there ought to be bail on the writ of error brought upon the ſecond judgment or not*, there had been different opinions in the two courts of king's bench and common pleas: the court of king's bench had been of opinion, *that bail was not neceſſary*; the common pleas, *that it was:* BUT *all the judges* now hold, "that bail is not requiſite upon bringing a writ of "error upon a judgment in an action of debt, *founded upon* "*a prior judgment.*" For they hold, 1ſt, That the contract is extinguiſhed by the firſt judgment; 2dly, That a judgment is *no contract*, nor can be conſidered in the light of a contract for *judicium redditur in invitum.* 3dly, Another reaſon why bail cannot be inſiſted upon is, that *an action of debt upon a judgment* is an action of a ſuperior nature to an action of debt upon bond, or any of the other actions particularly ſpecified in this ſtatute of 3 *Jac.* 1. and therefore ſhall not be included in it; agreeably to the reaſoning uſed in the archbiſhop of Canterbury's caſe, in 2 Rep. 46. b. "That "if the makers of the ſtatute had intended that it ſhould have "extended to this action of a ſuperior nature to thoſe which "are ſpecified in it, they would have begun with it, and "would have mentioned it prior to thoſe of an inferior na"ture." 4thly, Another reaſon is, that this ſtatute ought rather to be taken literally, than extended. There was a caſe of *Taylor* v. *Baker*, 3 *Keble*, 802, where *Holt*, upon this ſtatute, prayed bail in error upon a judgment given in an action of debt on judgment: but Mr. Juſtice *Wild* ſaid, "that "this ſtatute extends not to executors, nor to judgments; "but ought to be literally taken; eſpecially, the practice "ever ſince having been not to put in bail; and the enume"ration is only of debts of an inferior nature." If it ſhould be thought ſtrange, that bail ſhould be required when the action

tion is only upon a contract, and ſhould not be required when the action is upon a judgment, which is of ſo much higher a nature; the anſwer is, that in the former caſe the legiſlature have required it; in the latter they have not, unleſs a judgment could be eſteemed a contract, which we think it cannot. This is therefore *caſus omiſſus*: and the ſtatute is not to be extended by conſtruction, becauſe actions of debt on judgment are in general oppreſſive; though there may be ſome particular caſes where they may be fairly accounted for. For theſe reaſons, ALL THE JUDGES are of opinion, that though in the original action bail was requirable, yet it ought not to be required in writs of error upon actions of debt brought on ſuch judgment.

Alexander v. Biſs, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 449.

So, in this action, which was debt for goods ſold and delivered; and on an account ſtated, judgment was ſigned in Trinity Term: on the 10th of July a writ of error was allowed and ſerved; on the 17th of July, the defendant was taken in execution for 38l. the amount of the damages; on which he paid that ſum to obtain his diſcharge; and afterwards obtained a rule, calling on the plaintiff to ſhew cauſe why the writ of *ca. ſa.* and the ſubſequent proceedings ſhould not be ſet aſide for irregularity, and why the ſum of 38l. paid into the hands of the ſheriff, ſhould not be returned to the defendant. The queſtion was, "Whether, under the ſtat. 3 *Jac.* 1. c. 8. § 1. it was neceſſary for the defendant to put in bail in error?" *The Court* took time to conſider, and afterwards ſaid, that they had looked into the caſes (1) which were deciſive of the preſent queſtion: and on the authority of theſe caſes, they were of opinion, that this caſe is not within the ſtat. 3 *Jac.* 1. and that there was no occaſion to give bail in error: the conſequence of which was, that the proceedings after the allowance of the writ of error were held to be irregular, and the rule was made abſolute.

Kendal, v. Carey, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 768.

It was moved to ſtay proceedings in an action of debt upon a judgment, and that the bail-bond might be delivered up, becauſe the defendant had brought a writ of error on the judgment, and given bail in error in the king's bench; ſo that two ſecurities were obtained at once for the ſame cauſe of action: cauſe was ſhewn, that there was no bail to the original action, in which caſe the practice of the court is, to require bail on the action on the judgment, notwithſtanding the bail in error. *Gould*, J. The reaſon of this practice is, becauſe there has never been bail given in this court: the uſage of the king's bench, I believe, is different; but I think this

(1) *Yelv.* 227. 2 *Balſ.* 53. 1 *Sidow.* 14. 1 *Strange*, 476. 2 *Strange*, 1190. 2 *Burr.* 746.

court is right. These are checks against delay, and ought not to be taken off.—Rule discharged.

Handasyde v. Morgan, in error, Tr. Ter. 2 Geo 3. 2 *Wilf.* 144.

After verdict, plaintiff in error put in bail in due time; a rule for better bail was served upon the maid-servant of the plaintiff's attorney, upon a Tuesday: and on the Saturday following, and not before, this notice came to the attorney's knowledge: on an affidavit of these facts, it was moved for two days' time to perfect the bail: but the Court absolutely refused to give any time, unless it could be shewn them that there was some real error in the record.

Jaques v. Nixon, Tr. Ter. 26 Geo. 3. B.R. 1 *Term Rep.* 279.

An action of trover for goods had been brought, in order to try the validity of a commission of bankrupt, which had issued against the plaintiff. The cause was tried on the 25th of May, and a verdict given for the plaintiff, with nominal damages of 1s. A writ of error was sued out and allowed on the 31st of May; and on the same day a copy of the allowance was served on the plaintiff's attorney. Final judgment was signed on the 14th June, and execution sued out on the same day; within four days after which, bail in error was put in. The question was, Whether the allowance of the writ of error, and the service of it, was a supersedeas? PER CUR. As to the practice which has obtained in suing out a writ of error before judgment signed, it happens in almost all cases, that the writ is sued out before judgment is actually signed, because otherwise execution would issue instantly. And the Court have gone so far, that, if a writ of error be sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the Court will set aside the execution. Then as to the next point; the allowance of a writ of error in the general course of practice is not served till final judgment is actually signed; and the words of the rule apply to that. The rule requires bail to be put in within four days after the allowance; but there is no opportunity of putting in bail before judgment is signed. As to the defendant's being too soon in serving the copy of the allowance, it makes no difference, for it only operates as an allowance from the time of signing judgment. The *service* of the allowance is only material to bring the party into contempt, if he proceed to sue out execution afterwards; for the allowance of the writ of error is of itself a *supersedeas*.—Rule absolute.

Bennet v. Nichols, Mic. Ter. 31 Geo. 3. B.R. 4 *Term Rep.* 121.

So, where the judgment was signed on a Monday, and execution taken out on the Friday: on a motion to set aside the *fieri facias*, on the ground of irregularity, the only question was, how many days were allowed to a defendant to put in bail in error. *The Court*, after consulting with the master said, that he had four clear days, and that the plaintiff, in this case, was not entitled to sue out execution till the Saturday;

Saturday; and they made the rule abſolute for ſetting aſide the execution.

A rule having been obtained, calling on the plaintiff to ſhew cauſe why the proceedings in this action, which was brought on a judgment, ſhould not be ſtayed pending a writ of error to reverſe that judgment. A preliminary objection was taken, that the defendant, *not having put in bail in the ſecond action*, could not make any application to the court in this cauſe. *The Court*, (after conferring with the maſter) ſaid, that, according to the eſtabliſhed practice, the defendant was not in a ſituation to make any application until he had put in bail. Rule diſcharged. Smith *v.* Shepherd, Mic. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 9.

This was a rule to ſhew cauſe why an *exoneretur* ſhould not be entered on the bail-piece in error, the principal having become a bankrupt pending the writ of error, and having obtained his certificate. PER CUR. Where there are bail to an action, and the principal becomes a bankrupt before they are fixed, they ought in ſtrictneſs to ſurrender the principal, who, being a bankrupt, would be immediately entitled to be diſcharged. Therefore the Court, to avoid circuity, have done that directly, which they could only otherwiſe do indirectly. But that is never done in favour of bail in error, becauſe they cannot ſurrender the principal at all (1). Rule diſcharged. Southcote *v.* Braithwaite, Hil. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 624.

Juſtification of bail.] In this caſe, the defendant having been arreſted on the 21ſt of November, by the ſheriff of Middleſex, at the ſuit of the plaintiffs, was permitted to go at large on an undertaking given by his attorney for his appearance. Bail above not having been put in in time, or bail-bond taken, the plaintiffs brought an action againſt the ſheriff for an eſcape. On the 7th of January, the defendant became a bankrupt. On the 26th of this month notice of bail was given; and now a motion was made to juſtify theſe bail, the ſheriff offering to pay the coſts of the action brought againſt him. The juſtifying of the bail was oppoſed. PER CUR. The bail ought not to be permitted to juſtify in this caſe. There is no doubt but that many undertakings to put in bail have been enforced by this Court, *where the plaintiff or his attorney has accepted the undertaking*; in ſuch a caſe, the acceptance being the act of the party, he has no reaſon to complain that a bail-bond was not given. But infinite miſchief and inconvenience would follow if we were to permit this practice to obtain. The legiſlature, being aware of the extortion that might be practiſed by ſheriffs'- Fuller and others, *v.* Preſt, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 109.

(1) By the ſtat. 16 & 17 *Car.* 2. c. 8. bail in error are liable at all events in caſe judgment is affirmed.

officers on an arreſt, endeavoured to guard againſt it as well as they could; and by the ſtat. 23 *Hen.* 6. c. 9. they pointed out the manner in which bail-bonds ſhould be taken, with the fees of the officers, and declared that all other obligations, not warranted by the act, ſhould be void; and the ſame reaſon that applies to bonds equally applies to other undertakings. We fully ſubſcribe our opinion to the caſe of *Rogers* v. *Reeves* (1), where a diſtinction between undertakings to the party and thoſe to the bailiff was anxiouſly taken; and here, if the plaintiffs had accepted the undertaking, all would have been well. But this is a novel experiment; and if it were ſucceſsful, it would open a door to groſs impoſition. We ought to prevent, as far as we can, the ſheriffs'-officer deſtroying the wiſe proviſions of the ſtat. 23 *Hen.* 6. by fixing the price of his own indulgence, inſtead of complying with the requiſitions of the act. Inſtead of taking a bail-bond as the ſtatute requires, he has taken another kind of undertaking, under the pretence of an indulgence to the defendant, for which he exacts his own price; and therefore, if we were to encourage this practice, we ſhould be giving an encouragement to the ſheriffs'-officers to infringe the law. This is a practice injurious to the plaintiff as well as to the defendant; and if this application be made on behalf of the ſheriff, he is not entitled to any indulgence, becauſe he has broken the law; if it come from the defendant, the anſwer is, that he has conſpired with the ſheriff, and therefore we will not aſſiſt him. Rule refuſed.

Anon. Ea. Ter. 11 Geo. 3. C.B. 2 *Black.* 758.

It was agreed and ſettled by the judges of the court of common pleas, that no juſtification is neceſſary of bail, who immediately ſurrender their principal, notwithſtanding ſuch bail may have been excepted againſt; but that ſuch exception ſhould be diſregarded.

Collier *v.* Godfrey, Mic. Ter. 30 Geo. 3. C.B. 2 *Hen. Black.* 291.

In this caſe, it appeared from the notice of juſtification, that the bail, who were going to juſtify, had not actually become bail before that notice was given, according to a rule of C.B. Mic. 18 *Geo.* 3. This was held to be a ſufficient objection, and the bail were rejected.

Dawkins *v.* Reid, Mic. Ter. 31 Geo. 3. C.B. 2 *Hen. Black.* 529.

Where bail in C. B. are put in *in due time*, the defendant is not bound to give notice, but the plaintiff muſt ſearch in the filazer's book: but if the bail be not put in in due time, then notice muſt be given.

North *v* Evans, Ea. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 35.

Of the four days allowed in C.B. to perfect bail after exception, the firſt is reckoned excluſively, and the laſt incluſively; ſo that where the exception was on Wedneſday,

(1) *Ante*, p. 543.

it was held, that an attachment could not regularly iſſue againſt the ſheriff till the Tueſday following (Sunday being no day); but in this caſe, though the attachment had iſſued on the Monday, the Court would not ſet it aſide, becauſe the bail were not perfected.

Bail in this action were oppoſed and rejected on a former day, and the defendant ſurrendered on the next; freſh bail being now brought up for juſtification: the coſts of the firſt oppoſition were inſiſted on. *Sed Per Curiam*, The Court will not inſiſt, on the coſts of a former oppoſition being paid to the plaintiff, where the defendant is ſurrendered on the next day. Holward *v.* Andre, Ea. Ter. 37 Geo. 3 C.B. 1 *Pul. & Boſan.* 32.

Though the rule to bring in the body has *expired*, yet if the defendant juſtifies bail, *before the plaintiff* moves for an attachment againſt the ſheriff, it is in time to prevent the attachment. Thorold *v.* Fiſher, Ea. Ter. 28 Geo. 3. C.B. 1 *Hen. Black.* 9.

Bail *in error* juſtified themſelves *de bene eſſe* at a judge's chambers, in the vacation, without the conſent of the plaintiff, though his attorney attended, and examined the bail: and it was HELD to be no bail unleſs they had juſtified again in court within the firſt four days of the ſucceeding term. Hawkins *v.* Plomer and Hart, Ea. Ter. 16 Geo. 3. C.B. 2 *Black.* 1064.

The only queſtion in this caſe was, Whether bail above could be put in on *a dies non juridicus*, the 2d of February? AND *The Court* ſaid, that on enquiry, it appeared that the practice of the court of common pleas agreed with that which was the practice of the court of king's bench, and that a *dies non juridicus* was conſidered as a day for ſuch buſineſs as is tranſacted at the judge's chambers. Baddeley *v.* Adams, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 170.

One *Gobel* offered to juſtify as bail for 1600l.; but it appearing, that though he had a fortune in Antigua, yet he had no effects in England, and had nine actions depending againſt him for the amount of near 3000l. *The Court* ſet him aſide: but declared, that the merely having no effects in England, was not of itſelf a ſufficient objection without other auxiliary circumſtances. Smith *v.* Scandrett, Mic. Ter. 10 Geo. 3. B.R. 1 *Black.* 444.

But afterwards, where a merchant came to *juſtify as bail* in 9000l. and he regularly juſtified in that ſum, *incluſive of his landed property in Jamaica*, it was objected to the including this property: AND *The Court* thought the objection a good one, becauſe his landed property in Jamaica is not liable to the proceſs of the court; and he was rejected. Boddy *v.* Leyland, Hil. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2526.

But a Frenchman, who had reſided in England twelve years, in a houſe of 45l. *per ann.* as a factor for Birmingham goods, and ſwore himſelf worth 2000l. in the bank of Paris, but had no conſiderable property in England, was admitted to juſtify as bail for 180l. *the defendant being himſelf a foreigner.* Chriſtie *v.* Fileul, Mic. Ter. 20 Geo. 3. 2 *Black.* 1323.

Glead *v.* Mackay, Tr. Ter. 14 Geo. 3. C.B. 2 *Black.* 956.

In this case, it was objected, that one of the bail resided within the verge of the Court. *Gould.* J. thought the bail ought not to be admitted. *Blackstone*, J. thought that that circumstance alone was not sufficient to reject the bail, without other suspicious matters, such as being in debt, protected, or the like. *Nares*, J. doubted; but it being sworn that the bail was going to leave her house in Spring-gardens, and then in treaty for another out of the verge of the court, she was admitted.

2 *Black.* 957, 1323.

The other bail being a foreigner, was sworn and examined by an interpreter. The like was also done in another case, viz. *Christie* v. *Filleul*, Mic. Ter. 20 *Geo.* 3. C.B. where one of the bail was a foreigner.

2 *Black.* 1122.

Notice given to justify three bail is irregular, *Allen* v. *Keyt*, Mic. Ter. 17 *Geo.* 3. C.B.

Neat *v.* Allen, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul.* & *Bos.* 21.

In this case it appeared, that one of the bail was indemnified by the sheriff's officer; and this being objected, *The Court* said, the sufficiency of the bail is the object of which the Court are to take care; that there is no impropriety in their being indemnified; that it is a very common practice.

Greenhill *v.* Hopley, Mic. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Bos.* 103.

But the court of C.B. will reject bail, though they have no written indemnity from the defendant's attorney, if they declare that he has promised that they shall not be sufferers, this being contrary to the general rule of Hil. 37 *Geo.* 3. whereby it is ordered, "that no person shall be permitted to justify, if he shall have been indemnified for so doing, by the attorney concerned for the defendant; but the Court will give the defendant time in such a case to put in fresh bail.

Mitchell *v.* Morris, Hil. Ter 18 Geo. 3. C.B. 2 *Black.* 1179.

After many frivolous notices to justify, one of the bail justified, and time was given to perfect the other: on the same night, the same bail (one not being justified) surrendered the defendant; on a motion for an attachment against the sheriff for not bringing in the body, the counsel shewed for cause the surrender, to do which, the bail need not justify; and of that opinion was the Court, who discharged the rule upon the attorney's consenting to pay the costs of the frivolous notices.

Jackson *v.* Morris, and Richardson, *v.* Morris, Hil Ter. 18 Geo. 3. C.B. 2 *Black.* 1179.

But where the bail were ordered to be set aside, as being surreptitiously put in and justified, and in the mean time they surrendered the defendant: *The Court*, on a motion for an attachment against the sheriff, for not bringing in the body, held, that as the bail were put in surreptitiously, they were as no bail, and therefore could not surrender, and made the rule absolute.

Edwin *v.* Allen, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 401.

Formerly it was held in B.R. to be necessary for the bail, to justify before they could surrender the principal, *after an assignment of the bail-bond*; but in this case, *The Court* said, they had lately adopted the practice of the court of common

non pleas in this reſpect, in order to ſave unneceſſary expence.

Bail is not regularly put in till the allowance of it has been ſerved, even though the plaintiff oppoſe the juſtification. An attachment was obtained againſt the ſheriff for not bringing in the body. It appeared that bail was put in and juſtified, but there was no ſervice of the rule allowing the juſtification; but the plaintiff was preſent at the time of juſtifying, and oppoſed the bail, though unſucceſsfully. On a rule to ſhew cauſe, why the attachment ſhould not be ſet aſide; *The Court* ſaid, that bail is not regularly put in till the allowance of it has been ſerved, and it is of importance that all the ſteps preſcribed by the practice of the Court ſhould be followed. And if this exception were to prevail, it would enable the defendant's attorney to put into his pocket thoſe duties which belong to the revenue. Rule diſcharged. The K. v. Sheriff of Middleſex, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 433.

The writ was returnable on the 3d of May, being the firſt return-day of the term; bail was put in in due time, and notice of exception was given on the 15th, and on the ſame day notice of juſtification for the 19th: the bail did not appear on that day to juſtify, and no further time was obtained; but on the next day they ſurrendered the principal, and gave notice of it accordingly; and afterwards, on the ſame day, the plaintiffs took an aſſignment of the bail-bond, on which proceſs was ſued out on the 22d. After cauſe ſhewn on a rule, calling on the plaintiffs to ſhew cauſe, why the proceedings on the bail-bond ſhould not be ſet aſide for irregularity, the defendant having been ſurrendered before the aſſignment of the bail-bond. *The Court*, on reference to the maſter, ſaid, that the practice was, that if the bail do not juſtify on the day appointed, and no further time be allowed for them to do ſo, they are out of court, and cannot afterwards ſurrender the principal. But under the circumſtances of this caſe, the plaintiffs having got the defendant's body before the aſſignment of the bail-bond, they made the rule abſolute upon payment of coſts. Hardwick v. Bluck, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 297.

But the authority of the above caſe of *Hardwick* v. *Bluck* has been denied in ſome ſubſequent caſes.—In this caſe, the writ was returnable on the 18th of November, and the ſheriff was then ruled to return the writ; on the return of the writ, the defendant was in the Fleet priſon, in an action in C.B.; on the 28th November, he was removed from the Fleet by *habeas corpus*, and on the ſame day, he was ſurrendered in diſcharge of his bail in this action, and committed to the cuſtody of the marſhal; and on the next day, the 29th, the plaintiff was ſerved with a notice of the above ſurrender; on the 23d of November, the ſheriff was ruled to bring in the body; on the 24th of November, bail above was put in, *though the time for putting in bail expired on the 22d*; the K. v. Sheriff of Middleſex, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 527.

the rule for bringing in the body expired on the 28th of November, and on the 24th of January, a rule was granted directing an attachment to iſſue againſt the ſheriff for not bringing in the body; afterwards the defendant obtained a rule calling on the plaintiff to ſhew cauſe, why the rule for the attachment ſhould not be ſet aſide for irregularity. PER CUR. after cauſe ſhewn, This motion was made on the conſtruction of the rule of court, Trin. 33 *Geo.* 3. (1), *Whether the ſheriff could put in bail, in order to comply with the rule for bringing in the body, without juſtifying*, and on the authority of *Hardwick* v. *Bluck?* The maſter, on reconſideration, thinks he was miſtaken in that caſe in his report of the practice; and we think that the ſheriff is not obliged to juſtify his bail, and that the rule of court, *Trin.* 33 *Geo.* 3. extends to the caſe of the ſheriff, and therefore, that this rule ſhould be made abſolute: the Court alſo denied the authority of *Hardwick* v. *Bluck* in another caſe, in Hil. Ter. 38 *Geo.* 3. *Calow* v. *Dury.*

Smith *v.* Miller, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 96.

Bail are not regularly put in, unleſs the name of the proper county be inſerted in the bail-piece. On ſhewing cauſe againſt a rule, calling on the plaintiff to ſhew cauſe, why the proceedings on the bail-bond ſhould not be ſtayed. It was contended, that thoſe proceedings were regular, *becauſe the bail above was not regularly put in in the firſt action*, the county of Middleſex having been inſerted in the bail-piece inſtead of Surrey. And for this was cited *Garnett* v. *Heaviſide*, *Barn.* 63. Of this opinion were *The Court*, who thought that the caſe of *Garnet* v. *Heaviſide* was deciſive; and therefore they diſcharged the rule.

Anderſon *v.* Noah, Ea. Ter. 37 Geo. 3. C.B. 1 *Pull. & Baſan.* 31.

The defendant was arreſted by the name of *Noah*, and put in bail by the name of *Noel*; it was objected at the time of juſtification, that there was no bail in the action before the Court; but the Court gave leave to amend the bail-piece.

K *v.* Lyon, Hil. Ter 4 Geo. 3. B R. 3 *Burr.* 1461.

How far bail are liable.] In this caſe, cauſe was ſhewn on the behalf of the proſecutor, why the recognizance of bail ſhould not be diſcharged: the caſe was this;—the defendant was indicted for perjury, and removed the indictment into B.R. by *certiorari*, previous to the iſſuing whereof, he entered into a recognizance with two ſureties as uſual, "to "appear and plead in the next term, and to give notice of "trial, and go to trial in or at the ſittings after ſuch next "term, unleſs the court ſhall otherwiſe direct." This condition was not complied with, and the recognizance was clearly and indiſputably become forfeited. After this the

(1) See Title RULES OF COURT.

proſecutor

profecutor moved for coſts againſt the defendant, for not going on to trial; theſe coſts had been taxed, and duly demanded of the defendant, and for non-payment of them the profecutor had obtained and executed an attachment, and the defendant was in cuſtody upon this attachment for his contempt in not paying them. [With regard to the merits of the profecution, the defendant had after the time limited in the recognizance, given notice of trial in the following term, and went to trial according to ſuch notice, and was acquitted.] It was therefore inſiſted, on behalf of the bail, that the profecutor could have but one ſatisfaction for theſe coſts, though he might have either required them of the bail, or taken the principal in execution; but *having made his election to proceed againſt the perſon of the principal, and gotten his body in execution*, he was not afterwards ſtill at liberty to proceed againſt the bail. *The Court* after argument, and full conſideration, held, that as the recognizance was actually forfeited, and the profecutor had had coſts taxed to him for the defendant's neglecting to go on to trial, and as he had received no ſatisfaction for theſe coſts (for the man's body being in cuſtody, is no real ſatisfaction to him for the coſts), there was no reaſon for their diſcharging the recognizance, for there is no pretence for perſons to apply for a favour without firſt doing juſtice. Rule diſcharged.

The bail-bond cannot be put in ſuit, till after four days from the appearance-day of the return of the writ.—This caſe was as follows: *Capias* indorſed for 60l. bail, was returnable upon *dies Paſch.* the 7th of May, and a bail-bond given thereon: on the 8th of May, the ſame bail were put in above, and notice given to the plaintiff's attorney, who on 8th of May, excepted to the bail; on 10th May (being the appearance-day of the return of the writ) notice was given that the bail would juſtify on the 12th, when they did not attend in due time, and thereupon the bail-bond was aſſigned, and proceſs ſued out againſt the defendant and his bail on May the 13th. *The Court*, on a motion for that purpoſe, ſet aſide the proceedings as to the bail with coſts, the bail-bond being put in ſuit too ſoon, according to the rule 9 *Ann.* ſec. 4. Bellis *v.* Milford, Ea. Ter. 15 Geo 3. C.B. 2 *Black* 1009.

It was agreed by the Court and counſel in this caſe, that an action upon a bail-bond muſt be brought in the ſame court where the bail was given, and that this is now the ſettled practice; therefore the bail-bond upon which this action was brought, having been given upon a proceſs out of the common pleas, the proceedings were ſtayed. Walton *v.* Bent, Tr. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1923.

So alſo in this caſe, the original action was brought in the court of king's bench, and bail not being put in in due time, the bail bond was aſſigned to the plaintiff, who thereupon Morris *v.* Rees, Mic. Ter. 13 Geo 3. C.B. 3 *Wiſ.* 348. 2 *Black.* 838.

upon brought this action in C.B. It was therefore moved to ſet aſide the proceedings, the original action being commenced in B.R. and it being a ſettled rule, that actions on bail-bonds muſt be brought in the court where the original action was laid: AND of that opinion was the Court, notwithſtanding this application was after plea pleaded; and they ſaid that they would have given the defendant his coſts, if coſts had been inſerted in the rule to ſhew cauſe: and *Gould*, J. inclined to think, that as the ſtatute of the 4th of Queen *Ann*, c. 16. (directing the aſſignment of the bail-bond) gives the Court, after ſuch bonds are put in ſuit, an equitable juriſdiction to ſtay proceedings, and to let a defendant in to try the merits of the original action upon reaſonable terms; no other court but that in which the original action is brought can exerciſe ſuch juriſdiction.

Walker v. Carter, Ea. Ter. 12 Geo. 3. C.B. 2 *Black.* 816.

In debt on a bail-bond, *The Court* will not order the proceedings to be ſtayed, unleſs the coſts of *all the actions that may have been brought* againſt the principal and bail be paid as well as the debt.

Mitchell v. Gibbons, Mic. Ter. 29 Geo. 3. B.R. 2 *Hen. Black.* 76.

For the bail in a bail-bond are liable, as far as juſtice requires, to the whole extent of the penalty of the bond, to ſatisfy the debt really owing to the plaintiff, and the coſts; but the ſheriff cannot under the ſtat. 12 *Geo.* 1. c. 29. take the bond in a penalty of more than double the ſum ſworn to.

Jackſon v. Haſtell, Hil. Ter. 20 Geo. 3. B.R. 1 *Doug.* 330.

But the bail in the action are only liable to the debt ſworn to, and the coſts, and not for the ſum recovered by the verdict, if it exceed that for which the defendant was held to bail.

Sparrow v. Nayler, Hil. Ter. 13 Geo. 3. C.B. 3 *Black.* 876.

And a bail-bond cannot be aſſigned, when the original ſuit is out of court by not declaring in time. In this caſe, the defendant had been arreſted by proceſs returnable in Michaelmas term, 1771; and *Cooke* and *Jackſon* became bail to the ſheriff: after this, part of the debt was paid, but no declaration *de bene eſſe* was delivered: it remained in this ſtate till September, 1772, when *Naylor* became bankrupt; and then the plaintiff for the firſt time took an aſſignment of the bail-bond; this being put in ſuit, it was moved to ſtay proceedings: AND *Per Cur.* It was held in *Higgins* and *Whitell*, this term, and is the ſettled practice, that if a plaintiff does not declare before the eſſoign-day of the third term inclusive, after the return of his writ, he has deſerted his cauſe, and is out of court; and being ſo out of court, we are of opinion, he cannot take an aſſignment of the bail-bond: for by the ſound conſtruction of the ſtat. 3 *Ann.* the ſuit muſt be depending when the bail-bond is aſſigned; and it is the true reaſon why the bail-bond cannot be ſued in any other court, than that wherein the original action was brought, that no other court has capacity to do equitable

able juſtice between the parties; which ſhews that the ſuit muſt be there depending. Rule abſolute.

Where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts. It was moved in this caſe, to ſtay the proceedings upon the aſſignment of a bail-bond, upon payment of coſts and the ſum ſworn to, the defendant in the original action being dead: the counſel who ſhewed cauſe, ſaid this was not the practice where the bail-bond is aſſigned, though it might be allowable upon putting in bail above; for after aſſignment the bail commonly redeem themſelves by payment of the debt and coſts; that it was ſo ſettled in *Savage* v. *Weſt*, 9 *Geo.* 3. where the court held, that the plaintiff in an action on an aſſignment of a bail-bond was entitled to recover not only the ſum ſworn to with coſts, but the whole debt due. In ſupport of the rule it was ſaid, that the diſtinction was where the plaintiff could not have had judgment in the original action, for there the proceedings may be ſtayed upon payment of coſts only; and it was contended, that here the plaintiff could not have had a verdict, nor of courſe judgment; that before the death of the defendant he could have reaped no benefit from the ſuit; and therefore it was prayed, that the proceedings might be ſtayed upon payment of coſts only. It appearing however, from the affidavit on the other ſide, that the plaintiff might have had judgment: *The Court* ſaid, The practice is ſettled, that where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts: and as it was clear in this caſe that he might have had judgment againſt the original defendant. Rule diſcharged. Orton v. Vincent, Ea. Ter. 14 Geo. 3. B.R. *Cowp.* 71.

The court of king's bench in this caſe made a rule, that in future, wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in caſe the party means to put in bail in order to ſtay proceedings upon the bail-bond) ſhould be, that he will put in and perfect bail on ſuch a day, analogous to the caſe where the ſheriff is ruled, who before he can diſcharge himſelf, muſt give notice that he will put in and perfect bail, and in that caſe, the plaintiff may oppoſe the bail in court, without its being a waiver of the bail-bond. Boldero v. Gray Ea Ter. 18 Geo. 3. B.R. *Cowp.* 705.

The bail to the original action, are not liable to pay the coſts of a writ of error in the exchequer chamber; and the plaintiff is not injured by this practice, becauſe when a defendant brings a writ of error, he puts in other bail, to whom the plaintiff may reſort for the coſts of the writ of error. Yates v. Doughan, Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 288.

Bail to the ſheriff cannot be held to bail on an aſſignment of the bail-bond. In this caſe the defendant had entered into a bail-bond to the ſheriff for the appearance of another, the Brander v. Robſon, Tr Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 336.

the bond being aſſigned, he was arreſted for 50l. and upwards, on ſuch aſſigned bond; in conſequence of which, he was obliged to give another bond to the preſent ſheriffs, conditioned for his appearance in this action: a rule was obtained; calling on the plantiffs to ſhew cauſe, why the bail-bond given by the defendant for his appearance in this action, ſhould not be delivered up to be cancelled. After cauſe ſhewn, *The Court* ſaid, as this was a general queſtion, affecting the practiſers in all the courts, they would conſult the reſt of the judges. And now Lord *Kenyon*, CH. J. delivered the opinion of the Court. We have conferred with the judges of the other courts on this queſtion, and we find that, by the practice of thoſe Courts, a perſon who has become bail for another cannot himſelf be held to bail; and we wiſh to conform to that practice, it being highly reaſonable. In the ordinary tranſactions between man and man, the creditor cannot always know the ſolvency of the party whom he is to truſt, and therefore it is neceſſary that he ſhould have this kind of proceſs to inforce the payment of his debt: but the ſheriff has it in his power to take this or that man for his bail, he is to have ſolvent perſons; and it is not neceſſary that he ſhould be armed with this compulſory proceſs againſt the bail. However, it is ſufficient for us to ſay, that, according to the practice of the other courts, a perſon in the defendant's ſituation cannot be held to bail; and therefore this rule muſt be made abſolute.

Samuel v. Evans, Tr. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 569.

The ſtat. 23 *Hen.* 6. c. 9. relating to bail-bonds *is a public act*: therefore the Court will take notice of it, though it be not pleaded. And if it appear on a declaration, by the aſſignee of the ſheriff on ſuch bond, that the bond is void by the proviſions of that ſtatute, the Court, on motion, will arreſt the judgment after verdict againſt the defendant, upon a plea of *non eſt factum*.—This was an action of debt on a bail-bond. The declaration ſtated, that on the 5th July, 1786, the plaintiff ſued out a *pluries capias*, directed to the ſheriff of Monmouthſhire, commanding him to take the defendant, if he ſhould be found in his bailiwick, ſo that he might have his body before our lord the king at Weſtminſter on *Monday next after the Morrow of All Souls* [the ſixth of November] to anſwer, &c. That the ſheriff arreſted the defendant on the 4th November, 1786, and detained him by virtue of the arreſt; and that the defendant being ſo arreſted, the ſheriff took bail for his appearance; and the defendant and one *Ball*, on the 4th of November, became bound to the ſheriff in 20l. conditioned for the appearance of the defendant *on the Morrow of All Souls* [the third of November]; that the defendant did not appear at the time therein mentioned, whereby the bond became forfeited, and the ſheriff aſſigned the bond to the plaintiff in the uſual manner. Plea *non*

eſt

eſt factum. On the trial, the plaintiff obtained a verdict. And a rule having been made to ſhew cauſe why the judgment ſhould not be arreſted, on the ground that the bond was void, under 23 *Hen.* 6. c. 9. becauſe it appeared on the face of it to have been taken after the return of the writ, as ſtated in the condition. On ſhewing cauſe, it was contended, FIRST, That the ſtat. 23 *Hen.* 6. c. 9. muſt always have been pleaded; and SECONDLY, That it was equally neceſſary ſince the ſtat. 4 *Ann.* c. 16. § 20. as before. The caſe was very elaborately argued by the counſel on both ſides; and ſeveral contradictory precedents cited. THE COURT afterwards delivered themſelves as follows: *Aſhurſt*, J. *If all the caſes on this ſubject were on one ſide, however apparently contrary to reaſon they might be, the Court would be bound by them: but if there be ſeveral caſes, which are not reconcileable with reaſon on one ſide, and one ſenſible caſe to the contrary, we ought to decide according to the latter.* Now there can be no doubt on the reaſon of the thing, but that the ſtat. 23 *Hen.* 6. is a general law; for though it be ſaid to relate to officers of a certain deſcription, yet all the king's ſubjects are included in it, for it gives to all of them a liberty of being bailed. *Buller*, J. It is aſtoniſhing that a doubt could ever have ariſen, whether the ſtat. 23 *Hen.* 6. c. 9. were a general law or not: for it alludes to *all arreſts*; and every perſon who may be arreſted is within the proviſions of it. Even if the ſtatute of *Anne* had never paſſed, I ſhould have had no difficulty in adopting the opinion that this is a general law. But the point is not now open to conſideration; for whatever might have been the law before the ſtatute of *Ann*, the caſe of *Saxby* v. *Kirkus* (1) removes all doubt: the Court there ſaid, though the 23 *Hen.* 6. c. 9. were a private law, yet the ſtat. 4 & 5 *Ann.* having enabled the ſheriff to aſſign ſuch bond, the Court muſt take notice of the law that enables him to take ſuch bond. If then we are bound to take notice of this ſtatute, there can be no doubt in this caſe; for, as to the manner of pleading, it is properly ſaid in *Hobart*, that the ſpecial matter muſt appear by ſome means or other upon the record; and if it be ſhewn on the declaration, it need not be pleaded. So, if it appear on craving oyer of the bond, the defendant may demur, without pleading the ſpecial matter. In ſhort, it is ſufficient if it appear upon any part of the record. Then it has been ſaid, that the condition may be rejected, and that the bond may be good as a ſingle bill: but a ſingle bill would not anſwer the purpoſe; the bond is directed by the

(1) *Bull.* N. P. 224.

ſtatute

ſtatute to be conditioned for the appearance of the defendant at the return of the writ: now here it is impoſſible that any appearance, according to the condition of the bond, could anſwer the purpoſes of the writ. If the party had appeared on the Morrow of *All Souls*, it would not have been a ſubſtantial compliance with the condition; for there is a difference between proceedings by bill, and thoſe by original; in the former, the judgment relates to the firſt day of the term only, of which day the appearance ought to be; but in the latter it relates to the return of the term, and therefore the appearance ſhould be as of that day. *Groſe*, J. of the ſame opinion. Rule abſolute.

Belchier *v.* Ganſell, Mic. Ter. 20 Geo. 3. B.R. 4 *Burr.* 2302.

In an action for 2334l. bail had juſtified: but as the plaintiff did not like them, he and his attorney therefore obtained a ſide-bar rule, "for leave to diſcontinue that action, upon payment of coſts;" not diſcloſing that bail had juſtified in the action on which he prayed to diſcontinue: then he brought a new action, upon the very ſame bonds; only laying the new action in Middleſex, inſtead of London. The plaintiff made a freſh affidavit of the debt being due; and carried this affidavit and the declaration in the new action to the clerk of the rules, and inſiſted upon his marking upon the declaration, that "ſuch a debt was ſworn to," in order to carry ſuch declaration ſo marked to the marſhal, and charge the defendant in cuſtody with this new declaration: the ſcheme was to detain the defendant in cuſtody till the next term, as this being the laſt day of the term, he would not be able to juſtify in this new action till next term. THE COURT were at firſt doubtful what method they ſhould take; they held this to be a trick, and an unwarrantable conduct in the attorney; and that it ought not to have the intended effect: He ought to have aſked leave of the Court, "to charge the defendant in cuſtody," diſcloſing the whole of the caſe to them: they firſt thought of making a new rule, for the defendant to ſhew cauſe why the plaintiff ſhould not be at liberty to do ſo. But at length they diſcharged the ſide-bar rule, which gave the plaintiff leave to diſcontinue: ſo that the bail to the former action, who had juſtified as aforeſaid, ſtill remained liable to their recognizance.

Trinder *v.* Shirley, Mic. Ter. 19 Geo. 3. B.R. *Doug.* 44.

How the bail ſhall be relieved.] In this caſe it was moved that an *exoneretur* might be entered on the bail-piece, the defendant having become a peer (by ſucceſſion to his brother the late Earl *Ferrers*): the ground of the motion was, that it was no longer in the power of the bail to ſurrender the principal. Rule abſolute.

Merrick *v.* Vaucher, Hamp *v.* the ſame, Lazard *v.* the

So, if a defendant (an alien) be ſent out of the kingdom under the alien bill, 33 *Geo.* 3. c. 4. the court will permit the bail to enter an *exoneretur* on the bail-piece, unleſs they are indemnified, or have money in their hands, belonging to the

the defendant ſufficient to anſwer the plaintiff's demand.—The bail in theſe actions obtained rules, calling on the reſpective plaintiffs to ſhew cauſe why an *exoneretur* ſhould not be entered on the ſeveral bail-pieces, the defendants having been ſent out of the kingdom under the alien-bill, 33 *Geo.* 3. c. 4. Theſe applications were made by the bail, on the ground that it was become impoſſible, by an act over which they had no control, and in which no blame was imputable to them, to render the principal; and the caſe was compared to the above caſe of *Trinder* v. *Shirley*. PER CUR. The bail only engaged for the principal in the then ſituation of the parties; but it is now become impoſſible for them to render the principal, and this impoſſibility does not ariſe from any act which they could control, but from the operation of an act of parliament. Theſe bail, therefore, to whom no fault or neglect whatever is imputable, ought not to ſuffer in conſequence of an act which was paſſed for the benefit of the public. And the plaintiffs have no reaſon to complain of our granting theſe applications; for even if they had ſeverally proceeded to judgment, and charged the defendant in execution, he might equally have been ſent out of the kingdom under this act. *The Court* were about to make the rules abſolute: but it was ſuggeſted, that at leaſt the Court ſhould require affidavits from the bail, that they had no effects in their hands belonging to the defendant, out of which they could repay themſelves in the event of the ſeveral plaintiffs recovering, and that they were not indemnified; the Court, thinking this reaſonable, made the rules abſolute, only on condition that the bail produced ſuch affidavits.

ſame, Mic. Ter. 35 Geo. 3 B.R. 6 *Ter. Rep.* 50.

Accordingly, in a ſubſequent caſe, where a rule ſimilar to thoſe obtained in the above caſe came on, it was oppoſed on an affidavit, which ſtated, that the defendant had depoſited a draft for 1000l. (the amount of the plaintiff's demand) on *Drummond* and Co. the bankers, with his attorney, who had indemnified the bail: AND *The Court* ſaid, That this evinced the propriety of the diſtinction laid down in the above determination; and they accordingly diſcharged this rule.

Coles *v.* de Hayne, Mic Ter 35 Geo. 3 B.R. 6 *Ter. Rep.* 52.

Afterwards, on the trial of the cauſe, a verdict was given for the plaintiff, for 1000l.; upon which it was moved, that an *exoneretur* might be entered on the bail-piece, on the bail paying the 1000l. *But The Court* were of opinion, that, as the bail had choſen to defend the action with a view of taking the chance of a verdict in their favour, they ought to pay the plaintiff's coſts, which they had thus occaſioned, out of their own pocket. And they diſcharged the rule.

Coles *v.* De Hayne, Ea Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 246.

And if a defendant be ſent out of the kingdom under the alien-act after a bail-bond has been given for his appearance, and

Poſtel *v.* Williams, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 517.

before the return of the writ, *The Court* will order the bail-bond to be delivered up to be cancelled.

Fowler *v.* Dunn, Ea. Ter. 7 Geo. 3. B R. 4 *Burr.* 2034.

In this case, it was moved for an *habeas corpus* to bring up the body of the defendant, who stood convicted of felony, and was upon the point of transportation, in order to be surrendered by his bail in a civil action. The Court at first doubted whether this could be done after conviction and sentence; but at length they granted the motion, it being alleged that there was a precedent in 2 *Strange*, 1217. However, it afterwards appearing that the man was actually on board a ship in the river for transportation, and that the ship was ready to sail, LORD *Mansfield* said, That this made a very great difference in the case; for under these circumstances it might be extremely inconvenient: they might as well pray an *habeas corpus* to bring him hither, even after actual transportation; for the king's writ will run into the colonies. Motion refused.

Wood *v.* Mitchell, Ea. Ter. 35 Geo. 3 B.R. 6 *Ter. Rep.* 247

But in such a case, the Court will permit an *exoneretur* to be entered on the bail-piece. The defendant in this case having been convicted of a felony, and sentenced to transportation, a rule was obtained, calling on the plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece, on the ground that it was now become impossible for the bail to render the defendant. *The Court* said, That this case was distinguishable from that of *Fowler* v. *Dunn*, where the difficulty arose from the defendant being actually on board a ship in the river Thames, which was ready to sail, and where the rule for the *habeas corpus* was refused on account of the inconvenience of bringing up the defendant at that period; but that there was no such difficulty in this case, the form of the motion being to enter an *exoneretur* on the bail-piece. Rule absolute.

Sharp *v.* Sheriff, Ea. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 226.

And the Court, on the application of the defendant's bail, will grant an *habeas corpus* to the sheriff in whose custody the defendant may be, if it be only *under a charge of felony*, to bring him up, in order that he may be surrendered by his bail; the bail first justifying, to entitle themselves to make such an application. The defendant was arrested at the suit of the plaintiff, on the 17th February, and bail was put in; *after which he was taken into custody upon a charge of murder committed in Ireland*, where a bill was found by the grand jury against him, and application had been made to the secretary of state to send him over there, in order to take his trial. On a rule calling on the plaintiff to shew cause why a writ of *habeas corpus* should not issue to the sheriff of Hampshire, in whose custody the defendant was, commanding him to bring up the defendant, in order that his bail might surrender him, or to shew cause why an *exoneretur* should not be entered on the bail-piece, or why proceedings

ings ſhould not be ſtayed againſt the bail pending this enquiry. The firſt anſwer given was, that *the bail not having juſtified, were not in a condition to make any motion*; and on that ground the motion was delayed until the bail juſtified, when it was renewed. And per Lord *Kenyon*, CH. J. It is impoſſible at preſent to permit an *exoneretur* to be entered on the bail-piece; that part of the rule is at leaſt premature; we do not at preſent know that the defendant will be ſent out of the kingdom. But I cannot ſee any objection to the application for the *habeas corpus* to bring him up, in order that his bail may ſurrender him. The undertaking of the bail is either to pay the debt or ſurrrender the defendant; *the defendant is ſtill in a condition to be ſurrendered*; and the bail are deſirous to perform that part of their undertaking. There is no pretence therefore for the plaintiff to object to it; nor is there any reaſon why the bail ſhould be put in a worſe ſituation, becauſe the defendant is ſuppoſed to have committed a crime, againſt which they entered into no ſtipulation with the plaintiff. This does not appear to me to be an application to the favour of the Court, but is what the bail are entitled to aſk *ex debito juſtitiæ*; and, as at preſent adviſed, it ſeems to me to be almoſt a matter of courſe. It was then offered to produce an affidavit, ſtating that the bail were indemnified. But by *The Court*, That can make no difference; for if they are indemnified by the defendant himſelf, it may avail them nothing; and if by any other perſon, that will be only ſhifting the reſponſibility from one innocent perſon to another.—Rule abſolute for the *habeas corpus*. The defendant was afterwards brought up, and ſurrendered by his bail; when the Court committed him to Newgate upon the charge of felony.

A rule was granted in C.B. to ſhew cauſe why an *exoneretur* ſhould not be entered on the recognizance of bail, on the ground that in the *capias ad reſpondendum* againſt the principal, the *ac etiam* was "in a certain plea of treſpaſs on the caſe on promiſes," for 25l. but that the declaration was in debt for 260l. on ſimple contract. *The Court*, on ſhewing cauſe, were of opinion, that as the ſum ſworn to was under 40l. the defendant might have been arreſted and holden to bail on a *clauſum fregit*, without an *ac etiam*: the ſtat. 13 *Car.* 2. ſt. 2. c. 2. which requires the cauſe of action to be expreſſed in the writ, and which gave riſe to the clauſe of *ac etiam*, operates only where the ſum is above 40l. thus, therefore, when the debt is under 40l. the *ac etiam* is not neceſſary, and a difference between that and the Court is not material, particularly as relating to the bail, who engage to be anſwerable for the debt of the defendant. Rule diſcharged. Lockwood *v.* Hill, Hil. Ter. 30 Geo. 3. C.B. 1 *Hen. Black* 310.

Judgment having been obtained on a *ſcire facias* againſt the bail, the queſtion in this caſe was, Whether or not a *cognavit* Hodgſon *v.* Nugent, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 277.

cognavit by the principal, without notice to the bail, discharged the bail. *The Court* thought that the bail were not discharged, and refused to grant a rule to enter an *exoneretur* on the bail-piece.

Humphrey *v.* Leite, Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2107.

If bail be objected to, and so does not justify, though his name be not struck out of the bail-piece, he shall not be considered as liable; and he may at any time move the Court that an *exoneretur* may be entered: in this case it was moved to stay proceedings against one of the bail who had been excepted to, and consequently had not justified; but had omitted to get his name struck out of the bail-piece. He came very late with his application, viz. after two *scire faciases* and *nichils* returned to them. However, the Court granted a rule to shew cause; and *Per Cur.* (after cause shewn) On payment of costs, let an *exoneretur* be entered *nunc pro tunc*.

Fulke *v.* Bourke, Ea. Ter. 4 Geo. 3. B R. 1 *Black.* 462.

So, in this case, it was moved to stay the proceedings on a *scire facias* against the bail for irregularity. The fact was, that *Cook* and *Manning* became bail for the defendant at a judge's chambers; afterwards the bail being excepted to, *Cook* and one *Saunders* justified, and *Manning* did not. *Per Cur.* It should have been part of the rule, that *Manning's* name should be struck out of the bail-piece; and on motion, it was accordingly so amended, without costs: afterwards, no cause being shewn, it was made absolute on payment of the plaintiff's costs.

Bailley *v.* Smeathman, Mic. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2134.

In this case the master certified, that where the action is by original, the court of B.R. proceeds by the same rule as the Court of C.B. viz. that the bail has, till the *quarto die post*, to surrender the principal, provided it be done *sedente curiâ*.

Perrot *v.* Hele, Ea. Ter. 10 Geo. 3. C.B. 3 *Wils.* 59.

But it was laid down as a rule by the Court, that when bail above is excepted against, and cannot justify themselves, they are considered as no bail, and therefore cannot render the defendant to prison: but other fresh bail may be put in, and before any exception taken to them, they may render him to prison in discharge of themselves.

Hunt *v.* Coxe, Mic. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1360. 1 *Black.* 393.

As to the time and manner of surrendering, the Court held in this case, that a surrender at about half an hour after eleven at night on the last day (which was the last day of the term), without an actual bringing of the defendant into court (which was then risen), or before a judge (none being accessible at that late hour), in order to have an *exoneretur* entered upon the bail-piece, was not sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tipstaff, and even lodged in the king's-bench prison that very night, which the bail swore was the utmost that the very late notice they received from the sheriff of the *ca. sa.* which was returned *scire feci*, gave opportunity

to them to do. Therefore, the rule which had been obtained in this caſe to ſtay proceedings, and enter an *exoneretur*, was diſcharged with coſts: for the Court would not meddle with the ſufficiency of the time for ſurrendering the principal: becauſe a *ſcire feci* had been duly returned by the proper officer.

But in this caſe, on a rule to ſhew cauſe, why the proceedings on the *ſcire facias* ſhould not be ſet aſide for irregularity; the queſtion was, Whether the defendants, as bail, had ſurrendered their principal in time? The *ſcire facias* was returnable on the 14th November, but the defendants did not ſurrender their principal till the evening of that day after the riſing of the Court, when it was done at one of the judge's chambers. *The bail were not ſummoned till an hour before the riſing of the Court, but the ſheriff returned* ſcire feci. Againſt the rule it was inſiſted, that the ſurrender was too late. And with reſpect to the objection, that the bail were not ſummoned in time, it was ſaid, that as the ſheriff had made his return of *ſcire feci*, the Court ought not to enquire into the time when they were ſummoned, but they might bring an action againſt the ſheriff if the return were falſe; and for this was cited the above caſe of *Hunt* v. *Cox*. But *The Court*, on the authority of *Pool* v. *Wills* (1), made the rule abſolute. And they obſerved, that ſummoning the bail only an hour before the riſing of the court could not anſwer any purpoſe. However, as no *exoneretur* was entered on the bail-piece, nor render of the principal entered on the marſhal's book, the rule was made abſolute on payment of coſts.

Webb *v.* Harvey and another, Mic Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 757.

Proceedings againſt bail.] In this caſe the Court conſidered the *ca. ſa.* againſt the principal as little more than matter of form, and chiefly intended to intimate to the bail, in *what ſpecies of execution* the plaintiff determined to proceed; and as the *leaving* it in the ſheriff's office was a notice to the bail, that the plaintiff would proceed againſt the perſon of the defendant, it was incumbent upon the bail to ſearch whether any *ca. ſa.* was left in the office, and that the court would not enter into an examination by affidavit whether

Hunt *v.* Coxe, Mic. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1360. 1 *Black.* 393.

(1) *Pool* v. *Wills*, Ea. Ter. 16 *Geo.* 3. B.R. A rule having been obtained to ſhew cauſe why the proceedings againſt the bail ſhould not be ſet aſide for irregularity; which irregularity was, that the ſheriff had not ſummoned the party on the *ſcire facias* in due time, *he having ſummoned them on the return-day of the* ſcire facias *after* the riſing of the court. *The Court*, after cauſe ſhewn, made the rule abſolute for ſetting aſide the proceedings.

the *ca. ſa.* was actually returned, or ſuch return actually filed, before the iſſuing of the *ſcire facias* againſt the bail; and the rather, becauſe if the bail had pleaded to the *ſcire facias*, that no *ca ſa.* was returned and filed before the *teſte* of the *ſcire facias*, ſuch return might have been filed at any time before putting in a replication to ſuch plea.

Perry *v.* Campbell, Tr. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 390.

Upon a rule to ſhew cauſe, why the proceedings againſt the bail ſhould not be ſet aſide for irregularity, it appeared that the *ca. ſa.* againſt the principal iſſued, and was lodged in the ſheriff's office 13th May, returnable the 20th; on the 19th a writ of error was allowed and ſerved in the principal action; and on the 20th, the plaintiff got the *ca. ſa.* returned *non eſt inventus*, and brought his action againſt the bail. PER CUR. The proceedings againſt the bail are clearly irregular; the ſheriff could not make a return to the *ca. ſa.* till the 20th, before which time the writ of error was allowed and ſerved. Rule abſolute.

Bell *v.* Jackſon and another, Ea. Ter 32 Geo. 3. B R. 4 *Ter. Rep.* 663.

In this caſe, the *ſcire facias* was returnable the 13th of February, the laſt return of Hilary term, and the ſheriff returned *ſcire feci*. The principal ſurrendered himſelf in diſcharge of his bail on the 21ſt of February. A rule having been obtained, calling on the plaintiff to ſhew cauſe, why the proceedings againſt the bail ſhould not be ſet aſide, becauſe there were not fifteen days between the *teſte* and return of the *ſcire facias*, upon the authority of *Imp. Prac.* B.R. 451. THE COURT, after cauſe ſhewn, held that four days excluſive are ſufficient between the *teſte* and return of the *ſcire facias*, when the proceedings are by bill. But as the defendants appeared to have been miſled by a book of practice in conſiderable repute, they diſcharged the rule without coſts.

Berigal *v.* Melliſh, Tr. Ter. 33 Geo 3. B.R. 5 *Ter. Rep.* 363.

On a rule to ſhew cauſe, why the proceedings in an action upon the recognizance in this action, ſhould not be ſtayed upon payment of the damages and coſts in the original action; the principal having abſconded, and the bail not being able to ſurrender him on the return of the *capias ad ſatisfaciendum*. It appeared that the plaintiff, before the expiration of the eight days, within which bail are allowed to ſurrender, proceeded againſt the bail, and delivered a declaration conditionally; the bail offered to pay the original debt and coſts, but not the coſts of the ſecond action againſt the bail, upon the ground that if they had ſurrendered the principal within the eight days, they ſhould have been diſcharged, and the plaintiff could not have charged the principal with more than the original debt and coſts; and conſequently by offering to pay within the eight days as much as the principal could have been compelled to pay, had he been

been ſurrendered, they ought not to be obliged to pay more because he had abſconded. PER *Buller*, J. The bail ought to ſurrender their principal immediately upon the return of the *capias ad ſatisfaciendum*; if they do not, a cauſe of action accrues againſt them; and therefore the coſts of the declaration delivered in the action againſt the bail, ought to have been tendered, before they had any ground for applying to this court to ſtay the proceedings. The allowing of the eight days after the return of the *ca. ſa.* for the bail to ſurrender the principal, is merely an indulgence given to them by the practice of the court; for they are liable even though the principal die the day after the return of the *capias ad ſatisfaciendum*. Upon payment of the debt and coſts in the former action, and the coſts in the action againſt the bail, let the proceedings be ſtayed.

The principal in this caſe having died on the 14th of March, after the return of the *ca. ſa.* but before the return was filed, a rule was obtained calling on the plaintiff to ſhew cauſe, why an *exoneretur* ſhould not be entered on the bail-piece, and why the filing of the *ca. ſa.* returned by the ſheriff ſhould not be ſtayed. After cauſe ſhewn, the Court took time to conſider; and *Aſhhurſt*, J. now delivered the opinion of the court.—We have been furniſhed by the officers of the Court, with the caſe of *Field* v. *Lahy*, determined in E. 24 *Geo.* 3. B.R. which was thus, "Mr. *Cowper* ſhewed cauſe againſt a rule for ſtaying of the *ca. ſa.* obtained by Sir *T. Davenport*, on a ſuggeſtion that the principal was dead. Mr. Juſtice *Buller* read the caſes of *Hunt* v. *Cox*, and *White* v. *Satchwell*. *The Court* ſaid there was no pretence for the motion, and diſcharged the rule." Therefore as this point has been determined ſo lately, when the former caſes were conſidered, we think that that caſe ought to govern the preſent; and conſequently that this rule muſt be diſcharged. Rawlinſon *v.* Gunſton, Ea. Ter. 35 Geo. 3. 1 R. 6 *Ter. Rep.* 4.

The defendant was bail for one *Page*, againſt whom the plaintiff ſigned judgment on 14th April in Eaſter term, and ſued out a *ca. ſa.* teſted 12th February, the laſt day of Hilary term, returnable on 19th April, to which the ſheriff returned *non eſt inventus*; on this the plaintiff took out a *ſcire facias* againſt the defendant, teſted the 9th April, the firſt day of Eaſter term, returnable the 23d of April; and a ſecond *ſcire facias* teſted the 23d April, and returnable the 30th of April; on 17th May, the plaintiff ſigned judgment againſt the preſent defendant, and ſued out a *fi. fa.* under which his goods were taken by the ſheriff. A rule was obtained to ſhew cauſe, why the proceedings ſhould not be ſet aſide, and the goods taken in execution reſtored, *the* ca. ſa. *being* Gawler *v.* Jolley, Mic. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 174.

teſted the term before judgment was ſigned againſt the principal. THE COURT held the proceedings irregular, as they ſaid ſuch practice would tend to fix the bail, without giving them an opportunity to ſurrender the principal, and therefore made the rule abſolute.

Kenny v. Thornton, Tr. Ter. 11 Geo. 3. C B. 2 *Black.* 768.

Where the bail is enrolled as taken in Middleſex, there the *ſcire facias* muſt be brought in Middleſex only; but where as taken in any other county, the *ſcire facias* may be taken in either county, either that in which it is taken, or in which it is enrolled.

Harriſon v. Davies, Mic. Ter. 11 Geo 3. B.R. 5 *Burr.* 2683.

The ſurrender of the defendant to the ſheriff before the return of the writ, is no ground for ſtaying proceedings upon a bail-bond, for nothing can be a performance of the condition of the bail-bond, but putting in bail.

Meyſey v. Carnel. Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 533

However, in this caſe, where it was moved to ſtay proceedings on a bail-bond on payment of coſts: it appeared that bail were put in, but, on exception, not juſtified; that the plaintiff took an aſſignment of the bail-bond; and afterwards the bail, not having juſtified, ſurrendered the principal: under theſe circumſtances it was contended, on the authority of the above caſe of *Harriſon* v. *Davies*, that the plaintiff had a right to proceed on the bail-bond; BUT *The Court* ſaid, that the practice now ſettled was in favour of the preſent application, on payment of coſts; for that the plaintiff had the body of the defendant, which was all that he could have had, if the bail had juſtified before they had ſurrendered the principal, and therefore there was no injury done to the plaintiff.

Jones v. Lander, Tr. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 753.

And if the defendant, who has given a bail-bond, ſurrender himſelf to the ſheriff *before the return of the writ*, the bail-bond may be given up, and it will be conſidered as if no ſuch bond had been given. In this caſe, the de endant was arreſted by the ſheriff, and gave a bail-bond. On the day of the return of the writ, in order to diſcharge his bail, he voluntarily ſurrendered himſelf to the ſheriff. After the return of the writ the plaintiff demanded an aſſignment of the bail-bond, which the ſheriff refuſed on the ground that the defendant was in cuſtody. On 22d of February, the defendant was diſcharged by *ſuperſedeas*, the plaintiff not having declared againſt him. The ſheriff was ruled to return the writ on the 17th of February, and he returned *capi corpus*. Then he was ruled to bring in the body, whereupon he obtained a rule calling on the plaintiff to ſhew cauſe, why the rule to bring in the body ſhould not be diſcharged. *The Court*, after cauſe ſhewn, thought that as the defendant had voluntarily ſurrendered himſelf to the ſheriff *before the return of the writ*, it was a legal ſurrender, the

ſheriff

ſheriff having the defendant in his cuſtody to anſwer the exigency of the writ. And that at all events this rule muſt be made abſolute, the ſheriff being bound by the *ſuperſedeas* to diſcharge the defendant out of his cuſtody. Rule abſolute.

In this caſe it was clearly held by *Gould*, *Blackſtone*, and *Nares*, juſtices (abſente *De Grey*, CH. J.), that the bail to the ſheriff had no right to take the defendant on a Sunday, in order to ſurrender him: even on an eſcape (if voluntary) this cannot be done. Brooke *v.* Warren, Ea. Ter. 19 Geo. 3. C.B. 2 *Black.* 1273.

If on exception to bail, notice be given of other bail, only one of whom juſtifies, and the names of the former ſtill remain on the bail-piece, they may, unleſs a rule has been had to ſtrike out their names, ſurrender the principal. K. *v.* Sheriff of Eſſex, Ea. Ter. 34 Geo. 3 B.R. 5 *Ter. Rep.* 633.

A writ of error having been brought upon a judgment in B.R. returnable in the exchequer chamber, the bail obtained a rule for ſtaying the proceedings againſt them upon the *ſcire facias*, until the writ of error in the exchequer chamber ſhould be determined; they undertaking to pay the debt and damages within four days *next after the affirmance of the ſaid judgment:* the judgment was affirmed, whereupon another writ of error was brought, returnable in parliament, to reverſe the judgment given in the exchequer chamber: the bail then moved for, and obtained, a rule to ſhew cauſe, why the proceedings againſt them ſhould not be further ſtayed, till the determination of the writ of error returnable in parliament. *And The Court*, after cauſe ſhewn, held that the firſt rule could only intend *the final affirmance*; for it would be abſurd to ſuppoſe, that the bail were to be liable and obliged to pay the debt and damages, while it remained doubtful and uncertain whether ſuch debt and damages were payable at all or not, and whether the judgment might not itſelf be reverſed. Rule abſolute. Kerſhaw *v.* Cartwright and another, Hil. Ter. 12 Geo. 3. B.R. 5 *Burr.* 2819.

If an action be brought in B.R. againſt bail on a recognizance of bail taken in C.B. they have the ſame indulgence (of eight days in full term after the return of the writ againſt them) to render the principal as if the recognizance had been taken in B.R.—In Michaelmas term laſt the plaintiffs ſued Sir *W. Lewes* in C.B. in which action *Branſcombe* and *Bowen* became bail above. The defendant, Sir *W. Lewes*, ſuffered judgment by default, and afterwards brought a writ of error here; and the judgment given in the common pleas was affirmed here in laſt Eaſter term. In the ſame term, after the return of the *ca. ſa.* againſt the principal, the plaintiffs commenced ſeparate actions here on the recognizance of bail againſt *Branſcombe* and *Bowen*, by writs returnable the laſt return Fiſher and another, executors of Perry *v.* Branſcombe, and the ſame *v.* W. and J. Sutton, executors of Bowen, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 355.

turn of that term, the 29th of May. On Thurſday the 15th of June, Sir *W. Lewes* ſurrendered himſelf in diſcharge of his bail before a judge of the common pleas, by whom he was committed to the cuſtody of the warden of the Fleet. The defendants obtained rules to ſhew cauſe why the proceedings in theſe actions againſt the bail ſhould not be ſtayed upon payment of coſts. *The queſtion in this caſe was, Whether, as theſe actions were brought in this court on a recognizance of bail entered into in a cauſe in the common pleas, the bail were entitled to the ſame indulgence as if the actions had been commenced in the common pleas?* Per Lord *Kenyon*, CH. J. There is no doubt about the conſtruction of the recognizance; the recognizance is undoubtedly forfeited. When the queſtion was firſt ſtated, I thought that it depended on the condition of the recognizance; and if it had, I ſhould have had no doubt but that it muſt have been conſtrued according to the rules of that court in which it was taken: but now I am thoroughly ſatisfied that the queſtion depends altogether on the indulgence given to the bail by the rules and practice of this Court. *There are two modes of proceeding againſt bail, either by* ſcire facias, *or by action on the recognizance.* The latter is the moſt harſh and expenſive; and in order to ſoften the hardſhip of it, the Court have granted a certain indulgence to the bail; by a rule of court the bail, when ſued by action, "*have liberty to render the defendant in diſcharge of his bail by the ſpace of eight entire days in full term next after the return of the* latitat, *or other proceſs ſued out againſt them.*" Here the principal was rendered within that time, and therefore the proceedings againſt the bail ought to be ſtayed. And from what has been ſtated at the bar reſpecting the practice of the court of common pleas in this particular, it appears that there is not much ſubſtantial difference between the indulgence granted by the one court and the other. *Per Curiam.*—Rule abſolute.

Meddowſcroft v. Sutton and another, executors of Bowen, Tr. Ter. 37 Geo. 3. C.B. 1 *Pul. & Baſan.* 61.

Bowen was ſerved with an attachment of privilege on a recognizance of bail, but died before the *quarto die poſt*, until which day he had time to ſurrender the principal: the plaintiff then ſerved the defendants with an attachment of privilege, and before the *quarto die poſt* of that writ the principal was ſurrendered: it was therefore moved to ſtay the proceedings againſt the defendants on payment of coſts. AND *Per Cur.* after cauſe ſhewn, The caſe of *Hoare* v. *Mingay*, 2 *Sh.* 918. has eſtabliſhed this rule: that if the principal is ſurrendered within four days after the return of that writ, in which there is an effectual proceeding, it is ſufficient. The former ſuit was done away in this caſe by *Bowen*'s death: the ſufficiency of the ſurrender within the *quarto die poſt*, is a privilege to the party ſued, to which the executors of the

the bail are as much entitled as the bail himſelf. Rule abſolute.

Bail ſued on their recognizance by attachment of privilege, may render the principal on the appearance-day of the return. The plaintiff, who was an attorney, having in Hilary Term recovered judgment in B.R. againſt the defendant, on the 3d of February ſued out an attachment of privilege againſt the bail in C.B. on their recognizance, teſted on the 23d of January, and returnable on *Wedneſday next after the Morrow of the Purification*, which was the 8th of February. On the 11th of February the defendant was rendered, and an *exoneretur* entered; notwithſtanding which, the plaintiff ſigned judgment againſt the bail, and then brought an action on that judgment in B.R. In conſequence of this, a motion was made in that court to ſet aſide the proceedings, and a rule then made to refer it to the prothonotaries to report as to the regularity of the proceedings in C.B. againſt the bail. But ſome difficulties having ariſen, the matter was brought for argument before the Court: and the only material queſtion was, At what time bail, when ſued by attachment of privilege, ought to render their principal, either on the return-day of the writ, or on the *quarto die poſt*, as in common caſes? *Per Curiam*, the rule of practice ought to be uniform as to the time in which bail may render the principal; and there is no good reaſon why they ſhould not have the ſame time allowed where the proceedings are by attachment of privilege, as in other caſes, viz. till the appearance-day of the return. The prothonotaries afterwards reported to the court of B.R. that the render on the 11th of February was regular. Fletcher *v.* Angell, Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 117.

In both courts, where the bail are ſued by *ſcire facias*, and the proceedings are by original, they have till the *quarto die poſt* of the return of the firſt *ſcire facias*, if *ſcire feci* be returned, or if *nihil* be returned, till the *quarto die poſt* of the return of the ſecond *ſcire facias*, to render the principal. Where the proceedings are by bill in B.R. the time for rendering is the return-day of the *ſcire facias*, and in all theſe caſes it is abſolutely neceſſary that the render be made *ſedente curiâ*. 2 *Hen. Black.* 118 (n. a.)

Accordingly, in this caſe cauſe being ſhewn againſt a rule, to ſtay proceedings in an action of debt againſt bail on their recognizance, on the ground that they had not rendered the principal (which was done at a judge's chambers) till after the riſing of the court on the *quarto die poſt* of the return of the writ: it was contended that this was irregular, it being the ſettled practice of the Court to require the ſurrender to be made *ſedente curiâ:* upon a reference to the officers, they all agreed that the practice was as ſtated in 2 *Hen.* Lardener *v.* Baſſage. Hil. Ter. 36 Geo. 3. C.B. 2 *Hen. Black.* 593.

2 *Hen. Black.* 118 (n. a.), and therefore *The Court* diſcharged the rule.

Sheers v. Brooks and others, Mic. Ter. 33 Geo. 3. C.B. 2 *Hen. Black.* 120.

Bail above may juſtify the breaking and entering the houſe of *A.* (the outer door being open), in which the principal reſides, in order to ſeek for him for the purpoſe of rendering him. In treſpaſs for breaking and entering the dwelling-houſe of the plaintiff. *The plea* (after the general iſſue) was a juſtification "for that one *H. P.* had commenced a certain action in C.B. againſt one *R.B. N.K.* and others; and that the defendants, *according to law, duly became bail* for *N.K. by entering into a recognizance* to the ſaid *H.P.* whereby, &c. and further, that whilſt the ſaid recognizance remained in due force, and whilſt the ſaid action was depending, the ſaid *N.K. uſed, occupied, and reſided in the ſaid meſſuage, or dwelling-houſe*, of the ſaid plaintiff, and *whilſt the ſaid* N.K. *uſed, occupied, and reſided in the ſaid meſſuage, or dwelling-houſe, of the ſaid plaintiff.* They, the ſaid defendants, *as the bail of and for the ſaid* N.K. and the ſaid *R.S. in aid and aſſiſtance of them*, and at their requeſt, &c. broke and entered into the ſaid meſſuage, &c. by the *outer door* thereof, the ſaid *outer door thereof being then open* (1), *in order to ſeek for, and if there found, to apprehend and take the ſaid* N.K. *in the ſaid meſſuage or dwelling-houſe of the ſaid plaintiff, to ſurrender him to the priſon of the Fleet, in diſcharge of themſelves (the ſaid defendants) from the recognizance, ſo by them entered into as aforeſaid, as they lawfully might*, &c. To this plea there was a general demurrer: and in ſupport of the demurrer two points were made on the argument; 1ſt, That it did not appear that the defendants were in a ſituation to juſtify the taking of *N.K.* (the principal) in any place, becauſe the plea did not ſtate that he was delivered to them as bail by the Court; and the difference between bail and mainprize is obvious. 2dly, That they had no right to take him in the houſe of another.—PER CUR. This plea appears to be good, both in form and ſubſtance: it ſhews that the defendants were bail, and not mainpernors; for it ſtates, that *they duly became bail*, and entered into a recognizance, the legal effect of which is, that the principal was in their cuſtody; and a further averment of his being delivered to them would have been unneceſſary. When a party is bailed, the bail have a right to go into the houſe of the principal, as much as he has himſelf; *they have a right to be conſtantly with him, and to enter when they pleaſe to take him*; and there does

(1) See *Lee* v. *Ganſell*, in p. 662, ſupra.

not

not appear to be any difference between a houſe of which he is ſolely poſſeſſed, and a houſe in which he reſides by the conſent of another; the party muſt receive him into the houſe, ſubject to all the legal conſequences to which he would have been liable, if the houſe had been his; a contrary determination would affect the liberty of the ſubject, as it would make it extremely difficult to procure bail.—Judgment for the defendants.

For more reſpecting bail, ſee AFFIDAVIT, ARREST, ATTACHMENT, RULES OF COURT, SHERIFF, and other Titles.



A

TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED IN

THIS VOLUME.

ABATEMENT.

1. PLEA to the jurisdiction. Page 1
2. An affidavit is necessary whenever you plead to the jurisdiction of the Court. *Hatch* v. *Cannon.* 595
3. Plea of privilege. 1
4. Plea of joint contract. 2
5. Plea of misnomer. 5
6. Plea in abatement to be verified on oath. 8
7. Conclusion of plea in abatement. 8
8. When to be filed. 8
9. Plea after imparlance. 9
10. Plea after last continuance. 10
11. Judgment upon plea in abatement. 11

ABETTOR.

See APPROVER.

ACCEPTANCE.

1. In what manner a bill of exchange may be accepted; what shall amount to an acceptance; and what sort of acceptance, *or agreement* to accept, shall bind the parties. 294

ACCESSORY.

See APPROVER.

ACCOMPLICES.

1. In cases not within the statutes, an accomplice fully and fairly disclosing the guilt of himself and companions, and admitted a witness, and giving evidence, ought not to be prosecuted for that offence, nor perhaps for any other of the same kind accidently omitted by him. *Rex* v. *Rudd.* 654
2. But if prosecuted he cannot plead this in bar, or avail himself of it on his trial, but may apply to the court to put off the trial that he may apply for a pardon. *Ibid.*

ACCORD.

1. Accord without satisfaction cannot be pleaded. *James* v. *David.* 223
2. A mere accord no ground of action. *Lynn* v. *Bruce.* 308

ACCOUNT.

1. Proceedings in action of. *Godfrey* v. *Saunders.* 230

ACKNOWLEDGMENT.

1. Evidence of the acknowledgment of the debt by an obligor, does not ſuperſede the neceſſity of producing the ſubſcribing witneſs to the bond, in an action on the bond. *Abbot* v. *Plumbe.* 361

ACT OF GOD.

1. A ſhipwright may maintain an action for the repairs of a ſhip burnt in his dock without his wilful default. *Monctone* v. *Athawes.* 285

2. The act of God, what ſhall be deemed ſuch. 57

ACT OF PARLIAMENT.

1. A defendant in a penal action will be diſcharged on common bail, if the affidavit on which he has been held to bail miſtates the act, as for inſtance, the 27th of the king, when it ſhould be the 22d. *Watſon* v. *Shaw.* 516

ACTION.

1. If an action be brought colluſively to obtain the opinion of the judges upon a doubtful queſtion, the court on the diſcovery of the colluſion will refuſe to proceed in the cauſe. *Tonſon* v. *Collins.* 12

2. The rule for amendment in penal actions laid down. 427

3. Treſpaſs *vi & armis* and *treſpaſs on the caſe* cannot be joined in one action. 12

4. Diſtinction between treſpaſs and caſe. 12

5. The diſtinction between treſpaſs and caſe is this: *immediate* damage to the plaintiff's property, is a ground for treſpaſs; *conſequential* damage to it, is a ground for caſe. 12, 13

6. The great importance of preſerving the boundaries between the two actions. 16

7. The difference between actions upon torts and joint contracts, and actions upon the caſe. 16

8. The action of debt on a prior judgment is in general oppreſſive, though in ſome particular caſes it may be fairly accounted for. *Biddleſon* v. *Whytel.* 771

9. An alien enemy held capable of maintaining an action on a ranſom bill. *Ricord* v. *Bettenham*; *Cornu* v. *Blackburne.* 567

10. This has been ſince denied to be law. *Anthon* v. *Fiſher*, 569. *Brandon* v. *Neſbitt*, 570. *Briſtow* v. *Towers.* 571

11. Treſpaſs *vi & armis* will lie wherever there is an excluſive right. *Wilſon* v. *Mackreth.* 13

12. Action upon a bail-bond muſt be brought in ſame court where bail was given. *Walton* v. *Bent*, 779. *Morris* v. *Rees.* 779

13. Action for money had and received to plaintiff's uſe does not lie for Eaſt-India ſtock. *Nightingale* v. *Deviſme.* 282

14. If an action be brought againſt one partner alone where there are ſeveral, and the demand is upon the partnerſhip: this muſt be pleaded in abatement; it cannot be given in evidence, for the not pleading it in abatement is a waiver of the objection. *Rice* v. *Shute.* 2, 3

15. An action againſt a carrier will lie in the name of the conſignor, upon his agreement. *Davis* v. *James.* 66

16. Where a common carrier and a wharfinger are not diſtinguiſhable, as to goods delivered, and where trover will not lie, but it

it muſt be an action on the caſe. *Roſs* v. *Johnſon.* 149
17. In actions on the caſe, ſatisfaction made to the plaintiff pending the ſuit will take away the remedy. *Bird* v. *Randal.* 16, 144

ACTION UPON THE CASE.

1. An action on the caſe is a liberal action ſuited to every wrong and grievance. *Millar* v. *Taylor.* 12
2. Diſtinction between treſpaſs and caſe. 12
3. Action upon the caſe for ſlander of title. 16
4. ——— for ſlander of the perſon. 18
5. Action on the caſe for a malicious proſecution. 30
6. ——— for miſfeazance in office. 38
7. ——— for miſfeazance by ſheriffs. 38
8. ——— for miſfeazance by juſtices of peace. 39
9. ——— for miſfeazance by attornies. 39
10. ——— for miſfeazance in the exerciſe of a public authority. 41
11. ——— for miſfeazance in the diſcharge of a public duty. 45
12. ——— for miſfeazance in a truſt. 57
13. ——— for conſequential damages. 74
14. ——— for detinue. 158

ACTION OF TROVER.

1. Caſes reſpecting. 147

ACTION OF TRESPASS.

1. Treſpaſs *vi et armis*, caſes reſpecting. 158
2. Action of aſſault and battery. 158
3. Action for falſe impriſonment. 163
4. Treſpaſs affecting another in the relation of a maſter. 181
5. ——— in the relation of a huſband. 182
6. ——— in the relation of a parent. 187
7. Treſpaſs by an injury done to the property of another. 189
8. Treſpaſs in reſpect to the realty. 200

ACTIONS FOUNDED ON CONTRACT.

1. Account. 230
2. Aſſumpſit. 230
3. Aſſumpſit for uſe and occupation. 315
4. Debt. 321
5. Covenant. 368

ACTIONS ON PENAL STATUTES.

1. Caſes reſpecting. 418

ADDITION.

Plea in abatement for want of. 5

ADMINISTRATORS.

1. Action of debt may be maintained by an adminiſtrator on a foreign judgment. 342
2. An adminiſtrator having recovered a judgment for a debt due to the inteſtate, need not declare as adminiſtrator in an action on the judgment. *Crawford* v. *Whittal.*
3. If he does, it is ſurpluſage. *Ibid.*
4. And it is no objection on a ſpecial demurrer in ſuch a caſe, that he has not made *profert* of the letters of adminiſtration. *Ibid.*

See EXECUTOR.

ADMIRALTY.

1. The juriſdiction over all matters of prize, and every thing conſequential to a capture as prize belongs

longs exclusively to the court of admiralty. *Lindo* v. *Rodney.* 436

2. If the proceedings in the court of admiralty be erroneous, they are to be rectified on appeal; but if they have no jurisdiction over the subject-matter, the whole is *coram non judice.* But there is a great difference between applications for prohibitions to the admiralty, *pending the suit*, and *after sentence*; in the first case, the court will examine the whole case, and see the ground of the proceedings in the admiralty; but the rule is quite the reverse after a sentence is passed; in such a case, they will not look out of the proceedings, for the party who applies for a prohibition, after sentence, must shew a nullity of jurisdiction on the face of the proceedings. *Ladbrooke* v. *Cricket.* 439

3. Whether the court of admiralty has or has not jurisdiction, depends upon *the subject-matter*; therefore they have cognizance of an hypothecation-bond, given in the course of a voyage, though it be executed *on land, and under seal. Menetone* v. *Gibbons.* 441

4. The admiralty court has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as prize; and a monition having issued, after the goods were condemned, and decreed to be delivered to the captors, at the suit of such master against the plaintiffs, as owners or agents of the prize goods, to bring into court the produce remaining in their hands, to answer the freight; the court of king's bench refused a prohibition, though no *fidejussory* caution had been taken before the goods were delivered to the captor; but the question of freight had been reserved by the terms of the decree, for future consideration. *Smart* & al. v. *Wolff.* 446

5. And notwithstanding any of the prize acts, the prize courts, and courts of lords commissioners of appeals, have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors; and if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though, perhaps, they would have put a different construction on the prize acts; and the same courts have power to enforce their decrees. *Home* v. *Earl Camden* and others. 456, 469, 476

6. But if it appear, that the court of admiralty is proceeding in a question over which it has no jurisdiction, a court of common law will grant a prohibition, without imposing any terms on the party applying for it. *Velthasen* v. *Ormsley.* 486

ADVOWSON.

1. A. B. being seized of the advowson of a donative, the church in his lifetime becomes void, then A. B. dies (the church being still void), having first made his will; the plaintiff, his executor, brought this *quare impedit*, supposing himself entitled to this turn, as an executor is in the case of a presentative benefice: after two arguments, THE WHOLE COURT were clearly of opinion, that the right of donation descended to the heir of A.B. and that his executor had no title, which he would have had, if it had been a presentative benefice. *Repington* v. *the Governor of Tamworth School.* 487

2. In an action for money had and received to the plaintiff's use, in

in order to try his right to a donative church, with cure of ſouls, the queſtions were, firſt, Whether the plaintiff, as incumbent of this donative church, is not within the ſtatutes of 13 *Eliz.* c. 12 and 13; and 14 *Car.* 2. c. 4, and obliged to comply with the requiſites therein? Secondly, Whether it was not neceſſary for him to have proved, upon the trial of the cauſe, that he had conformed to thoſe requiſites? *Powell* v. *Milburn.* 500

3. The court of king's bench granted a rule for the defendants, as being lords of the manor of S. to ſhew cauſe, why a *mandamus* ſhould not iſſue, to command them to allow, and preſent to the ordinary of the peculiar juriſdiction, the nomination of *W. M.* clerk, to be ſtipendiary prieſt, or curate, of the chapel of W. in the ſaid manor of S. in order that he might obtain a licenſe from the ordinary? *The King* v. *the Marquis of Stafford* and *S. Giffard, eſq.* 502

4. Where the grant of a rectory by the crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory has been held to paſs, not being included in the exception. *Arthington and Hardcaſtle* v. *the Biſhop of Cheſter and Jackſon.* 505

5. The grant of the next preſentation, or of an advowſon, made after the church is actually vacant, is a void grant, *quoad* the fallen vacancy, upon the ground of public utility, and the better to guard againſt ſimony; but not for the fictitious reaſon of its having then become a choſe in action: but no lapſe incurs till after induction to a ſecond benefice. *Wolferſtan* v. *the Biſhop of Lincoln and Whitehead.* 508

6. The defendants in the above caſe afterwards brought a writ of error upon the above judgment, returnable in B.R.; and it appeared manifeſt to that court, that the plea, the replication, and the rejoinder, were all of them bad: ſo that it ſtood now upon the declaration only. The caſe was again very elaborately argued; and the Court were extremely clear, that, as to lapſe, the avoidance of the former benefice does not take place till induction to the ſecond; and Lord *Mansfield* and Mr. Juſtice *Wilmot* both ſaid, that this was a fact ſo ſettled, that it ought not now to be diſputed. The Court were, alſo, equally clear, that a grant of a next preſentation, or of an advowſon, made after the church is actually fallen vacant, is a void grant, *quoad* the fallen vacancy. *The Biſhop of Lincoln* v. *Wolferſtan.* 510

7. But although a grant of an advowſon, made after the church has actually fallen vacant, is void, *quoad* the fallen vacancy, yet it is good as to the advowſon itſelf, unleſs it be a corrupt purchaſe. *Barret* & al v. *Glubb* & al. 511

8. The prerogative preſentation to a church of which the advowſon is held in common, does not paſs for the term of the otherwiſe rightful patron. *Grocer's Comp.* v. *Archbiſhop of Canterbury.* 487

9. Where an advowſon is held in common, and the *rota* of preſentation is not expreſsly ſettled, the firſt and peaceable preſentations are an evidence of a compoſition between the parties. 492

10. But the royal prerogative of preſenting to a church, vacant by the incumbent being promoted to a biſhoprick, does not deſtroy the effect of a prior grant of the next

preſentation, by the owner of the advowſon. *Calland* v. *Troward.* 492. Affirmed in error. 496

11. A lay patron may revoke his preſentation before inſtitution; and ſuch revocation not amounting to a corrupt agreement to preſent cannot be void for ſimony. *Rogers* v. *Holled.* 497

12. Where two churches are united by act of parliament, after the next avoidance of both, the patron cannot preſent to the united vicarage upon the next avoidance of one. *Hardinge* v. *Biſhop of Winton.* 498

ADULTERY.

1. Actions for criminal converſation: caſes reſpecting. 182

2. Proof of a marriage in fact neceſſary in actions for crim. con. 182

3. What will be ſufficient proof of ſuch marriage. 182

AFFIDAVIT.

1. If the defendant is arreſted in a *qui tam* action on an affidavit which entitles the cauſe, he may be diſcharged on common bail. *R. King* q. t. v. *Cole.* 513

2. It has been decided under the lottery-act, 27 *Geo.* 3, c. 1, that the plaintiff ought to make an affidavit previous to the ſuing out of the writ, ſpecifying the amount of the penalties ſued for, and ſuch amount ought alſo to be ſpecified in the firſt proceſs. *King* q. t. v. *Horne.* 514

3. But the laſt caſe ſeems to have been overruled in C.B. *King* q. t. v. *Pacey* 514

4. And where ſeveral perſons have ſeparately incurred penalties, a ſeparate affidavit muſt be made and filed againſt each of them. *Goodwin*, q. t. v. *Parry.* Idem v. *Smith* and two others. 515

5. But an affidavit to hold to bail on the lottery acts is ſufficient if it ſtate that the defendant "inſured or cauſed to be inſured," the allegation being ſufficiently poſitive. *Pritchett* q. t. v. *Croſs.* 515

6. An objection was taken to an affidavit to hold to bail on the lottery-act, 1ſt, becauſe the act of parliament was miſrecited, the offences imputed to the defendants being againſt an act of the 22d, and not the 27th, of the preſent king. The court were clearly of opinion, that the objection was fatal. *Watſon* v. *Shaw* and others. 516

7. The defendant was arreſted for inſuring lottery tickets, upon an affidavit, which only ſtated, that he had forfeited ſuch a ſum by inſuring, &c. without ſtating that the defendant was indebted to the plaintiff, or that the debt was ſtill due. And the Court were of opinion, that the affidavit was ſufficient. *Davis* v. *Mazzinghi.* 516

8. The affidavit alleged, that the defendant had promiſed and agreed to pay ſeveral perſons divers ſums of money, on certain events and contingencies relating to the drawing certain tickets and numbers, &c. without adding, that the defendant had taken and received any money in conſideration of ſuch promiſes; which it was ſaid was fatal. Another objection was, that it included ſeparate offences, by inſuring with ſeveral perſons. But the Court thought there was no foundation for either of the objections. *Holland* v. *Bothmar.* 516

9. An affidavit to hold to bail, which was not poſitive, as the act 12 *Geo.* 1, c. 19, § 2, requires it to be; but only that the defendant was indebted to him in ſuch a ſum as appears by agreement, held inſufficient. *Jennings* v. *Martin.* 517

10. The like where the affida-

vit

vit was as appears by a bill of exchange. &c. *Bright* v. *Purrier.* 517

11. That the defendant is indebted to the plaintiffs in 200l. upon promiſes, is too general. *Cope* v. *Cooke.* 517

12. An affidavit ſtating, that the defendant had by letter promiſed to pay a legacy, and that therefore he is juſtly indebted, inſufficient. *Mackenzie* v. *Mackenzie.* 517

13. That the defendant was indebted in ſo much as appears by the maſter's allocatur, not ſufficient. *Powell* v. *Portherch.* 518

14. An affidavit that, on or about the 9th day of February, the deponent ſerved a rule with the maſter's allocatur, and demanded coſts, not ſufficient to ground an attachment on. *Wadham* v. *Brett.* 518

15. An attachment will not be granted if the affidavit does not ſtate that the defendant has been ſerved with a copy of the rule perſonally, and that the original rule was at the ſame time ſhewn to him. *The King* v. *Smithies.* 518

16. An affidavit to hold to bail in theſe words, "that *J. F.* is juſtly indebted unto this deponent in the ſum of 20l. and upwards, according to the bill of this deponent delivered to the ſaid *J. Jackſon*," inſufficient. *Williams v. Jackſon.* 518

17. An affidavit ſwearing that the defendant was indebted in the ſum of 500l. and upwards, without ſtating how the debt aroſe, inſufficient. *Cooke* v. *Dobree.* 519

18. An affidavit in trover, "That the defendants had poſſeſſed themſelves of divers goods, and had refuſed to deliver them up, and that they or ſome of them had converted and diſpoſed of them to their own uſe," held ſufficiently preciſe to hold the defendants to bail. *Charter* v. *Jaques.* 519

19. But an affidavit that the defendant is indebted in 23l. and upwards in trover, is not ſufficiently poſitive. *Hubbard* v. *Pacheco.* 519

20. An affidavit to hold to bail in trover, which ſtated, that the defendant had converted a bill of exchange, held bad, as it did not appear but that the bill might have been paid. *Clarke* v. *Cawthorne.* 754

21. A bond was given, conditioned for the payment of bills of exchange drawn in England on *A.* in the Eaſt-Indies, in caſe ſuch bills ſhould be returned to England proteſted for *non-payment.* The affidavit to hold to bail after ſtating "that the defendant was indebted to the deponent, the obligee, in a certain ſum," ſtated alſo the condition of the bond, and "that the ſaid bills were not paid to his knowledge or belief in India, or elſewhere, but that they were proteſted for *non-acceptance* in India, and were ſtill unpaid." It was no objection that the affidavit ſtated the knowledge or belief of the deponent, that the bills were unpaid; but it was bad becauſe it introduced a new term not mentioned in the bond, namely, a proteſt for non-acceptance. *Hobſon* v. *Campbell.* 519

22. In an action for double rent, an affidavit ſtating, the notice to quit, &c. "by reaſon of which, and by force of the ſtatute, an action had accrued," held to be inſufficient. *Wheeler* v. *Copeland.* 520

23. An affidavit, "that the defendants were indebted to the plaintiff in 245l. for money lent by the plaintiff to the defendants for the uſe of another, and for which the defendants promiſed to be accountable, and to repay, or cauſe to be paid,

paid, or ſecured to the plaintiff," held inſufficient to hold the defendants to bail. *Jacks* v. *Pemberton.* 520

24. If debt and aſſumpſit be joined together, the defendant cannot be held to bail upon the affidavit. *Crooke* v. *Davis.* 520

25. So two or more defendants in different actions cannot be held to bail upon one affidavit. *Gilby* v. *Lockyer.* 520

26. The defendant, the maker of a promiſſory-note, was held to bail on an affidavit ſtating, that the defendant and the indorſer were ſeverally indebted to the plaintiff in the amount of the note; the affidavit was on one ſtamp only; the maker and the indorſer were alſo included in the ſame writ with ſeveral *ac etiams*; held irregular, there being only one affidavit inſtead of two. *Huſſey* v. *Wilſon.* 521

27. The like point decided. *Dean and Chapter of Exeter* v. *Seagell.* 521

28. The defendant was held to bail on an affidavit, which ſtated, that "the defendant was indebted to the plaintiff in 50l. under a certain agreement in writing, of ſuch a date, by which the defendant agreed to forfeit the ſum of 50l;" the Court held that the plaintiff ſhould have ſhewn the breach of the contract. *Stinton* v. *Hughes.* 521

29. An affidavit that 2,300l. is due and owing for arrears of rent under a leaſe, ſufficient to hold to bail. *Long* v. *Linch.* 522

30. The plaintiffs will abandon their right to bail if there be a variation between the affidavit to hold to bail, and the declaration. *Spalding* v. *Mure.* 522

31. In an action brought by the aſſignees of a bankrupt to recover a debt, the affidavit, "as appears to theſe deponents by the laſt examination of the bankrupt, and as theſe deponents verily believe;" ſufficient. *Barclay* v. *Hunt.* 523

32. The like point. *Swayne* v. *Crammond*, 523. *Jenna Edwards.* 754

33. The like point as to executors. But if ſuch an affidavit want the words, that he believes the account to be true, it will be inſufficient. *Sheldon* v. *Baker.* 523

34. The court of C.B. will, however, in ſuch a caſe, permit a ſupplementary affidavit to be produced. *Roche* v. *Carey.* 524

35. Affidavits againſt a rule for a criminal information, are to be without any title, until the rule is made abſolute. *K.* v. *Harriſon*, *King*, q. t. v. *Cole*, and *Beven* v. *Beven.* 524

36. In moving for a prohibition, where the want of juriſdiction appears upon the face of the proceedings, an affidavit to verify the truth of the ſuggeſtion is not neceſſary; though every ſuggeſtion which does not appear upon the face of the proceedings, but is collateral and out of them, ought to be verified by affidavit. *Buggin* v. *Bennet.* 524

37. Where the affidavits of jurors, as to what paſſed at the time of bringing in the verdict, are to be received. *Rex* v. *Woodfall*, *Vaiſe* v. *Delaval*, 525. *Jackſon* v. *Williamſon.* 525

38. The court will not interfere in a ſummary way upon affidavits on the behalf of bail, where there has been an agreement to indemnify them. *Beal* v. *Langſtaff.* 525

39. On the bringing up a defendant, convicted of a miſdemeanor, for judgment, the court will permit an affidavit in aggravation to be read, made by a witneſs upon the trial,

trial, and grant the defendant leave to anſwer it. *The King* v. *Sharpneſs.* 526

40. The court, under particular circumſtances, will grant a defendant, brought up to receive judgment, time to anſwer affidavits produced in aggravation. *The King* v. *Wilſon.* 526

41. A conviction upon a charge of perjury is not a ſufficient objection to the reading of an affidavit, unleſs followed by a judgment, becauſe, upon a motion in arreſt of judgment, it may be quaſhed. *Lee* v. *Ganſell.* 526

42. An affidavit ſworn before the agent of the proſecutor cannot be received to ground an attachment on. *King* v. *Wallace.* 526

43. If a rule to ſhew cauſe be diſcharged on an affidavit which contains an anſwer falſe in itſelf, the court will not afterwards open the matter on an affidavit which diſproves the contents of the former one. *Davis* v. *Cottle.* 527

44. A criminal information having been granted againſt the defendant, he, before the trial at *niſi prius*, diſtributed certain hand-bills in the aſſize town, vindicating his own conduct, and reflecting on that of the proſecutor. This matter being diſcloſed to the judge at *niſi prius* by an affidavit, was held by him to be a ſufficient ground for putting off the trial. And that affidavit being returned to the court of king's bench, they granted another information upon it againſt the defendant, conſidering the affidavit taken at *niſi prius* as taken under the authority of the court. *The King* v. *Joliffe.* 527

45. After an affidavit hath been read and filed, it cannot be taken off the file. *Beal* v. *Langſtaff.* 526

46. Affidavit to hold to bail for having foreign wrought ſilks found in his cuſtody. *Rex* v. *Rebord.* 526

47. An affidavit to hold to bail that the defendant was indebted in 5000l. for money had and received, *and for which he has not accounted*, inſufficient. *Champion* v. *Gilbert.* 755

48. Caſes reſpecting the intitling of affidavits. *Rex* v. *Sheriff of Middleſex*, 696. *Wood* v. *Webb*, 696. *Hollis* v. *Brandon*, 753. *Clarke* v. *Cawthorne*, 754. *Kennet & Avon Can. Comp.* v. *Jener.* 755

AGENT.

1. An action on the caſe for money had and received to the plaintiff's uſe, ought to be brought againſt the principal, not againſt a receiver or collector. *Sadler* v. *Evans.* 232

2. Concerning the duty of an agent in inſuring, and what is or is not negligence in him. *Moore* v. *Mourgue.* 142

3. If money be miſpaid to an agent, and he has paid it over, he is not liable in an action by the perſon who miſpaid it. *Buller* v. *Harriſon.* 231

4. But if before he has paid the money to his principal, the perſon corrects the miſtake, the agent cannot afterwards pay it over without making himſelf liable. *Ibid.*

5. And if there was no new credit, no acceptance of new bills, no freſh goods bought or money advanced for his principal, the merely paſſing it in account is not a payment over. *Ibid.*

6. Where an agent is employed to buy goods, an acknowledgment under his hand-writing of his having received them, is evidence of a delivery to the buyer. *Biggs* v. *Lawrence.* 271

7. Where

7. Where a man pays money by his agent which ought not to have been paid, either the agent or principal may bring an action to recover it back. *Stevenson* v. *Mortimer.* 252

8. If money is mispaid to a known agent, and an action brought against him for it, it is an answer to such action that he has paid it over to his principal. *Ibid.*

9. Therefore if exorbitant fees are taken by a custom-house officer from the master of a vessel, though the payment of such fees are by the stat. imposed on the master personally, the owners may recover the excess in assumpsit for money had and received. *Ibid.*

10. No action lies against a steward, manager, or agent, for damages done by the negligence of those employed by him in the service of his principal, but the principal or those actually employed only are liable. *Stone* v. *Cartwright.* 78

11. An agent's bill to an attorney in the country may be taxed by the master. *Dixon* v. *Plant.* 723
Ex parte *Bearcroft.* 723

12. Payment to the agent in the country for the attorney of the party, is not payment to the party. *Yates* v. *Freckleton.* 705

AGREEMENT.

1. A paper containing words of present contract, with an agreement that the lessee shall take possession immediately, and that a lease shall be executed in future, operates only as an agreement for a lease, and not as a lease itself. *Goodtitle* ex dim. *of Eastwich* v. *Way.* 529

2. An agreement reciting that *A.* in case he should be entitled to certain premises on the death of *B.* would immediately demise the same to *C.* declaring, that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe* ex dim. *of Coore* v. *Clare.* 530

3. Words in an agreement, that "*A.* shall hold and enjoy, &c. if not accompanied by restraining words, operate as words of present demise. *Roe* ex dim. *of Jackson* v. *Ashburner and others, assignees of* T. S. *a bankrupt.* 531

4. If a tenant holds under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessee's son power to take the house for himself when he comes of age: the son must make his election in a reasonable time after he comes of age. *Doe* ex dim. *of Bromfield and wife.* 533

5. If one covenant with another to do a certain act in consideration of a reward, and the other prevent the stipulated thing from being literally performed, and accept of an equivalent, he may be sued for the reward, and the reason of his non-compliance with the literal terms of the covenant may be averred. *Hotham and two others* v. *East-India Company.* 534

6. An agreement to accept a bill on certain conditions is discharged, if the conditions are not complied with. *Mason* v. *Hunt and another.* 537

7. If the owners of different ships agree to indemnify each other to a certain amount, if any of their ships shall be lost, and one of them sells his ship, which is afterwards lost, the others are not liable, unless the vendor has sold (together with the ship) his interest in the

the agreement of indemnity. *Ayres* v. *Wilſon.* 540

8. In an action on the caſe upon articles, ſomewhat ſimilar to the agreement in the laſt caſe, the defendant pleaded, that the plaintiff had parted with his ſhip. To this plea the plaintiff replied, that he had agreed with the purchaſer to pay him 500l. if the ſhip was loſt within three months, and therefore was intereſted. The defendant demurred to this replication; but the court gave judgment for the plaintiff, becauſe he continued intereſted, in conſequence of his agreement with the purchaſer. *Reed* v. *Cole.* 541

9. By an expreſs agreement, the obligee of a bond to ſecure an annuity, may waive the forfeiture for non-payment on the day, ſo as to be entitled to recover againſt the obligor; although the obligor has been diſcharged under an inſolvent debtors' act, between the time of the forfeiture, and the commencement of the action. *Webſter* v. *Banniſter.* 541

10. If an officer or ſailor, in conſideration of certain wages, and of certain ſhares of all prizes which may be taken by a letter-of-marque, in the courſe of a cruiſe, enters on board, and ſubſcribes certain articles, by which, among other things, it is agreed, between the captain and them, together with ſeveral other perſons, as the officers and crew of the ſhip, that they ſhall repair on board, and proceed in the ſhip, and duly ſerve in their ſeveral capacities and ſtations, in her then intended voyage from London to the coaſt of Africa: and at and from thence to ſuch place or places in America, as the maſter for the time being ſhall direct, and from thence back to the port of London, or ſome other her diſcharging-port in Great Britain; and that the wages, or monthly pay, to grow due to the officers, ſailors, and others belonging to the ſhip, for their ſervices on board during that voyage, ſhall be paid to and accepted by them in manner following, viz. one-half part thereof at the port of delivery of the negroes in America, and the remaining part thereof, and alſo the wages which ſhould afterwards become payable, within thirty days next after the ſhip's arrival at her port of diſcharge in Great Britain: in this caſe if the ſhip is taken before ſhe compleats her voyage, the officers and crew are not entitled to any part of their wages. *Abernethy* v. *Landale.* 542

11. Where a leaſe comes to the hands of the original leſſor by an agreement entered into between him and the aſſignee of the original leſſee, "that the leſſor ſhould have the premiſes as mentioned in the leaſe, and ſhould pay a particular ſum over and above the rent annually, towards the good-will already paid by ſuch aſſignee;" ſuch agreement operates as a ſurrender of the whole term. *Smith* v. *Mappleback.* 545

12. If two perſons agree to perform certain work in a limited time, or to pay a ſtipulated weekly ſum for ſuch time afterwards, as it ſhall remain unfiniſhed, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly ſum, and the work is not finiſhed in the time, ſuch weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be ſet off by the obligee in an action brought againſt him by the obligor, who executed. *Fletcher* v. *Dyche.* 546

13. A

13. A broker, when he bought goods for his principal, agreed for one-half *per cent.* to indemnify him from any loſs on the reſale; and it was held, that this undertaking was diſcharged, when the principal had a fair opportunity of ſelling to advantage, but neglected it, though he was afterwards obliged to ſell at a loſs. *Curry* v. *Edenſor.* 547

14. At a public meeting of the dyers, dreſſers, whiſters, printers, and calenderers, a reſolution in writing was come to, that they would receive no goods unleſs under certain conditions; viz. to detain ſuch goods, not only till payment made for the work and labour performed upon the particular goods detained, but alſo for work and labour of the ſame kind performed upon goods already delivered out of their poſſeſſion, and this was held a legal agreement. *Kirkman* v. *Shawcroſs.* 549

15. An agreement by a friend of a bankrupt to pay all his creditors their full debts, in conſideration that they will not proceed any further under the commiſſion, is good in law. *Kaye* v. *Bolton.* 550

16. By a deed of compoſition, the creditors agreed to take 15s. in the pound in the following manner; viz. the trader was to give bills, accepted by a friend, for 10s. in the pound, and his own notes for the remaining 5s.; one of the creditors who ſigned the deed took bills from the debtor, accepted by his friend, for the whole 15s. in the pound; and the payment of theſe bills was reſiſted, upon the ground, that it was a ſecurity beyond that agreed for, and greater than the other creditors; but the tranſaction was adjudged fair. *Feiſe* v. *Randall.* 550

17. If *A. B. C.* and *D.* enter into an agreement to purchaſe goods in the name of *A.* only, and to take aliquot ſhares of the purchaſe, but it does not appear that they are jointly to reſell the goods: on failure of *A.* the oſtenſible buyer, *B. C.* and *D.* are not anſwerable to the ſeller as partners. *Coope* v. *Eyre.* 551

18. *A.* the owner of a ſhip, executes an abſolute bill of ſale of it to *B.* and by another deed of the ſame date aſſigns other property to *B.* which deed of aſſignment (reciting that the bill of ſale was for the better ſecuring a ſum of money lent by *B.* to *A.* and alſo reciting a bond and warrant of attorney given by *A.* to *B.* to ſecure the ſame ſum) declares that theſe ſeveral deeds and inſtruments were made to enable *B.* by ſale of all the things compriſed in them, to raiſe the ſum lent without the concurrence of *A.* at any time before the money ſhould be paid off; but in the ſame deed there is a covenant, that upon payment of the money, *B.* ſhall reconvey to *A.* but ſo as not to prevent *B.* from ſelling, &c. at any time before the full payment, &c.: under theſe conveyances *B.* is not abſolute owner of the ſhip, but only mortgagee, and is not liable for neceſſaries provided for the ſhip, before he takes poſſeſſion. *Jackſon* v. *Vernon.* 552

19. An agreement made by two partners to pay a certain ſum of money, to a third perſon, equally out of their own private caſh, is a joint contract, and they muſt be jointly ſued upon it. *Byers* v. *Dobey.* 554

20. Where goods are delivered under an agreement to take a ſpecific parcel of copper money in payment, a delivery of ſuch copper will be a good bar to an action for the value of the goods, though in fact it be counterfeit money. *Alexander* v. *Owen.* 555

21. An

21. An agreement to leave money by will, need not be in writing, though uncertain as to the time of performance. *Fenton* v. *Emblers.* 564

22. An agreement not to ſue without ſatisfaction, is no bar to an action of treſpaſs. *James* v. *David.* 223

23. An agreement for a leaſe, though no leaſe was ever tendered by the leſſor or demanded by the leſſee, is a good defence to an ejectment brought by the leſſor during the term. *Weakly* ex dim. *Tea* v. *Bucknell.* 528

24. Government having contracted to furniſh forage for a certain number of horſes to be kept by a ſuttler; and the contractor for forage having agreed not to commute the forage for money, an agreement between the ſuttler and contractor for forage, that the latter ſhall allow the former a ſum of money for each ration of forage allowed for the whole number of horſes, and ſhall retain the forage, is void. *Willis* v. *Baldwin.* 264

25. In an action on an agreement to deliver poſſeſſion of certain premiſes, ſubject to the forfeiture of a ſtipulated ſum on failure by either party, the perſon who was to deliver the poſſeſſion cannot ſupport an action for the forfeiture, although he aver that he was ready and willing to deliver the poſſeſſion, &c. without ſhewing on his declaration a poſſeſſory title in himſelf. *Luxton* v. *Robinſon.* 301

26. An agreement to pay a ſum of money to the aſſignees of a bankrupt, when his certificate ſhall be allowed, whereby a creditor is induced to ſign (although the money to be paid is for the benefit of all the creditors), is void. *Jones* v. *Barkley.* 245

27. If *A.* agree to give *B.* a certain ſum for goods in advancement of *C.* any ſecret agreement between *B.* and *C.* that the latter ſhall pay a further ſum, is void, as a fraud on *A.* although the bill of ſale is made to *A.* and *B.* cannot recover ſuch further ſum againſt *C. Jackſon* v. *Duchaire.* 249

28. *A.* gave *B.* a bond to ſecure an annuity; and before any payment became due, *A.* lent *B.* a ſum of money: on which it was agreed that *B.* ſhould retain the payments of the annuity as they became due, till that ſum was diſcharged; then *B.* became a bankrupt, and the agreement to retain was held a good plea to an action on the bond by *B*'s aſſignees for the payments accruing after the bankruptcy; being equivalent to a plea of *ſolvit ad diem. Sturdy* v. *Amand.* 355

29. In conſequence of a debtor repreſenting to one of his creditors, that if he will agree to accept a compoſition for his debt, all the other creditors will do the ſame, ſuch creditor does agree, &c. the agreement is not binding on him if that repreſentation be untrue. *Cooling* v. *Noyes.* 307

30. *A.* declared that in conſideration that he, at the requeſt of *B.* had conſented and agreed to accept and receive from *B.* a compoſition of ſo much in the pound upon a ſum of money due from *B.* to *A.* in full ſatisfaction and diſcharge of the debt, *B.* promiſed to pay the compoſition. This was not a good conſideration to maintain an aſſumpſit againſt *B.* a mere accord not being a ground of action. *Lynn* v. *Bruce.* 308

ALIENS.

1. It has been decided, that an action is maintainable by an alien enemy upon a ranſom-bill. *Record* v. *Bettenham.* p. 567

2. Alſo

2. Alſo where an enemy's ſhip, which had ranſomed a Britiſh veſſel, was retaken with the hoſtage and ranſom-bill on board, but which bill was ſecreted and not delivered up to the recaptor: it was held, that the firſt captor might recover upon the ranſom-bill. *Cornu* v. *Blackburne.* 567

3. But in a ſubſequent caſe, on a ranſom-bill, it was decided that an alien enemy cannot, by the municipal law of this country, ſue for the recovery of a right claimed to be acquired by him in actual war. *Anthon* v. *Fiſher.* 569

4. An action will not lie either by or in favour of an alien enemy. For though it was held in *Ricord* v. *Bettingham*, that the action by an enemy on a ranſom bill might be maintained, the action was not brought until peace was reſtored. *Brandon* v. *Neſbitt.* 570

5. The like point. *Briſtow* v. *Towers.* 571

6. But a native of a foreign ſtate, in amity with this country, taken in an act of hoſtility on board an enemy's fleet, and brought to England as a priſoner at war, is not diſabled from ſuing while in confinement, on a contract entered into with a ſubject of this country while a priſoner at war. *Sparenburgh* v. *Bannatyne.* 571

7. The ſon of an alien father and Engliſh mother, born out of the king's allegiance, cannot inherit to his mother in this country. *Doe* ex dim. *Duroure* v. *Jones.* 573

AMBASSADORS.

1. The privilege of foreign miniſters and their domeſtic ſervants depends upon the law of nations. *Triquet and others* v. *Bath*; *and Peach and another* v. *Bath.* 577

2. And the act of parliament of 7 *Ann.* c. 12. did not intend to alter, nor can alter, the law of nations: neither is there any one proviſion in that act which is not warranted by the law of nations. *Heathfield* v. *Chilton.* 578

3. But the law of nations does not ſcreen perſons who are not *bona fide* ſervants to public miniſters. *Ibid.*

4. And the law of nations does not take in conſuls, or agents of commerce; neither does it appear certain whether the miniſter, from the prime biſhop of Liege, has privilege. *Ibid.*

5. The privilege of a foreign miniſter extends to his family and ſervants, who are natives of the country where he reſides, as well as his foreign ſervants. *Lockwood* v. *Dr. Coyſgarne.* 578

6. And the regiſtering the name of the ſervants of ambaſſadors in the ſecretary of ſtate's office, and tranſmitting it to the ſheriffs' office, relates only to the bailiff who arreſts, and is no condition precedent to his being entitled to privilege. *Heathfield* v. *Chilton.* 578

7. But to entitle to privilege, an actual *bona fide* ſervice muſt be proved. *Triquet and others* v. *Bath*; *and Peach and another* v. *Bath.* 579

8. And the defendant ought himſelf to ſhew the nature of the ſervice, and ſwear to the actual performance of it. *Fontainier* v. *Heyl.* 579

8. And if a man has no privilege at the time of his being arreſted; no ſubſequent privilege can be given him, by being afterwards taken into the ſervice of a public miniſter. *Heathfield* v. *Chilton.* 579

9. The like point. *Lockwood* v. *Dr. Coyſgarne.* 580

10. Where the defendant was ſecretary to an envoy, but in fact the purſer of a king's ſhip, the Court held the duties of thoſe two offices

offices incompatible, and diſallowed the protection. *Darling* v. *Atkins.* 581

See ARREST. No. 8.

AMENDMENT.

1. A declaration in a *qui tam* action for uſury, amended by altering the date of the note, all being in paper. *Bonfield* q. t. v. *Milner.* 427

2. After a verdict in ejectment, a defect in ſetting out a title is cured, though it cannot cure a defective title. *Small* ex dim. *Baker* v. *Cole and Skinner.* 582

3. A *ca. ſa.* may be amended after it has been executed. *Hunt* v. *Kendrick.* 585

4. The declaration may be amended in an action on a penal ſtatute after record made up, carried down to trial, and withdrawn by the plaintiff, all being in paper till a verdict. *Mace* q. t. v. *Lovett.* 428

5. But an amendment of declaration after verdict has been refuſed. *Marriott* v. *Liſter.* 583

6. Alſo after a new trial granted no amendment of the pleas allowed in the record. *Parker* v. *Anſell.* 586

7. In ejectment the declaration was amended by altering the time of the demiſe, *where the plaintiff* would have been barred by a fine from bringing a new ejectment. *Doe* v. *Pilkington.* 582

8. Amendment of an information for a miſdemeanor by ſtriking out the word "purport," and inſerting the word *tenor*, made by a judge at chambers, the day before the trial, upon hearing both ſides, but without conſent on the part of the defendant, holden to be allowable and regular. *Rex* v. *Wilkes.* 582

9. As there can be no bill of Middleſex in debt only, the Court gave leave to amend the bill which was in debt only, and not in treſpaſs with an *ac etiam* in debt. *Cox* q. t. v. *Munday.* 585

10. The court of C. B. will amend the irregularity of a teſte to a writ, when not made fifteen days before the return. *Carty* v. *Aſhley.* 585

11. In an action brought againſt an executor, the judgment was entered by miſtake *de bonis propriis*; and leave was given to amend, by making it *de bonis teſtatoris, ſi, &c. Short* v. *Coffin.* 583

12. After verdict for the plainiff, it was objected, that the fourth and fifth counts were bad, becauſe it was alleged in both, that the ſaid *Charles* (the defendant) ſold, &c. to the ſaid *Charles* (the defendant), but this being after verdict, the Court rejected the words "to the ſaid *Charles*" in both the counts, as ſurpluſage. *Richards* v. *Symonds.* 583

13. The plaintiff's attorney entered an appearance for the defendant, according to the ſtatute, by the name of *James*, inſtead of *John:* and the Court held it to be a mere ſlip, and ordered the officer to alter the entry. *Wheſton* v. *Packman.* 584

14. The Court was moved, that a fine of lands, levied in the reign of queen *Ann*, might be amended by a deed of ſettlement, by altering the name of a pariſh in the fine, from *Coxley* to *Corley*; and it was ordered. *Bohoun* v. *Burton.* 584

15. So alſo where there was a miſtake in a recovery, the Court ordered the proceedings in the recovery to be amended. *Henzell* v. *Lodge.* 584

16. But the court will not grant leave to amend a recovery, upon an affidavit only that the party meant to include all his eſtates in a particular county. But it muſt appear on the

the face of the deed to lead the uſes, that there is ſufficient ground for an amendment. *Pearſon* v. *Pearſon.* 584

17. On a motion for leave to diſcontinue in formedon on payment of coſts, there being a miſtake in ſetting out the eſtate-tail in the writ, the Court ſaid, that as the plaintiff came to aſk a favour, he muſt pay the coſts, both in an ejectment which he had brought, and the formedon; which he conſented to, on being permitted to amend all the proceedings in the formedon. *Scott* v. *Perry.* 585

18. A rule was granted to ſhew cauſe, why the record ſhould not be amended after verdict, by adding at the end of the replication the words "and the defendant does ſo likewiſe," inſtead of, &c. and the rule to amend was made abſolute. *Sayer* v. *Pocock.* 586

19. Where an action of treſpaſs and falſe impriſonment was brought againſt two perſons jointly, but judgment was given againſt one of them only, the other being found not guilty; and afterwards a writ of error was brought upon this judgment, in the names of both the defendants, by miſtake; the Court gave leave to amend the writ of error. *Verelſt* v. *Rafael.* 586

20. After judgment in ejectment, in the court of king's bench in Ireland, and affirmed in the court of king's bench in England, the declaration was amended, by enlarging the term; although the record had been remitted to the court of king's bench in Ireland. A writ of *ſuperſedeas* was alſo iſſued to the former *mittimus*, and a new writ of *mittimus* was awarded to the judges of that court, incloſing the tenor of the record ſo amended. The whole upon payment of coſts by the party applying. *Vicars* v. *Haydon.* 587

21. A clerical miſtake may be amended in the return to a *mandamus*, after the return has been filed. *The King* v. *the Mayor and Burgeſſes of Lynn Regis.* 587

22. Where there is a general verdict on a declaration conſiſting of different counts, ſome of which are inconſiſtent or bad in point of law, and evidence has only been given on the good or conſiſtent counts, the verdict may be amended by the judge's notes. *Eddowes* & al. v. *Hopkins*, & al. 588

23. But where ſome counts in the declaration (which was for words) were good and ſome bad in law, and general damages were given; the Court were of opinion, that there ſhould not be a *venire de novo*, and that as the damages were entire, the judgment muſt be arreſted *in toto*. *Holt* v. *Scholefield.* 589

24. In an ejectment to recover certain premiſes, where there was a verdict for the plaintiff againſt twenty-two of the defendants; the *poſtea* ſtated, that "as to the premiſes in the within-written declaration mentioned, except as to two cottages, parcel thereof;" twenty-two of the defendants, naming them, were guilty, and ("as to the ſaid two cottages, parcel of the premiſes, in the ſaid declaration mentioned") that the ſaid *N.* and *M.* the other two defendants, were not guilty: the defendants brought a writ of error, and after joinder in error, and a day appointed for argument, the defendant in error applied to the judge who tried the cauſe, to amend the *poſtea* by his notes, which he did, by directing that the words within the inverted commas as above ſhould be ſtruck out. *Doe* ex dim. *Church* v. *Perkins and* 23 *other defendants.* 589

25. The court of king's bench was

was moved to amend a bill of Middlesex, which was filed as in the 24th year of *Geo.* 3. by making it according to the truth of the fact, as of Hilary term, 25th *Geo.* 3. And the motion was granted. *Green* v. *Rennet.* 590

26. The Court permitted the plaintiff to amend a writ of execution, as to one defendant, who had not joined in a writ of error, by altering it to the original sum recovered. *Laroche* v. *Wasbrough and Malland.* 590

27. The Court permitted a defendant to amend his judgment, and to enter a judgment, *pro retorno habendo*, after a writ of error had been brought. *Rees* v. *Morgan in error.* 590

28. If a *fi. fa.* be sued out into one county, where it should have been a *test. fi. fa.* without any original *fi. fa.* and the plaintiff afterwards sues out an original *fi. fa.* the court will permit him to amend the former, on payment of costs. *Cowperthwaite* v. *Owen* & al. *in error.* 590

29. In an action for money paid by the plaintiffs as executors, and also for money paid by their testator to the use of the defendant, there were two pleas; 1st, The general issue. 2dly, The statute of limitations. A verdict having been found for the plaintiffs generally on the first issue, and no notice taken of the last, the defendant brought a writ of error in the house of lords upon two grounds; 1st, That no verdict was given on the second plea; and 2dly, That the two separate demands could not be joined in one action. After a joinder in error, and a day appointed for argument in the house, the plaintiffs obtained a rule of the court of king's bench to shew cause, why they should not be at liberty to amend according to the judge's notes, by adding a verdict for them on the second plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their use; which after argument was ordered. *Petrie* v. *Hannay.* 590

30. An information was filed by the attorney-general against the defendant, for certain offences committed in India, the trial whereof is particularly provided for by the statutes 24 *Geo.* 3. c. 25. & 26 *Geo.* 3. c. 27. To this information the defendant demurred. The attorney-general then obtained a rule to shew cause, why the information should not be amended in certain particulars; which was ordered. *The King* v. *Holland.* 591

31. A motion was made to amend a *mandamus*, alleging, that the prosecutor had stated the custom of the borough, relative to the admission of burgesses, too narrow, but the application was refused. *The King* v. *the Mayor of Stafford.* 592

32. Where a defendant states in a plea of a former judgment, a less sum than the judgment was really for, if it clearly appear that a greater sum was recovered, the Court will permit the defendant to amend. *Skutt* v. *Woodward, executrix.* 592

33. In assumpsit upon a special promise, and also for goods sold and delivered, &c. The declaration stated the first as for 730l. and the latter for 1200l. concluding to the plaintiffs damage of one hundred pounds, which was evidently a mistake, the damage intended to be laid being one thousand pounds: this mistake was not discovered until after the trial; and the Court said, this amendment could not be ordered without sending the cause

o a new trial; therefore the rule was made abſolute for ſetting aſide verdict, and granting a new trial, and for making the amendment. *Tomlinſon* v. *Blackſmith.* 592

34. Where a *fi. fa.* is ſued out into a different county from that in which the venue is laid, and the party ſuing it afterwards takes out a *fi. fa.* into the proper county, and gets a return of *nulla bona*; the Court, in order to warrant the *fi. fa.* which firſt iſſued, will permit it to be amended, by inſerting the return of *nulla bona*, and the *teſtatum* clauſe, although the ſecond writ be returnable ſeveral days before the judgment was ſigned. *Meyer* v. *Ring.* 593

35. After a party has once amended on a demurrer, the Court will not give him leave to amend again on a ſecond demurrer. *Kinder* v. *Paris.* 593

36. And the Court will grant leave to amend a ſpecial capias, in order that an application may be made to the maſter of the rolls to procure a new original. *Carr* v. *Shaw and Price.* 593

37. A declaration in ejectment having been delivered, with notice to the tenants to appear in Michaelmas term, which was wrong, as the notice in a country ejectment, muſt, according to the practice, be to appear in an iſſuable term: the Court, on application, granted leave to the party to amend the notice, on an affidavit, ſtating, that the leſſor of the plaintiff could not bring another ejectment, on account of the ſtatute of limitations, the twenty years having expired after the declaration was delivered, and before the miſtake was diſcovered; and alſo that the leſſor of the plaintiff had been hitherto prevented by poverty from proceeding. *Doe* ex dim. *Baſs* v. *Roe.* 593

38. The Court will give leave to amend a record, by inſerting a ſpecial memorandum of the day when the plaintiff's bill was filed after a writ of error brought. *Dickinſon* v. *Plaiſted.* 594

39. The name of the attorney in the plaintiff's warrant may be altered, ſo as to make it correſpond with that in the declaration, after error brought, and the variance between the warrant and declaration aſſigned for error. *Richards* q. t. v. *Brown.* 428

AMERICA.

1. The acts of confiſcation paſſed in the ſeveral States of North America, after the declaration of independence, and before the treaty of peace, by which this country acknowledged their independence, are conſidered as nullities in the courts of law in this country. *Dudley* v. *Folliot.* 385

2. Conſequently, a creditor is not precluded from recovering againſt his debtor in England, upon a contract entered into between them in America, although both the parties have been attainted, and their property confiſcated, and veſted in the reſpective ſtates of which they were inhabitants, by the legiſlative acts of thoſe ſtates. *Folliot* v. *Ogden.* 356

3. The defendant in the above action afterwards brought a writ of error in the court of king's bench, and that court, after argument and full conſideration of the caſe, affirmed the judgment given by the court of common pleas. *Ogden* v. *Folliot.* 359

ANCIENT DEMESNE.

1. The tenant pleaded ancient demeſne, without an affidavit, to verify the fact. *Per Cur.* An affidavit is neceſſary wherever you plead

plead to the jurisdiction of the court; peremptory rule to plead ordered. *Hatch* v. *Cannon.* 595

ANNUITIES.

1. The court in which any judgment is entered up as the security for an annuity, has an equitable jurisdiction and control over such judgment; and, on application, will examine into the consideration on which it was founded. *Haynes* v. *Hare.* 595

2. When there is a bond, and also a deed of covenant to secure an annuity, although the bond is forfeited before a discharge under the insolvent-act, the party may be sued upon the covenant for payments becoming due after the discharge. *Catterell* v. *Hooke.* 599

3. The like point was decided. *Marks* v. *Upton.* 600

4. A lieutenant of marines cannot assign his full pay to secure an annuity. *Barwick* v. *Reade.* 600

5. A memorial of a warrant of attorney to confess a judgment, in order to secure an annuity, must be registered under the annuity-act. *Hopkins* v. *Waller.* 600

6. So also, where an annuity was secured by a bond and warrant of attorney to confess judgment, which was entered up, and a memorial inrolled in the court of chancery, stating the bond and the judgment, but taking no notice of the warrant of attorney; annuity set aside. *Davidson* v. *Lord Foley.* 601

7. But if a bond and warrant of attorney to confess a judgment be given to secure an annuity, and the judgment be entered up before the memorial is registered, the judgment need not be inserted in the memorial. *Sherson* v. *Oxlade.* 601

8. And a bond given by a third person to secure the payment of an annuity must be registered under the annuity-act, as well as the deeds made by the grantor himself. *Rosher* v. *Hurdis.* 602

9. And the memorial of every instrument, by which an annuity is secured, must contain the date of each instrument, otherwise the security will be void. *Downes* v. *Parkhurst.* 602

10. But where there are several deeds given to secure an annuity, and the memorial contains the date of some of them only, such defect in respect to those which have omitted to state the date, does not vitiate those of which the date is truly recited therein. Ex parte *Chester.* 602

11. The clause in the annuity-act, which requires the securities to be inrolled within twenty days of the execution, means within twenty days exclusive of the day on which the deeds are executed. Ex parte *Fallon and wife.* 603

12. If the consideration of an annuity be in notes, they must be set forth in the memorial. *Rumball* v. *Murray.* 604

13. The like point determined, where the memorial stated that the consideration-money, which was 700l. was paid by a promissory note, drawn by *Hammersley*, and payable at *Hammersley*, *Moreland*, and Co's, which said sum so secured has been since paid, without setting forth, whether the note was payable immediately, or at a distant day. *Berry* v. *Bentley.* 604

14. So, where the memorial of an annuity granted previous to the annuity-act contained the same considerations as the deeds did; and it appeared that the statement did not correspond with the consideration actually paid (viz. the consideration was 500l. whereas in fact only 350l. were really paid, the remaining

150l. being detained by the grantee for a year and an half accruing annuity) the Court held the memorial insufficient. *Cox* v. *Wright.* 604

15. The like point, where the memorial stated, that the consideration was 600l. when the real consideration was only 300l. in money paid at the time, and the giving up of a former annuity of 50l. *per ann.* *Washburn* v. *Birch.* 605

16. The like, where the memorial stated generally, "the annuity to have been granted in consideration of 160l. paid by the plaintiff to the defendant;" and it appeared upon affidavit, that 99l. 14s. 6d. of the money had been previously lent by the plaintiff for which the defendant gave several promissory notes; and that the plaintiff at the time of granting the annuity, advanced only so much money as remained to complete 160l. allowing twelve guineas for the expences of the deeds, but gave up the notes. *Kirkman* v. *Price.* 605

17. But if the consideration is paid in bank-notes, and the memorial states it to have been paid in money, that has been held sufficient. *Wright* v. *Read.* 605

18. So, where a rule was obtained, calling on the plaintiff to shew cause, why the securities given to him by the defendant for an annuity of 200l. and why the judgment entered up on the warrant of attorney, should not be set aside. It appeared by the affidavits in support of the rule, that the sum of 1200l. was paid by the plaintiff to the defendant in cash and bank-notes; and two objections were made to the memorial; one that it did not set forth that any consideration was paid, except by way of recital; the other, that it did not shew how the consideration was paid, no notice being therein taken of the bank-notes. But the Court were of opinion that there was no foundation for either of the objections. *Cousins* v. *Thompson.* 606

19. And where there are several deeds securing the same annuity, it is not necessary to state the consideration in each of them, as they are considered as only constituting one assurance: neither is it necessary that the consideration of the annuity should be averred in the memorial as a substantive fact; but it is sufficient to satisfy the provisions of the act to set it forth by way of recital. *Hodges* v. *Money and Bailey.* 606

20. The object of the act of parliament, in requiring the consideration of the annuity to be stated in the memorial is, that the public should have complete information of the real transaction between the parties. And that intelligence is equally conveyed to the world, whether it be averred as a positive fact that the consideration was paid, or only stated by way of recital. *Sowerby* v. *Harris.* 608

21. If an annuity be granted in consideration of the grantee's giving up his business to the grantor, it need not be registered. *Crespigny* v. *Wittenoom.* 608

22. The like point decided. *Hutton* v. *Lewis.* 609

23. But if *A.* who is entitled for life to the dividends in certain stock, standing in the names of trustees, grant an annuity to *B.* payable out of the dividends, and impower those trustees to pay *B.* the annuity, it must be registered under the annuity-act. *Hudson* v. *Skinner.* 610

24. A *scire facias* to revive a judgment which has been entered up on a bond securing an annuity granted before the annuity-act, is an action within the clause which provides

provides "that a memorial ſhall be regiſtered before any action ſhall be brought on any judgment already entered." *Fenner* v. *Evans.* 610

25. A *fieri facias* was iſſued, by virtue of which the arrears of an annuity for the preceding half-year were levied. When the next quarter became due, another *fieri facias* was ſued out, and a ſecond levy made, but the judgment had not been revived: held that it was not neceſſary to revive the judgment, in order to ſue out the ſecond execution. *Scott* v. *Whaley.* 611

26. The ſtatute requires that the conſideration for every annuity ſhall be ſet forth in the memorial, otherwiſe that the deed ſhall be null and void to all intents and purpoſes. *Saunders* v. *Hardinge.* 611

27. The defendant granted an annuity; and, for ſecuring the ſame, aſſigned a leaſe of two houſes, but they were not regiſtered within twenty days; afterwards, a third perſon, to whom he had ſold his intereſt, applied to have the deeds cancelled, becauſe they were not enrolled "within twenty days of the execution," according to the annuity-act. But the Court held that it was expreſsly confined to caſes where the application was made by the grantor himſelf; and that it was immaterial whether the deeds in queſtion were or were not delivered up, as they were clearly nullities. *Garrood* v. *Sanders.* 613

28. It is alſo an objection, that the names of the witneſſes to each of the deeds are not ſet forth with ſufficient accuracy in the memorial. *Hart* v. *Lovelace.* 613

29. A memorandum indorſed on a deed (by which an annuity is granted for the life of the grantor) importing that the grantor may redeem it on certain terms, muſt be inſerted in the memorial under the annuity-act. *Steadman* v. *Purchaſe and Cox.* 616

30. Where an annuity is redeemable, the terms and conditions of redemption ought to be ſet forth in the memorial, in order that the party who is to have the benefit of ſuch redemption, may, without being driven to compulſory means, be appriſed of thoſe terms and conditions, and may redeem it with moſt eaſe and convenience to himſelf. Ex parte *Anſell.* 616

31. The like point. *Harris* v. *Stapleton.* 618

32. But it was afterwards determined in the court of common pleas, that if there is neither a warrant of attorney nor a judgment actually entered up in the court to which application is made, the court has no juriſdiction. *Craufurd* v. *Caines.* 618

33. And where, upon a ſummary application to ſet aſide an annuity for non-compliance with the requiſites of the annuity-act, the rule has been diſcharged, after hearing every objection that could be then urged againſt the ſecurity, the Court will not entertain a ſimilar application between the ſame parties on the ſame ſtate of facts, though it be ſtated, that they have objections to offer which were not before entered into, and which are fatal to the annuity, *Greathead* v. *Bromley.* 619

34. The act only meant to refer to ſuch judgment on warrants of attorney as were intended to be part of the ſecurity for the annuity; and not to extend to caſes where a judgment is obtained in the ordinary courſe of law on any inſtrument given for ſecuring the ſame. *Buck* v. *Tyte.* 620

35. It is no objection, that the conſideration has not been truly ſtated in the memorial, becauſe the

consideration-money there set forth to have been paid as the consideration of the annuity, was paid in two different sums at different periods, where different securities had been previously taken, and the whole cancelled; as the cancelling was the real consideration for giving the enregistered securities. *Symmons* v. *Mortimer*. 620

36. It is no objection that the whole consideration was not in money where the purchaser redeems a former annuity at the express requisition of the grantor, and on his account; for he must in such case be taken to have expended so much money for the grantor's use, which is the same as if he had paid it to him. Ex parte *Fallon*. 621

37. But where part of the consideration of an annuity is paid over by the grantee to a third person, with the consent of the grantor, or is accounted for to the grantor by a note from a third person, the whole of the transaction must be stated in the memorial. *Watts* v. *Millard and another*. 622

38. So, a solicitor, who advances his own money on the purchase of an annuity, is not entitled to any commission-fee. And if any part of the consideration-money be returned to him by the grantor, as a charge for such commission, the Court will set aside the annuity deeds. *Broomhead* v. *Eyre*. 623

39. After the grantor has paid off the annuity, and received back the annuity-deeds uncancelled, he cannot deliver them back as a security for a fresh annuity: for the regrant of the annuity is substantially a new transaction; and there ought to be a memorial of such regrant. *Hammond* v. *Foster*. 624

40. And if the memorial of a deed to secure an annuity be defective, the whole deed is void to all intents and purposes, even though there are other parts of it not connected with the annuity. *Dann on the demise of Dolman* v. *Dolman*. 624

41. But where the memorial alleged, that the parties executed a deed, &c. by which the plaintiff demised to the defendant, for 100 years, "upon trust as therein mentioned, and upon further trust, that in case the said annuity of 300l. or any part thereof, should be unpaid, &c." and it appeared by the plaintiff's affidavit, that there was no other trust, held well enough. *Tolderv* v. *Allan*. 627

42. "The consideration," required by the 3d sect. of the annuity-act to be stated in every deed, &c. whereby any annuity was granted, means the consideration which is paid by the grantee, and which that section expressly requires, "shall be in money only;" and that act having required that "the name or names of the person or persons, 'by whom,' and on whose behalf the consideration was advanced, should be truly set forth;" the names of both the persons ought to be inserted when the person actually paying the money pays it on account of some other person. *Dalmer* v. *Barnard*. 628

43. But where an objection was taken to the memorial, that it was therein stated, that the consideration was paid "by *E. Boulton*, or her solicitor;" in the alternative, *Eyre*, CH. J. said, That the deed must express by whom the consideration was paid, but not the memorial. Ex parte *Ansell*. 629

44. The like point decided. *Glasse* v. *Mount*. 629

45. The statute requires, whenever any step is taken respecting an annuity granted before the act passed, that an inrolment shall be made like

like to the memorial which must be made at the making a new grant; therefore the assignment of any annuity granted before the act passed must be registered before the assignee can take any step upon it, if such assignment existed at the time of the inrolment of the deeds. *Grant* v. *Foley*. 630

46. But the assignee of an annuity which was properly inrolled when it was first granted, need not inrol afresh for the sake of inserting his deed in the memorial, before he proceeds against the grantor; for the court of king's bench has held that the act is fully complied with by registering a memorial of the original securities. *Bromly* v. *Greathead*. 630

47. So, where the defendant, *Birch*, had granted by an indenture, bond, and warrant of attorney, an annuity to the plaintiff, *Dixon*, who afterwards assigned the whole of it to *Cousins*, who sued out execution in the name of *Dixon*; an objection was taken that there was no memorial of the assignment from *Dixon* to *Cousins*, but there was a memorial of the original indenture, bond, and warrant. *Per Cur.* It is not necessary. *Dixon* v. *Birch and Tyte*. 630

48. The Court will not set aside annuity-deeds for a mere clerical mistake in the memorial, as if, in stating the assignment of a term of sixty-one years, it set forth a term of sixty-two; or if, after reciting the true consideration, as for instance, 280l. it afterwards state, "which said sum of 250l. was paid, &c."—Neither need a consideration of 10s. paid to a trustee be set forth in the memorial as part of the consideration; or that an annuity was payable for the portion of time from the last quarter-day to the death of the annuitant. *Ince* v. *Everard*. 630

49. The act does not extend to any annuity secured by lands of equal or greater annual value whereof the grantor was seised in fee-simple or fee-tail. *Halsey* v. *Hales*. 631

50. In a judgment on bond for the payment of an annuity, if a *fi. fa.* be sued out and marked for only part of the penalty; a new *fi. fa.* for subsequent arrears cannot be taken out without a *sci. fa.* *Howel* v. *Hanforth*. 366

51. The whole penalty shall not be levied on an annuity-bond and judgment, but only the arrears then due, and the judgment shall stand as a security for future arrears. *Ogilvie* v. *Toley*. 366

52. In debt for an annuity granted by the defendant to plaintiff for life, *if the same be personally demanded*, the demand is not traversable. *Hope* v. *Colman*. 351

53. Where an annuity is set aside for a mistake or omission of form only, and not for fraud, the party may recover back the consideration-money in an action, for money had and received. *Shove* v. *Webb*. 233

54. By an express agreement, the obligee of an annuity-bond may waive a forfeiture for non-payment on the day, so as to be entitled to recover future payments, although the obligor has been discharged under an insolvent-act, between the time of the forfeiture and the action brought. *Webster* v. *Bannister*. 541

55. An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee; and down to the day of the demise in the ejectment, but not afterwards. *Birch* v. *Wright*. 315

56. But

56. But where an annuity-bond granted by two becomes void by the neglect of the grantee in not regiſtering the memorial, he cannot recover back any part of the conſideration-money from the one who was known to be only a ſurety for the other; and had not in truth received any part of it, notwithſtanding they both joined in the receipt. *Stratton* v. *Raſtall.* 236

APPEAL OF DEATH.

1. Proceedings in appeal of death. *Rigby, widow,* v. *Kennedy,* 633. *Rex* v. *Taylor,* 639. *Smith, widow,* v. *Taylor.* 640

APPRENTICES.

1. The maſter need not ſign a counterpart of the indenture. 641

2. If a perſon is bound apprentice to a maſter who is an infant under age, the indenture is only voidable, and the apprentice is entitled to the benefit of the apprenticeſhip. *K.* v. *St. Petrox in Dartmouth.* 641

2. But infants cannot be bound by indentures of apprenticeſhip beyond the age of twenty-one, and and if they be, they may diſſent from them after they arrive at that age. *Caſe of Mary Ann Davis.* 641

3. But the mere act of leaving the maſter's ſervice is not an avoidance of the indentures, though the apprentice be of age. *Aſhcroft* v. *Birtles.* 642

4. So, where an apprentice, who had been bound when an infant, for ſix years, by indenture, ran away, alleging that he did ſo with an intent to avoid the apprenticeſhip made when he was an infant, and to his prejudice; held that this was no avoidance. *K.* v. *Evered.* 642

5. And the indenture of apprenticeſhip cannot be avoided by the apprentice while under age. *K.* v. *Hindringham.* 643

6. But it is clear that the indentures may be cancelled and the apprenticeſhip diſſolved, with the conſent of all parties: namely, if the apprentice is under the age of twenty-one, an agreement between the maſter, apprentice, and father, or guardian, or, in the caſe of a pariſh apprentice, with the aſſent of the pariſh officers; but if the apprentice is of full age, it may be diſſolved by an agreement between him and the maſter only, without the intervention of any other perſons. 643

7. And where a maſter received money of an apprentice of full age, to vacate his indentures, and gave the apprentice a diſcharge under his own hand, but kept the indenture in his own poſſeſſion without cancelling it; held that the apprenticeſhip was diſſolved. *K.* v. *Juſtices of Devon.* 643

8. In an action of covenant brought upon an indenture of apprenticeſhip, by the maſter againſt the apprentice's father; held that the father was bound for the performance of the covenants by the ſon. *Branch* v. *Ewington.* 643

9. The ſtat. 43 *Eliz.* c. 2. having given the churchwardens and overſeers power to bind poor children to be apprentices, where they ſhall ſee convenient; the churchwardens and overſeers are not reſtrained to bind ſuch children to inhabitants of the ſame pariſh, but they may, under theſe words, in their diſcretion bind them to perſons reſiding in another pariſh, as well as in their own, the maſter conſenting. *K.* v. *St. Nicholas.* 644

10. And a perſon occupying lands in a pariſh, but living out of it, may be compelled to receive a pariſh apprentice. *K.* v. *Clapp.* 644

11. And

11. And it is not neceſſary that the maſter ſhould actually reſide in the pariſh, if he be an occupier there it is ſufficient. *K.* v. *Tunſtead and Happing.* 645

12. So, where ſeveral perſons hold land in partnerſhip, ſome of whom actually reſide on and occupy it, and others reſide at a diſtance in another pariſh; the latter as well as the former are bound to take pariſh apprentices. *K.* v. *Barwick.* 646

13. An indenture of a pariſh apprentice aſſented to by two juſtices ſeparately, and not at the ſame time, is abſolutely void. *K.* v. *Hamſtall Ridware.* 647

14. If an apprentice leave his maſter, and enters into the ſervice of another, the firſt maſter cannot ſue out an *habeas corpus*, but muſt bring his action againſt the other for teducing him. *K.* v. *Reynolds.* 648

15. No duty is payable in reſpect of any covenant of the parent or friends of an apprentice to maintain him, and to provide him with clothes during the term of his apprenticeſhip. *K.* v. *Leighton.* 648

16. There is no obligation on the maſter to provide for his apprentice, reſulting from the mere relation of maſter and apprentice. *Ibid.* 649

17. Alſo money given by the pariſh-officers to bind out a child is not liable to the duty, though the binding is voluntary, and not compulſory, under the ſtat. 43 *Eliz.* c. 2. *K.* v. *St. Petrox.* 649

18. In an action on a promiſſory note, which was given by the defendant as an apprentice-fee with his ſon; there was evidence to ſhew that there was no mention made in the indenture of this premium, or any ſtamp thereon in proportion to the value, in default of which the indentures are void; held that the indentures being void for this defect, the conſideration of the note had failed, and the plaintiff was nonſuited. *Jackſon* v. *Warwick.* 651

19. Journeymen are not liable to the penalties for exerciſing a trade, without having ſerved an apprenticeſhip thereto. *Beach* q. t. v. *Turner.* 652

20. And a man may exerciſe as many trades as he has worked at, or ſerved to, ſeven years. *French* q. t v. *Adams.* 652

21. By the uſage and conſtitution of a borough, all perſons who had ſerved apprenticeſhips for ſeven years, to any freeman of the corporation, reſident within the town, were entitled to their freedom; held that a perſon apprenticed to one who reſided in another town where his buſineſs was carried on, and in the borough *only occaſionally during the ſummer ſeaſon*, not entitled to the freedom. *K.* v. *Marſhall.* 653

APPROVER.

1. The law reſpecting approvers fully conſidered and aſcertained. *Rex* v. *Rudd.* 654

ARBITRATORS.

See AWARD.

ARREST.

1. The defendant was attending his cauſe at the ſittings, and ſtaid in court till five in the afternoon, to ſpeak with his attorney, and then went to dine at a tavern; during dinner he was arreſted; but held privileged. *Lightfoot* v. *Cameron.* 659

2. A member of parliament is entitled to the privilege of being free from arreſts in all caſes, except

cept treaſon, felony, and actual breach of the peace. *The King* v. *John Wilkes.* 660

3. A bailiff in execution of meſne proceſs may break open the door of a lodger, having firſt gained peaceable entrance at the outer-door of the houſe. *Lee* v. *Ganſell.* 662

4. An arreſt muſt be by the authority of the bailiff; but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance of the perſon arreſted; and in debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its having been delivered to the ſheriff. *Blatch* v. *Archer.* 666

5. A peace-officer may juſtify an arreſt on a reaſonable charge of felony, without a warrant, although it ſhould afterwards appear that no felony has been committed. *Samuel* v. *Payne.* 667

6. But where a felony has actually been committed, not only a conſtable, but even a private perſon, acting *bona fide*, and in purſuit of the offender, upon ſuch information as amounts to a reaſonable and probable ground of ſuſpicion, may juſtify an arreſt. *Ledwith* v. *Catchpole.* 668

7. One who is convicted on a penal ſtatute, cannot be arreſted on a Sunday, for non-payment of the penalty. *The King* v. *Myers.* 669

8. A meſſenger from a foreign prince to his ambaſſador reſident here, is privileged from arreſt. *Hopkins* v. *De Robeck.* 669

9. A creditor may lawfully enter a detainer againſt his debtor, who is in fact reſident within the walls of a priſon, though he be not there as a priſoner. *Wilkinſon* v. *Jaques.* 670

10. And a perſon in cuſtody under an attachment for non-payment of coſts, may be charged with an execution in a different action. *Bonafous* v. *Schoole.* 670

11. The junior clerk of the kitchen to the king is privileged from arreſt, being ſervant of the king. *Bartlett* v. *Hebbes.* 671

12. But an indictment will not lie againſt an officer of the palace-court for arreſting a perſon, not of the king's houſehold, within the king's palace, againſt whom a writ has iſſued out of that court, though no leave to make the arreſt has been obtained from the board of green-cloth. *The King* v. *Stobbs.* 671

13. The Court will not diſcharge a perſon in cuſtody, becauſe he was arreſted while attending commiſſioners of bankrupt to prove a debt. *Kinder* v. *Williams.* 674

14. But the court of common pleas have laid down this general rule, viz. That all perſons who have relation to a ſuit, which call for their attendance, whether they be compelled to attend by proceſs or not (in which number, bail are included), are entitled to privilege from arreſt, *eundo et reduendo*, provided they came *bona fide*. *Meekins* v. *Smith.* 674

15. The clauſe in the ſtat. 32 *Geo.* 2. c. 28. § 1. which provides that no perſon arreſted ſhall be carried to priſon within twenty-four hours, relates only to perſons arreſted on meſne proceſs. *Evans* v. *Atkins.* 675

16. A defendant arreſted on Saturday, was diſcharged on the ſame day, the ſheriff not knowing that at that time there was a detainer lodged in his office; this being diſcovered, the defendant was arreſted on the next day, Sunday; held that he ought to be diſcharged out of cuſtody,

cuſtody, the arreſt being contrary to the ſtat. 29 *Car.* 2. c. 7. § 6. *Atkinſon* v. *Jameſon.* 676

17. The defendant having been arreſted for 80l. on a *teſtatum capias* into Surrey, gave to the plaintiff a draft for 45l. ſaying it would be immediately paid, and agreed to meet the plaintiff a few days afterwards to ſettle the remainder of the debt, on which the plaintiff agreed that the defendant ſhould be diſcharged out of cuſtody. The draft was diſhonoured, the defendant having no effects in the hands of the drawee; held that he might be again arreſted on the ſame affidavit. *Puckford* v. *Maxwell.* 676

18. A defendant cannot be arreſted by an officer whoſe name was not originally in the warrant, but only inſerted after it was ſigned and ſealed by the ſheriff. *Houſin* v. *Barrow.* 676

19. The defendants were held to bail by proceſs out of the court in New York, and the plaintiffs proceeded to judgment there. The defendant *Murray* coming to this country, was arreſted for the ſame demand; held regular. *Maule* v. *Murray.* 677

20. If a perſon be arreſted after the writ is returnable, the officer cannot legally detain him (though for the ſhorteſt time) till the writ be continued. *Loveridge* v. *Plaiſtow.* 677

21. In this caſe, the plaintiff had ſued out a bailable attachment of privilege, and renewed his proceſs four ſeveral times, but without marking it to be an *alias* or pluries; the laſt proceſs was taken out after the paſſing of the bank-indemnity act, which requires, that in all affidavits to hold to bail, the plaintiff ſhall add, that the defendant has not tendered the amount of the debt in bank-notes; held that this was not neceſſary, becauſe what was once regular cannot be made irregular by an act of parliament intervening. *Crooks* v. *Holdich.* 677

22. An attachment for non-performance of an award is only in the nature of a civil execution, and the party cannot be arreſted thereon on a Sunday. *Rex* v. *Myers.* 669

23. So of an attachment for non-payment of coſts. *Ibid.*

24. Therefore, where one who had been convicted of a penalty, under a penal ſtatute, was apprehended on a Sunday for non-payment of the forfeiture; the arreſt was held illegal. *Ibid.*

25. If *A.* having been robbed, ſuſpect *B.* and take him, and deliver him into the charge of a conſtable preſent, *B.* if innocent, may maintain treſpaſs againſt *A. Stonehouſe* v. *Elliot.* 15

ARSON.

1. Arſon may be committed by ſetting fire to a priſon, the entrance to which is through a dwelling-houſe. *The King* v. *Donnevan.* 678

2. But a tenant from year to year is not guilty of arſon by burning the houſe of which he is in poſſeſſion; but if by firing his own houſe he thereby burn the houſe of another, he is guilty of the crime. *Rex* v. *Pedley.* 678

3. In both of theſe actions, which were brought upon the ſtat. 9 *Geo.* 1. c. 22. to recover ſatisfaction for ſome ſtacks of oats and a barn, which were laid in the declaration to have been feloniouſly ſet on fire in the night by perſons unknown, the plaintiffs had verdicts: and it was afterwards moved, in arreſt of judgment, that it ſhould have been laid to have been done

done unlawfully, or wilfully, and maliciously; but, as in this particular offence, the words wilfully and maliciously are omitted, though expreſſed as to every preceding and every ſubſequent offence mentioned in the ſame clauſe, the Court held, that they need not be laid in the declaration which may follow the words of the ſtatute, however imperfectly expreſſed. *Allan* v. *Hundred of Kirton, and Simpſon* v. *Hundred of Aſhwardhern in Lincolnſhire.* 681

4. Setting fire to a parcel of unthreſhed wheat is not felony within 9 *Geo.* 1. c. 22. *The King* v. *Judd.* 682

ARTICLES.

See AGREEMENT. DEBT.

COVENANT.

ARTICLES OF THE PEACE.

1. Upon articles of the peace exhibited, the Court have the power of requiring bail for ſuch a length of time as they ſhall think neceſſary for the preſervation of the peace, and are not confined to a twelvemonth. *The King* v. *Bowes* 683

ARTIFICERS.

1. Where a defendant has been convicted of enticing and ſeducing artificers in the manufactures of this kingdom into foreign ſervice, there is no diſcretion left in the Court; the puniſhment directed in the act being peremptory. *Rex* v. *Cater.* 685

ASSAULT.

1. The declaration in aſſault and battery cannot lay the offence on a day certain, and on divers other days and times, from and between that day and, &c. *Michell* v. *Neal,* et ux. 160

2. Where the action is by bill in the king's bench, the offence ſhould be charged fully and poſitively, and not by way of recital; as, *whereas,* A. B. on ſuch a day, made an aſſault, &c. *White* v. *Shaw.* 160

3. In an action of aſſault and battery, wherein the declaration, after ſtating the aſſault, ſtated in the ſame count, that the defendant then and there tore, rent, ſpoiled, damaged, and deſtroyed the clothes of the plaintiff, the jury found a verdict for the plaintiff, with 1s. damages, and they alſo found, upon being aſked by the judge, that the clothes were torn in conſequence of the beating; and it was held that the rule is, that wherever the tearing of the plaintiff's clothes is merely conſequential to the beating, the plaintiff is not entitled to more coſts than damages, unleſs the jury find to the amount of 40s. damages. *Coterill* v. *Tolly.* 160

4. And the adding to the count, for an aſſault, that the defendant then and there tore the plaintiff's clothes, is only an aggravation and part of the aſſault, and will not, on a general verdict for the plaintiff, entitle him to full coſts. *Mears* v. *Greenaway.* 161

5. The like point. *Lockwood* v. *Standard.* 162

6. If the defendant juſtifies, and there is a verdict for the plaintiff, the plaintiff is not entitled to full coſts, unleſs the juſtification be both of the aſſault and battery. *Page* v. *Creed.* 162

7. But if the defendant plead the general iſſue, and a juſtification to the whole, and the plaintiff obtains a verdict with damages under 40s. the plaintiff is intitled to full coſts. *Smith* v. *Edge.* 162

See alſo TRESPASS.

ASSIGNMENT.

1. If a leſſee of tithes covenants for himſelf, and his aſſigns, that he will not let any of the farmers in the

the parish have any part of the tithes, this covenant runs with the tithes, and binds the assignee of such lessee. *Bally* v. *Wells.* 685

2. The assignee of a lease is not liable to answer to the lessor for any breach of the covenants before the assignment. *St. Saviour's church-wardens* v. *Smith.* 408

3. A Mrs. *Moore*, as executrix of her husband, was solely entitled to dig and search for lead and lead-ore, and her agent signed a writing upon plain paper without stamps, and thereby let or set to the plaintiffs a plat of ground. The plaintiffs did agree to pay to Mrs. *Moore*, or her agent, every sixth pig of lead, &c. held that this writing was no lease, because nothing was reserved to Mrs. *Moore*; nor an assignment, because it was not by deed. *Harker and another* v. *Birkbeck and another.* 686

4. Held that the assignment of a term may be by a note in writing, without either seal, delivery, or stamps. *Beck on the dem. of Fry*, v. *Philips.* 687

5. In an action of covenant for not repairing certain premises, the declaration stated in substance, "That one *Thomas Grice* demised the premises in question to the defendant, for a term of twenty-one years, and afterwards the fee-simple of the same premises were by deeds of lease and release duly conveyed to *John Scott* and *Robert Scott*, and the heirs and assigns of *Robert Scott* for ever; but nevertheless in trust for the said *John Scott*, his heirs and assigns for ever: concluding (without averring the death of *Robert Scott*), by means of which said premises, the said *John Scott* became, and was and still is seized of, and in the said reversion in his demesne as of fee;" held that *John Scott* having declared on a covenant made with *John* and *Robert Scott*, and supposed himself capable of sustaining an action alone for the breach of it, this is wrong. *Scott* v. *Goodwin.* 688

6. There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession; nor receives the lease. *Taylor* v. *Shum.* 692

7. A lease may be assigned to a feme covert, and is good unless the husband dissent. *Barnfather* v. *Jordan.* 413

8. If a term is assigned by way of mortgage, with a clause of redemption, the lessor cannot declare against the mortgagee in covenant as assignee of all the estate, right, title, interest, &c. of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession. *Eaton* v. *Jaques.* 410

9. But under an absolute assignment of a term, the assignee may be sued on the covenants before he has taken actual possession. *Walker* v. *Reeves.* 411

10. The assignee of a term declared against as such, is not liable for rent accruing after he has assigned over, though it be stated that the lessor was a party executing the assignment, and agreed, thereby that the term which was determinable at his option should be absolute. *Chancellor* v. *Poole.* 412

ASSUMPSIT.

1. A general *indebitatus* assumpsit will lie for copyhold fines. *Whitfield* v. *Hunt*, 253. *Evelyn* v. *Chichester*, 254. *Astle* v. *Grant*, 255

2. Also a general *indebitatus* assumpsit will lie for tolls. *Seward* v. *Baker*, 255. *Mayor of Yarmouth* v. *Eaton.* 256

3. Also

3. Alſo for wharfage. *Stephens* v. *Coſtar.* 258

4. Likewiſe for harbour duties. *Pole* v. *Johnſon.* 259

5. Aſſumpſit will lie for the aſſignee of a reſpondentia bond, the obligor having before hand engaged by indorſement to pay the money to any aſſignee. *Fenner* v. *Mears.* 323

6. A private act of parliament gave power to commiſſioners to divide common fields, and to make ſuch orders and regulations as they ſhould think fit; they awarded that all proprietors of lands allotted to them, which had been ploughed or manured ſince any corn had been reaped, ſhould pay to the perſon who had manured or ploughed it, 4s. an acre: general *indebitatus* aſſumpſit was held to lie for it. *Bell* v. *Burrows.* 257

7. If a defendant be under a moral obligation to do any act, and promiſes another payment for doing it, aſſumpſit will lie. As for inſtance, an action may be brought by an apothecary againſt the overſeers of a pariſh for the cure of a pauper. *Watſon* v. *Turner.* 260

8. So aſſumpſit will lie for nurſing a baſtard child, put out by the mother's uncle. *Scott* v. *Neiſon.* 261

9. Alſo, this action may be maintained by the wife's father againſt the huſband, to recover the money which he expended after her death, in defraying the expences of her funeral. *Jenkins* v. *Tucker.* 261

10. So alſo, in the inſtance of goods being diſtrained by the commiſſioners of land-tax; if a neighbour ſhould redeem the goods, and pay the tax for the owner, he may maintain an action againſt the owner. *Ibid.*

11. But as this action muſt be grounded either on an expreſs or implied contract, no action can be maintained for money paid for the uſe of another, if it appear to have been paid againſt the conſent of the party. *Stokes* v. *Lewis.* 262

12. Neither can this action be maintained upon an unconſcientious contract. *Jeſſons* v. *Brooke,* 263. *Plumbe* v. *Carter.* 263

13. Alſo, if the conſideration be founded on an illegal and void agreement, the action of aſſumpſit will not lie. *Willis and another* v. *Baldwin,* 264. *Parſons* v. *Thomſon,* 265. *Garforth* v. *Fearon,* 267

14. So alſo, if the aſſumpſit has ariſen from any illegal tranſaction, the party cannot recover; ſuch as ſmuggling tranſactions. *Holman and another* v. *Johnſon,* 269. *Biggs and others* v. *Lawrence,* 271. *Cuguas* v. *Penaluna,* 271. *Waymel* v. *Reid.* 272

15. Or upon a charge of per centage upon the ſale of an office. *Stackpole* v. *Earle.* 272

16. But if part of the contract ariſes upon a good conſideration, and part of it upon a bad one, it is diviſible, and the party may recover on that which is good. *Robinſon* v. *Bland.* 273

17. In order to ſuſtain a promiſe, there muſt be either a damage to the plaintiff, or an advantage to the defendant. *Cooke* v. *Oxley.* 293

18. An aſſumpſit will lie, for not paying the conſideration of an aſſignment of an uncertain debt. *Mouldſdale* v. *Birchall.* 294

19. Any damage to another, or ſuſpenſion, or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking. *Pillans and Roſe* v. *Van Mierop and Hopkins,* 294. *Iſrael* v. *Douglas,* 296. *Oxley* v. *Young.* 295

20. An *indebitatus* aſſumpſit for money lent to the wife, at the requeſt of the huſband, is a good count. *Stephenſon* v. *Hardy,* 302

21. Aſſumpſit

21. Aſſumpſit is a proper form of action, if there has been a promiſe, although there may have been an expreſs warranty. *Stuart* v. *Wilkins.* 133

22. And although the warranty is of ſomething paſt or then exiſting. *Ibid.*

23. Aſſumpſit for money had and received will not lie when the money has been paid on a contract which the other party contends to be ſtill open. *Weſton* v. *Downes.* 134

24. By a navigation-act it was enacted, that on a certain day the firſt general meeting of the proprietors ſhould be held, at which the company ſhould execute deeds under their common ſeal for each diſtinct ſhare: "which deeds ſhould reſpectively veſt a certain ſhare in each proprietor." The plaintiff declared in aſſumpſit againſt the defendant for not completing a contract for the purchaſe of ſome ſhares, that on a day prior to the firſt general meeting, "he was lawfully entitled to ſo many ſhares:" held that this was a material averment, and the ground of a nonſuit, as it could not be proved: the ſhares not *veſting* till after the general meeting. *Latham* v. *Barber.* 300

25. It is no bar to an action of aſſumpſit that there was a former action of aſſumpſit between the ſame parties, in which the plaintiff recovered one demand, and might alſo have recovered the preſent demand: if in point of fact the preſent demand were not the ſubject of enquiry in the former action. *Seddon* v. *Tutop.*

26. Aliter if the preſent demand were enquired into in the former action. *Ibid.*

ATTACHMENT.

1. Attachment for a contempt was granted againſt a man, who being a defendant perſonally conſented (at the trial) to an arbitration, and not to bring a bill in equity: but after the award, and after the rule of *niſi prius* was made a rule of court, did bring a bill in equity for relief againſt the award, and very perverſely perſiſted, but at length ſubmitted, and paid full coſts out of pocket. The Court diſcharged him without any fine, rather than ſet a ſmall one for ſo high an offence. *Rex* v. *Wheeler.* 694

2. If the party complained of purges himſelf, he ſhall not in general have coſts; yet in a caſe where the complaint appeared very groundleſs and vexatious, coſts were ordered to be paid by the party complaining. *Rex* v. *Plunkett.* 697

3. The defendant cannot come in and acknowledge the contempt, and ſubmit to puniſhment, before, or without anſwering interrogatories, unleſs it be in the caſe of a reſcue returned. *Rex* v. *Elkins.* 697

4. On attachment, the defendant cannot confeſs the contempt and receive judgment till after the interrogatories are filed. *Rex* v. *Edwards and Symmonds.* 697

5. The maſter's report upon an attachment cannot be moved for on the laſt day of the term, except upon extraordinary caſes, and perſonal ſervice of notice. *Rex.* v. *Wheeler.* 694

6. Attachment granted for arreſting a plaintiff while attending arbitrators under a rule of court, on purpoſe to prejudice his cauſe. *Rex* v. *Hale.* 694

7. Affidavit of ſervice of rule, with an *allocatur* of coſts, and demand made thereof on or about ſuch a day, is not ſufficient to obtain an attachment, for it might be on a Sunday. *Wadham* v. *Brett.* 518

8. If

8. If a defendant in a penal action obtain a rule to ſtay proceedings on paying a ſum agreed upon between him and the plaintiff: for nonpayment, the Court will grant an attachment. *King*, q. t. v. *Clifton.* 693

9. But upon the common rule to diſcontinue on payment of coſts, no attachment can lie for non-payment. *Stokes* v. *Woodeſon.* 693

10. If an attorney, required to anſwer the matters of an affidavit, ſwear in his exculpation to a ſtory highly incredible, although he may be liable to an indictment for perjury, if the facts ſworn to be falſe, yet the Court will grant an attachment. *The caſe of Groſsley, Clarke and Brierly.* 693

11. The Court will not grant an attachment againſt a peer for not paying a ſum of money awarded. *Walker* v. *Earl of Groſvenor.* 694

12. Nor againſt a member of the Houſe of Commons. *Catmur* v. *Knatchbull.* 694

13. The whole of the neceſſary expence of witneſſes, as well of their going to the place of trial, as of their returning from it; and alſo during their neceſſary ſtay there, ought to be tendered to them at the time of ſerving the ſubpœna: and the Court will not grant an attachment againſt a witneſs for not obeying a ſubpœna, unleſs his expences have been tendered. *Fuller* v. *Prentice.* 694

14. The Court will grant an attachment for an attempt to influence the jury. *The King* v. *Phillips, Lucas, and Gibſon.* 694

15. In this caſe, the Court granted an attachment againſt a bailiff, for refuſing to make an affidavit of the ſervice of a ſubpœna upon one *H. L.* to appear and give evidence before a grand jury, in order to found a motion for an attachment for his not appearing. *The King* v. *Rudge.* 695

16. But the delivery of notice of action purſuant to a penal ſtatute is no commencement of a ſuit, ſo as to ſubject the plaintiff or his agent to an attachment for miſbehaviour previous to the ſuing out of the writ. *Gordon* v. *Powis.* 696

17. The Court will not grant an attachment againſt a ſheriff for neglecting to take a replevin bond. *The King* v. *Lewis.* 696

18. An attachment granted in the firſt inſtance againſt the coroners for not attaching the ſheriff; and the attachment was ordered to be directed to *eliſors*. *Andrews* v. *Sharp.* 696

19. The like done. *The King* v. *Peckham.* 696

20. An attachment granted againſt a tenant in poſſeſſion, for not delivering up poſſeſſion. *Davies* ex dim. *Povey* v. *Doe.* 696

21. Held that a motion for an attachment in the courſe of a civil ſuit, ought to go on the crown ſide of the Court, and the affidavits be intitled, "the King againſt the party to be attached." *The King* v. *Sheriff of Middleſex.* 696

22. But afterwards, the practice was found to be otherwiſe: and the rule was declared to be, that till the attachment iſſues, every thing muſt paſs on the civil ſide of the Court: and afterwards on the crown ſide. *Wood* v. *Webb.* 696

23. After attachment granted; affidavits to be intitled. *The King* v. *Sheriff of Middleſex.* 696

24. When a defendant is brought up on attachment for reſcuing perſons arreſted on a warrant for obſtructing exciſe-officers, it is the practice to put the defendant to anſwer interrogatories, unleſs the proſecutor wave putting them, and in that caſe the Court will paſs judgment.

judgment. *The King* v. *Horſley*. 697

25. The rule for giving two days notice of bail does not extend to attachments; nor is any juſtification neceſſary. *The King* v. *Hall*. 698

26. One in cuſtody upon an attachment for non-payment of coſts under the ſtat. 5 & 6 *W.* and *M.* c. 11. § 3. may be diſcharged under the Lords' Act, 32 *Geo.* 2, c. 28. § 13. *The King* v. *Stokes*. 698

27. The ſtat. 5 *W.* & *M.* c. 11. § 3. has always been underſtood to mean that the ten days muſt elapſe before the attachment can be granted. *The King* v. *Ireland*. 698

See alſo AFFIDAVIT, No. 14. 15. AWARD, No. 7. 8. 9. 10. 11. 23. 24. 29. BAIL, No. 57.

ATTACHMENT FOREIGN.

1. In a judgment on a foreign attachment, it muſt appear that the party was ſummoned. *Fiſher* v. *Lane*. 699

2. Money awarded under a rule of reference at *niſi prius* made a rule of Court, cannot be attached. *Grant* v. *Hawding*. 700

3. So money due upon the maſter's *allocatur* cannot be attached. *Coppell* v. *Smith*. 701

4. Where the plaintiff and the *Garniſhee* are one and the ſame perſon, he muſt ſhew the conſideration of the judgment of which he himſelf is to have the advantage; but where the defendant had ſtated the cuſtom to be, that "if any perſon be or hath been indebted, &c." it was held bad; becauſe it neither averred that the defendant in the foreign attachment was indebted to the plaintiff, nor that the debt aroſe within the city. *Morris* v. *Ludlam*. 701

ATTORNEY.

1. An attorney does not loſe his privilege by accepting a bill of exchange. *Comerford* v. *Price*. 1

2. An attorney has no privilege againſt the court of conſcience in London. *Silk* v. *Rennet*. 717

3. An attorney has privilege to keep the venue in Middleſex when plaintiff, but not to change it thither when he is defendant. *Pope* v. *Redfearn*. 716

4. The like point *Yeardley* v. *Roe*. 716

5. Neglecting to charge the defendant being in cuſtody, with a declaration within two terms, by which omiſſion the defendant obtained his diſcharge, is liable to an action by the plaintiff; but the court will not proceed againſt him in a ſummary way: it ought to be left to a jury as to the quantum of the damages. *Pitt* v. *Yalden*. 49

6. The privilege of an attorney is the privilege of the court he belongs to; not his own perſonally. *Mayor of Norwich* v. *Berry*. 721

7. His privilege continues no longer than he remains an acting attorney of his court. *Ibid.*

8. His privilege exempts him from ſerving ſheriff of his corporation, though he was reſident in the corporation before, and when he was admitted an attorney. *Ibid.*

9. Attornies admitted on ſpecial circumſtances. *Fletcher's caſe*, 702. *Carter's caſe*, *ibid.* *Blunt's caſe*. 703

10. Attorney ſtruck off the roll under very hard circumſtances, where it appeared that he had not in fact ſerved for five complete years. Ex parte *Hill*. 703

11. Rule made on an attorney late deputy ſteward of a manor, to deliver up the court books to the principal ſteward. *Marſhall's caſe*. 726

12. On an attachment of privilege ſued in C.B. a *præcipe* muſt be left with the prothonotary. *Frogatt* v. *Tapſcott.* 717

13. An attorney admitted fraudulently ſtruck off the roll, and an attachment granted againſt the maſter. *Hill and Hargrave's caſe.* 704

14. An attorney arreſted by ſpecial original out of his own court, not entitled to his diſcharge by ſerving the ſheriff with a writ of privilege, but muſt plead it *ſub pede ſigilli. Croſley* v. *Shaw.* 2

15. Attornies not privileged from ſerving in the militia. *Gerrard's caſe.* 722

16. Where an attorney of one court ſues an attorney of another, the privilege of that court which is firſt poſſeſſed of the cauſe ſhall be preferred. *Danſer* v. *Berryman.* 716

17. Attornies are exempt from the office of conſtable. *K.* v. *Routledge.* 722

18. A ſolicitor in chancery may practice on the equity ſide of the exchequer. *Medowcroft* v. *Holbrooke.* 704

19. A barriſter cannot be admitted an attorney. *Cole's caſe.* 704

20. If an attorney be convicted of felony, the court will ſtrike him off the roll, though he has been burnt in the hand, and ſuffered impriſonment purſuant to his ſentence. *Brounſall's caſe.* 704

21. A party in a cauſe cannot change his attorney without the leave of the court. *Macpherſon* v. *Roriſon.* 704

22. And where the defendant has changed his attorney without leave of the court, the plaintiff is not bound to accept notice of bail. *Kaye* v. *De Mattos.* 705

23. Payment of the debt to an agent in the country, employed to ſue the defendant, by the plaintiff's attorney, is not payment to the plaintiff, though payment to the attorney is. *Yates* v. *Freckleton.* 705

24. An attorney is not bound to obey a ſubpœna to appear before the grand jury, and give evidence upon an indictment for forgery againſt his client. *The King* v. *Dixon.* 705

25. After verdict an attorney is not obliged to inform the oppoſite ſide of his client's abode. *Hooper* v. *Harcourt.* 706

26. But if a defendant's attorney, who is a ſubſcribing witneſs to an agreement, upon which the plaintiff brings his ejectment, refuſe to give evidence of his atteſtation, upon being ſerved with a ſubpœna for that purpoſe, whereby the plaintiff becomes nonſuited, the court out of which the record iſſued, will on motion grant an attachment againſt him. *Doe* ex dim. *Jupp* v. *Andrews.* 706

27. And he may be obliged to prove his client having ſworn, and put in an anſwer, upon which the latter is indicted for perjury. *Ibid.*

28. So an attorney is not reſtrained by any rule of law from giving evidence of a converſation between him and his client, touching the juſtice of his ſuit, after a writ of enquiry executed on an interlocutory judgment, and a compromiſe thereupon. *Cobden* v. *Kendrick.* 706

29. But this privilege is confined to counſel, ſolicitors, and attornies, when acting in their reſpective characters, and cannot be extended to others though profeſſionally and confidentially employed. *Wilſon* v. *Raſtall.* 707

30. Attornies cannot be compelled to deliver up the deeds and papers of their clients, till they are paid. *Wilkins* v. *Carmichael.* 709

31. An attorney has a lien on the

the money recovered by his client, for his bill of coſts: if the money come to his hands, he may retain to the amount of his bill: he may ſtop it *in tranſitu*; if he can lay hold of it: if he apply to the court, they will prevent its being paid over till his demand is ſatisfied. *Welſh* v. *Hole.* 710

32. So alſo, an attorney has a lien for his bill of coſts; on money levied by the ſheriff, under an execution on a judgment, recovered by his client; and is entitled to have it paid over to him, notwithſtanding the ſheriff has had notice, from the party againſt whom the execution iſſued, to retain the money in his hands; and that the court would be moved to ſet aſide the judgment for irregularity; and notwithſtanding a docket has been ſtruck againſt his client, who, after he recovered judgment, became a bankrupt. *Griffin* v. *Eyles.* 710

33. An attorney ordered to deliver up on oath, all court rolls, deeds, papers, and writings; on the party's giving ſuch ſecurity as the maſter ſhould approve of, to pay all money, that the maſter on reference to him, ſhould find to be due: and the ſum of 300l. was ordered to be paid into the maſter's hands, out of which the attorney's demands were to be ſatisfied, and that the attorney ſhould deliver the deeds, &c. into the maſter's hands at the ſame time; afterwards, on the maſter's report that the money was put into his hands, it was ordered, "that the party giving ſecurity to produce all ſuch parts of the title deeds, &c. as relate to the eſtates in which *J. B.* is intereſted, to the ſaid *J. B.* or his attorney, for their inſpection, or in any court, at the expence of the ſaid *J. B.* the ſaid deeds, &c. be delivered." *Sir Richard Hughes* v. *Mayre.* 710

34. If *A.* recover againſt *C.* and *C.* recover againſt *A.* and *B.* the court will permit *C.* on motion to ſet off the damages which he has recovered againſt thoſe obtained by *A.* on his undertaking, that the bill of *A*'s attorney in the firſt inſtance ſhall be ſatisfied, he having a lien on the judgment for his coſts. *Mitchell* v. *Oldfield.* 711

35. So, where there were two cauſes between the parties: and in the firſt the plaintiff obtained a verdict; and in the ſecond was nonſuited. A rule to ſhew cauſe why the coſts of the nonſuit ſhould not be deducted from the ſum given by the verdict in the firſt cauſe; was made abſolute, with a reſervation of the attorney's lien. *Morland* v. *Laſhly.* 712

36. If a defendant's attorney, after notice from the plaintiff's attornies not to pay money to the plaintiff himſelf, becauſe their bill is not ſatisfied, pay the whole ſum to the plaintiff himſelf, he will be liable to pay it over again. *Read* v. *Dupper.* 712

37. In B.R. the attorney has a lien upon the coſts and damages recovered, and has a right to have ſuch lien ſatisfied in the firſt inſtance, before any other lien that the party may have; but in the court of common pleas, the attorney has only a lien ſubject to the equitable claim againſt his client. *Randle* v. *Fuller*, 713. *Barker* v. *Braham*, 714. *Schoole* v. *Noble, Lett, and Byrne*, 715. *Nunez* v. *Modigliani*, 715. *Dennie* v. *Elliott, Hill and another* 715

38. An attorney plaintiff cannot ſue an attorney defendant by attachment of privilege, and hold him to bail: if he do, the defendant may plead his privilege in abatement, or the court will in a ſummary way, upon motion, ſtay

the proceedings, but without coſts. *Barber* v. *Palmer.* 716

39. An attorney plaintiff may ſue by common proceſs, and indorſe his own name on the copy as the attorney; and he may afterwards alſo declare by another attorney; *Jacſon* v. *Barnard.* 716

40. The plaintiff, who was an attorney, having ſued by his attachment of privilege, was nonſuited, and afterwards taken upon a *ca. ſa.* for the coſts returnable on a general return. On a motion on the behalf of the plaintiff to ſet aſide the *ca. ſa.* as irregular, not being returnable on a day certain, and another motion on the behalf of the defendant to amend: the Court were clearly of opinion, that the *ca. ſa.* was well enough. *Perrot* v. *Hele.* 716

41. When an attorney ſues by attachment of privilege, his name need not be inſerted on the writ. *Fields* v. *Lewen.* 717

42. An attorney is not liable to be ſued in the Middleſex court of conſcience. *Wiltſhire* v. *Lloyd.* 717

43. Where the plaintiff is an attorney, the defendant is not entitled to the benefit of 23 *Geo.* 3. c. 33. though reſident within the juriſdiction of the county court. *Huſſey and another* v. *Jordan.* 718

44. In aſſumpſit, the defendant pleaded his privilege as a 6oth clerk in chancery: replication, that the defendant was diſcharged out of priſon on the inſolvent debtors' act, and aſſigned his office to the clerk of the peace: to this the defendant demurred generally, and the plaintiff joined in demurrer; the caſe was twice argued; held not privileged not being in actual practice. *Goldſmith* v. *Baynard.* 718

45. Whether the above office was aſſignable or not, doubted. 718

46. The privilege of an attorney is confined to the time of iſſuing the proceſs, and cannot commence ſubſequently and protect him at the time of the arreſt. *Brooke and others* v. *Bryant.* 718

47. The like point. *Dyſon* v. *Birch.* 719

48. A bill may be filed againſt an attorney in the vacation. *Comerford* v. *Price.* 720

49. The like point. *Lane* v. *Wheat.* 720

50. The like point. *Waghorne* v. *Fields.* 720

51. And if a bill be filed againſt an attorney in the vacation, the day of filing it may be inſerted in the memorandum. *Dodſworth* v. *Bowen.* 720

52. Although part of an attorney's bill be for conveyancing, and parliamentary buſineſs, the maſter has power to tax the whole. *Anonymous.* 722

53. So alſo an agency bill may be taxed by the maſter. *Dixon* v. *Plant,* 723. Ex parte *Bearcroft.* 723

54. After an attorney's bill has been delivered a month, and no application has been made to have it taxed by the maſter, the defendant will not be permitted to queſtion the reaſonableneſs of the items before a jury. *Williams* v. *Frith.* 723

55. The bill of an attorney cannot be taxed at the trial of an action brought upon it, nor after verdict. *Hooper* v. *Till.* 724

56. But an attorney's bill may be taxed after action brought, and at any time before verdict or judgment, unleſs the money has been paid. *Shaw* v. *Pickering.* 724

57. And

57. And an attorney may ſet off the amount of his bill, although it may not have been delivered a month. *Martin* v. *Winder.* 724

58. An attorney's bill for fees, all of which are due for buſineſs at the quarter-ſeſſions, may be referred to the maſter to be taxed. Ex parte *Williams.* 724

59. Not neceſſary to deliver a bill for buſineſs done at the ſeſſions. *Stephenſon* v. *Taylor.* 725

60. Decided otherwiſe. *Clarke* v. *Donovan.* 725

61. Theſe articles, "attending and taking inſtructions to commence an action, 6s. 8d.; drawing and engroſſing affidavit of debt, and duty, 6s. 7d.; attending you to get ſworn thereto, 3s. 4d.; paid for oath, 1s. Render it neceſſary that the bill ſhould be delivered to the defendant a month before action brought. *Winter* v. *Payne.* 725

62. The attorney after delivering the bill took it back again; held that it ſhould have been left. *Brocks* v. *Maſon.* 726

63. To maintain an action by one attorney againſt another, for buſineſs done by the plaintiff for the defendant before the defendant became an attorney; it is not neceſſary for the plaintiff to leave his bill ſigned with the defendant. *Ford* v. *Maxwell.* 726

64. And the delivery of a former bill is concluſive evidence againſt an encreaſe of charge on any of the items contained in it. *Loveridge* v. *Botham.* 726

65. An attorney cannot practice in an inferior court, if he is not an attorney of a ſuperior court; and if an attorney do any thing wrong any where, *quatenus attorney*, the Court will interfere. *Evans* v. *P——.* 726

66. But the court will not upon motion in a ſummary way compel an attorney who has made a fatal miſtake to indemnify his client. *Barker* v. *Buther.* 726

67. If *A.* be indebted to *B.* and upon being ſued, pay ſuch debt to the attorney of a perſon ſuing in *B*'s name, but without his authority, *A.* is notwithſtanding obliged to pay *B.* again, who may recover it in an action for money had and received; and *A*'s remedy is againſt the attorney who truſted to the counterfeited warrant of attorney from *B.* although he conceived that he was acting under the real authority of *B.* *Robſon* v. *Eaton.*

68. The undertaking of the defendant's attorney, in order to procure the diſcharge of the defendant, to put in bail or pay the debt, if made to the plaintiff, and not to the ſheriff, is not within the ſtatute which avoids all undertakings made for a priſoner's diſcharge, except bail-bonds. *Rogers* v. *Reeves.* 543

AVERMENT.

1. In debt upon a bond for the payment of a ſum of money; an averment that the bond was made upon a wicked and corrupt agreement, not apparent on the bond itſelf, adjudged to be admiſſible and good in pleading. *Collins* v. *Blantern.* 329

AVOIDANCE.

See ADVOWSON.

AUCTION.

1. Not within the ſtatute of frauds. *Simon* v. *Mottivos.* 563

2. Auctioneer liable to the bidders action for depoſit, where the bidder has ſufficient reaſon not to proceed. *Burrough* v. *Skinner.* 236

3 But upon a contract for a purchaſe, if the title proves bad, and the vendor is, without fraud, incapable of making a good one,

the purchaſer is not entitled to any damages for the fancied goodneſs of the bargain, which he ſuppoſes he has loſt; the return of the depoſit with intereſt and coſts, is all that can be expected. *Flureau* v. *Thornhill.* 236

4. An action does not lie againſt an auctioneer for ſelling an article at the higheſt price bid for it, contrary to the owner's expreſs directions, not to let it go under a larger ſum; for ſuch directions are a fraud upon real bidders. *Bexwell* v. *Chriſtie.* 137

5. So, if the owner of property put up to ſale by auction ſecretly employ puffers to bid for him, it is a deceit on the real bidders; and the higheſt bidder cannot be compelled to complete the contract. *Howard* v. *Caſtle.* 138

6. And a bidder at an auction may retract his bidding any time before the hammer is down. *Payne* v. *Cave.* 140

7. And the verbal declarations of an auctioneer at the time of the ſale are not admiſſible in evidence againſt the printed conditions. *Gunnis and others* v. *Erhart.* 140

8. An auctioneer employed to ſell the goods of a third perſon by auction, may maintain an action for goods ſold and delivered againſt a buyer, though the ſale was on the premiſes of the owner, and the goods were known to be his property. *Williams* v. *Millington.* 297

AUTHORS.

1. The queſtion reſpecting their copy-right intereſt conſidered and decided. *Millar* v. *Taylor.* 116

2. The author of any book or literary compoſition cannot, after printing and publiſhing the ſame, maintain an action againſt any perſon who may reprint and ſell the ſame, without his conſent, except ſuch action be founded on the ſtatute 8 *Ann.* c. 19. and on the terms and conditions preſcribed thereby. *Millar* v. *Taylor.* 117

3. At common law, an author of any book or literary compoſition, had the ſole right of firſt printing and publiſhing the ſame for ſale, and might bring an action againſt any perſon who printed, publiſhed, and ſold the ſame, without his conſent. The law did not take away his right, upon his printing and publiſhing ſuch book or literary compoſition; and no perſon might afterwards reprint and ſell for his own benefit, ſuch book or literary compoſition againſt the will of the author. The author's action at law is taken away by the ſtatute 8 *Ann.*; and an author, by the ſaid ſtatute, is precluded from every remedy, except on the foundation of the ſaid ſtatute, and on the terms and conditions preſcribed thereby. The author of any literary compoſition and his aſſigns, had the ſole right of printing and publiſhing the ſame, in perpetuity, by the common law. But this right is impeached, reſtrained, and taken away by the ſtatute 8 *Ann.* *Donaldſon* v. *Becket.* & al. dom. proc. 117

4. And it is ſettled, and not now to be controverted, that literary compoſitions, in their original ſtate, and the incorporeal right of the publication of them, are the private and excluſive property of the author; and that they may ever be retained ſo; and that if they are raviſhed from him before publication, trover or treſpaſs lies. *Millar* v. *Taylor.* 120

AWARD.

1. If arbitrators join with an umpire

umpire in his deed of umpirage, it is only ſurpluſage, and the deed is good. *Soulſby* v. *Hodgſon.* 735

2. If two partners refer all matters in difference between them, the arbitrator may diſſolve the partnerſhip. *Green* v. *Waring.* 735

3. Indorſement on an award unſtamped is a ſufficient authority to a third perſon to demand the money awarded. *Longman* v. *Holmes.* 728

4. On a reference of all matters in difference in this cauſe, if the arbitrators award general releaſes, the award is good as to the matters referred, but void as to the reſidue. *Pickering* v. *Watſon.* 728

5. An award may be good in part, though bad in part. *Fox* v. *Smith.* 727

6. The ſame point, that an award may be good in part, and bad in part. *Addiſon* v. *Grey.* 728

7. A motion to ſet aſide an award muſt be made before the laſt day of the next term after ſuch award is publiſhed; otherwiſe it is too late; and an attachment for the non-performance of it may iſſue. *Freame* v. *Pinneger.* 728

8. The like point, *Zachary* v. *Shepherd.* 729

9. But upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award for any illegality apparent upon the face of it, although the time limited by the ſtatute for applying to the Court to ſet aſide the award is expired. *Pedley* v. *Goddard.* 729.

10. And if an award be made on an improper ſtamp, and no application be made to enforce the award, the Court will not hear any motion to ſet it aſide, for the award may be rendered a valid inſtrument, by procuring the proper ſtamp, and paying the penalty for it: and the award in ſuch a ſtate may be conſidered as a nullity, and ſo not the object of any motion at all. *Preſton* v. *Eaſtwood.* 731

11. A ſubmiſſion to arbitration had been made a rule of court, but the arbitrator not having proceeded within the time limited, one *John Hurd*, and *Robert Hurd*, who were the real parties in the cauſe, *Owen* being only a nominal plaintiff, agreed to a ſecond arbitration, which was not made a rule of court; and for not obeying the award made by the ſecond arbitrator, an attachment was moved for; but refuſed, the ſecond reference not having been made by the parties on the record. *Owen* v. *Hurd.* 731

13. A ſubmiſſion to arbitration of all matters in difference between the parties in the cauſe is not confined to the ſubject-matter in the particular action then depending, but will extend to croſs-demands between the parties, though not pleaded by way of ſet-off; and the coſts being to abide the event, makes no difference: but a reference of all mattters in diſpute in the cauſe between the parties is confined ſolely to the matters in diſpute in that trial. *Malcolm and another, aſſignees* v. *Fullarton.* 732

14. But an award made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from ſuing upon a cauſe of action ſubſiſting againſt the defendant at the time of the reference, upon proof that the ſubject-matter of ſuch action was not laid before the arbitrators, nor included in the matters referred. *Reeves* v. *Farmer.* 733

15. The Court have no authority under the ſtat. 9 & 10 *W.* 3. c. 15. (which gives juriſdiction in this caſe), to make a verbal agreement by the parties to refer all matters

ters in difference, a rule of court. *Anſell* v. *Evans.* 734

16. That the arbitrator had not examined the witneſſes on oath is not ſufficient to ſet an award aſide, unleſs he was deſired to examine on oath. *Ridoat* v. *Pye.* 734

17. So, where an umpire made his award on the relation of the arbitrators, without re-examining the witneſſes: as no application was made to the umpire to examine the witneſſes before the award, it was held well enough. *Hall* v. *Lawrence.* 734

18. And it is no ground for ſetting aſide an award, that one of the defendant's witneſſes was re-examined by the arbitrator after the evidence was cloſed on both ſides, and the plaintiff's attorney gone, though the witneſs gave a teſtimony different from that which he gave before, and by which the arbitrator confeſſed his judgment was influenced. *Atkinſon* v. *Abraham.* 734

19. The power of awarding coſts is neceſſarily conſequent on the authority conferred upon the arbitrator; and arbitrators may elect an umpire the inſtant they begin to take the matter into conſideration. *Roe* ex dim. *Wood* v. *Doe.* 735

20. On a diſpute between a landlord and two tenants, who had occupied a farm at ſeveral times, the parties jointly agreed with the plaintiff that they would abide by the award, &c. held that though it was reaſonable that each ſhould make ſatisfaction for the time each occupied, yet by the terms of this agreement they had promiſed jointly and ſeverally, which made them reſponſible the one for the other. *Manſell* v. *Burredge and Roberts.* 736

21. The Court will, on a motion, in the firſt inſtance, without a rule to ſhew cauſe, give leave to enter up judgment, on a verdict reduced by an award. *Higginſon* v. *Neſbitt.* 737

22. But the Court will not grant an attachment for non-performance of an award, pending an action brought on the award, nor allow the plaintiff to waive the action, in order to apply for the attachment. *Badley* v. *Loveday.* 737

23. If an arbitrator award among other things, that each party ſhall pay a moiety of the coſts of the arbitration, and of making the ſubmiſſion a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment againſt the other party, if he refuſe to pay his moiety. *Hicks* v. *Richardſon.* 737

24. Coſts of ſuit, on a rule of reference, are common coſts. *Marder* v. *Cox.* 737

25. The like point. *Barker* v. *Tibſon.* 737

26. An averment, that the arbitrators, before the exhibiting of the bill, to wit, on the 21ſt of May, &c. did make their award, is ſufficiently poſitive. *Biſſex* v. *Biſſex.* 738

27. In debt on bond, it appeared that the bond was a common arbitration bond, in which the time was limited for the arbitrator to make his award: the declaration ſtated, that the time was afterwards, by the mutual conſent of both parties enlarged; within which enlarged time the arbitrator made his award, and it then ſtated the breach, &c. to this there was a demurrer; and after argument at the bar, it was held, that as it appeared that the defendant had bound himſelf to abide by an award under a penalty, if made within a given time, it could never extend the penalty to an award made after that time, under

der a new agreement. *Brown* v. *Goodman. Ea. Ter.* 29 *Geo.* 3. *B.R.* 3 *Ter. Rep.* 592

28. But a party cannot, in ſhewing cauſe againſt an attachment for not performing an award, impeach the award for defects not appearing on the face of it. On ſhewing cauſe againſt a rule for an attachment for not performing an award, the application was reſiſted on ſeveral grounds not appearing on the face of the award, but verified by affidavit. And the Court held, that a party cannot object to an award for any defect not appearing on the award itſelf in ſhewing cauſe againſt a motion for an attachment, but that he muſt obtain a rule for that purpoſe, within the time limited by the act of parliament. *Holland* v. *Brooks. Hil. Ter.* 25 *Geo.* 3, *B.R.* 6 *Ter. Rep.* 161

BAIL.

1. The affidavit to hold to bail muſt be poſitive: "that the defendant was indebted *as appears* by agreement," will not do. *Jennings* v. *Martin.* 517

2. The like, where it was, "as appears by bill of exchange." *Bright* v. *Purrier.* 517

3. So where it was, that "the defendant was indebted in 5000l. for which he has not accounted," for the latter words render it not poſitive. *Champion* v. *Gilbert.* 755

4. The affidavit made for the purpoſe of holding to ſpecial bail had only one ſtamp, and joined debt and aſſumpſit together: this was held irregular, and the defendant diſcharged on common bail. *Crooke* v. *Davis.* 520

5. The undertaking of the bail, that on ſtaying proceedings againſt them until the affirmation of the judgment, they will pay the debt and coſts within four days after the affirmance. This is to be underſtood a final affirmance. *Kerſhaw* v. *Cartwright.* 793

6. Bail excepted to and ſet aſide, to be exonerated, muſt have their names ſtruck out of the bail-piece. *Fulke* v. *Bourke.* 788

7. Bail excepted to, but not ſtruck off the bail-piece, may, if afterwards ſued, apply for an exoneretur, which ſhall be entered *nunc pro tunc. Humphrey* v. *Leite,* 788

8. In the caſe of the aſſignees of a bankrupt oath, that "the defendant is indebted *as appears* by the accounts, and they *verily believe* is ſufficient." *Barclay* v. *Hunt.* 523

9. The like point determined. *Tonna* v. *Edwards.* 755

10. A like affidavit is alſo ſufficient in the caſe of executors or adminiſtrators. *Ibid.*

11. The court of C.B. inclined to admit an affidavit, ſtating circumſtances from which a debt may be inferred. *Long* v. *Linch.* 522

12. Bail have time to ſurrender their principal (till the *quarto die poſt*, provided it be done *ſedente curiâ*) where the action is by original. *Bailey* v. *Smeathman.* 788

13. Lord *Baltimore* charged poſitively with a rape, and two women as acceſſary before the fact were admitted to bail by four manucaptors *Rex* v. *Lord Baltimore,* 743

14. After bail had juſtified the plaintiff (without diſcloſing this) obtained a ſide-bar rule to diſcontinue on payment of coſts, and brought a new action requiring freſh bail, the Court diſcharged the ſide-bar rule. *Belchier* v. *Ganſell.* 784

15. A perſon in cuſtody upon a *capias utlagatum*, after conviction of a criminal miſdemeanor, cannot be

be admitted to bail without the consent of the prosecutor. *Rex* v. *Wilkes*. 740

16. Persons committed on 13 & 14 *Car.* 2. c. 11. § 6. for forcibly resisting custom-house officers in the execution of their duty; and who are to remain in prison till the next quarter-sessions, cannot demand to be bailed of right. *Rex* v. *Dunn*. 760

17. Two days notice of bail not necessary on an attachment, nor need the bail justify. *Rex* v. *Hall*. 698

18. Bail who surrender their principal immediately, need not justify C.B. *anon*. 774. *Mitchell* v. *Morris*, 774. *Jackson* v. *Trinder*. 761

19. In debt on judgment, the defendant may be held to bail, if no bail was given in the original action, notwithstanding error brought on the original action, and bail thereon, C.B. *Kendal* v. *Carey*. 771

20. *Sci. fa.* on recognizance of bail taken in London, and enrolled at Westminster as so taken, may be sued either in London or Middlesex, C.B. *Kenny* v. *Thornton*. 792

21. No sheriff's-officer of any kind can be special bail. *Bolland* v. *Pritchard*. 760

22. Bail must pay the costs of all actions, as well as the whole debt before proceedings against them shall stay. *Walker* v. *Carter*. 780

23. The like point. *Mitchell* v. *Gibbons*. 780

24. Bail-bond cannot be assigned when the original suit is out of court, for want of declaring in time. *Sparrow* v. *Naylor*. 780

25. It is not decided whether it is a sufficient objection to bail that he lives within a privileged place. *Glead* v. *Mackay*. 776

26. A foreigner being bail, sworn and examined by an interpreter. 776

27. Bail-bond cannot be put in suit till after four days from the appearance day of the return of the writ. *Bellis* v. *Milford*. 770

28. Bail on a *testatum capies* from Middlesex put in where the writ is served, and not in Middlesex is as no bail, and the plaintiff may proceed as if the defendant had not appeared. *Fisher* v. *Levi*. 761

29. Bail cannot justify at a judges' chambers in vacation, unless by consent; and are no bail unless they justify the next term in court. *Hawkins* v. *Plomer*. 775

30. Notice to justify three bail irregular. *Allen* v. *Keyt*. 776

31. Defendant's attorney changed without leave of the court cannot give notice to justify bail. *Kaye* v. *De Mattos*. 705

32. A member of parliament committed for writing a libel discharged without bail. *Rex* v. *Wilkes*. 740

33. Upon a parol promise to save bail harmless, the court will not interfere in a summary way. *Beal* v. *Langstaff*. 525

34. A defendant was held to bail a second time for the same cause of action, after the plaintiff had discontinued the first writ by reason of a mistake. *Bates* v. *Barry*. 766

35. Time refused to perfect bail in error, because no real error could be suggested, so court thought it brought for delay. *Handasyde* v. *Morgan*. 772

36. Though the court of king's bench have a discretionary power to bail in all cases whatsoever, yet when the sessions are near, and the offence committed by a prisoner is of such a magnitude, as that of repeated forgery, there is no colour for

for an application for bail upon the ground of that general diſcretion. *Rex* v. *Rudd.* 654

37. Neither is the allegation, that the priſoner's ſtate of health is ſuch as to be endangered by the confinement, of itſelf a ſufficient circumſtance, in ſuch a caſe, to induce the Court to interfere in his behalf. *Ibid.*

38. There are three legal ways which give accomplices a right to a pardon, 1ſt, In the caſe of approvement, which ſtill remains a part of the common law, though grown into diſuſe. 2dly, The caſe of perſons who come within the ſtatutes 10 & 11 *Will.* 3. c. 23. § 5. and 5 *Ann.* c. 31. § 4. And, 3dly, The caſe of perſons to whom the king has, by ſpecial proclamation in the Gazette, or otherwiſe, promiſed his pardon; and in all theſe caſes the Court will bail them, in order to give them an opportunity of applying for a pardon. *Ibid.*

39. There is, beſides, a practice which does not give them a legal right, and that is, where accomplices having made a full and fair confeſſion of the whole truth, are in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders: if, in that caſe, they act openly and fairly, and diſcover the whole truth, though they are not entitled of right to a pardon, yet the uſage, the lenity, and the practice of the Court is, to ſtop the proceedings againſt them, and they have an equitable title to a recommendation for the king's mercy; and in that caſe, the Court will incline to bail the accomplice, to give him an opportunity of applying for a pardon. *Ibid.*

40. The ſheriff has no authority to take a bond for the appearance of perſons arreſted by him under proceſs iſſuing upon an indictment at the quarter-ſeſſions for a miſdemeanor: in ſuch a caſe he can only take a recognizance for their appearance. *Bengough and another* v. *Roſiter*, 744. *Bengough* v. *Roſſiter.* 746

41. A bail-bond given to the ſheriff of Durham, under a writ iſſued immediately from B.R. to him inſtead of the biſhop of Durham, is not void. *Jackſon* v. *Hunter.* 751

42. Under an original writ in a plea of treſpaſs on the caſe on promiſes, the ſheriff took a bail-bond conditioned for the defendant's appearance, &c. in a plea of treſpaſs, held well enough. *Owen* v. *Nail.* 752

43. The defendant was arreſted by the name of *Weſton*, and the plaintiff filed a declaration *de bene eſſe*, againſt *E. Waſon*, ſued by the name of *Weſton*; alſo the *jurat* of the affidavit, on which the defendant was held to bail, omitted to ſtate the place where it was ſworn. But the Court refuſed to diſcharge the defendant on common bail. *Symmers* v. *Waſon.* 753

44. In the court of C.B. a defendant was diſcharged out of cuſtody for irregularity in the affidavit, to hold to bail, by being intitled *E. H.* plaintiff, and *W. B.* defendant. *Hollis* v. *Brandon.* 753

45. But the court of B.R. afterwards refuſed to diſcharge a defendant out of cuſtody, becauſe the affidavit was entitled; becauſe the practice had obtained ſo long of adding a title to affidavits of this kind, but for the regulation of future practice, a rule of court was made, ordering, that affidavits to hold to bail ſhould not be entitled. *Clarke* v. *Cawthorne.* 754

46. Held no objection, becauſe the affidavit was not entitled "In the

the king's bench;" neither becauſe it only appeared to have been taken before *J. M.* a commiſſioner, &c." without ſaying by what court he was commiſſioned. *Kennet and Avon Can. Co.* v. *Jones.* 755

47. Affidavit on a penal ſtatute, that the proſecutor had cauſe of action againſt him for 200l. forfeited by him is poſitive enough. *The King* v. *Rebord.* 755

48. Special bail ſhall be given to pay the forfeiture, or yield the body for defendant having unſealed wrought ſilks in his cuſtody. *Ibid.*

49. A party cannot be held to bail for a penalty, but only for the ſum ſecured by the penalty. *Hatfield* v. *Linguard.* 756

50. Although in general a defendant cannot be held to bail twice for the ſame cauſe; yet if he be diſcharged out of cuſtody the firſt time for ſome act for which the plaintiff is not anſwerable; as for inſtance, an alteration in the warrant to arreſt by the ſheriff's officer without the plaintiff's knowledge: in ſuch caſe, the defendant may be again held to bail for the ſame cauſe of action. *Houſin* v. *Barrow.* 756

51. But if a defendant, on being informed that a writ has been iſſued againſt him, voluntarily give a bail-bond, he cannot afterwards object to the inſufficiency of the affidavit. *Norton* v. *Butler Danvers.* 757

52. And the length of time that may have elapſed ſince the taking the bail-bond was in this caſe holden to be no waiver of the above objection. *Fenwick* v. *Hunt.* 757

53. However, in another caſe, it was ruled, that the defendant could not take advantage of the objection after he had pleaded. *Levy* v. *Duponte.* 757

54. A defendant alſo, by putting in and perfecting bail above, waives all objections to the ſufficiency of the affidavit, on which he was held to bail. *Chapman* v. *Snow.* 757

55. An affidavit made by a third perſon; ſtated, that the defendant was indebted to the plaintiffs, who were reſident at Amſterdam in Holland, in a ſum of money for goods ſold and delivered, held ſufficiently poſitive. *Pieters and another* v. *Luytjes.* 758

56. The Court, on a demurrer to a declaration on a bail-bond, cannot preſume that the officer had no authority to take bail: if there be any real ground of exception, it muſt be ſtated in pleading. *Say* v. *Ellis.* 578

57. The ſheriff is not liable to an action on the ſtat. 23 *Hen.* 6. c. 9. for refuſing to take bail on an attachment iſſuing out of chancery. *Studd* v. *Acton.* 758

58. The keeper of the Poultry Compter cannot be bail. *Hawkins* v. *Magnall.* 760

59. The clerk to the defendant's attorney tendered as bail, was rejected. *Bologne* v. *Vautrin.* 760

60. And the rule extends to articled clerks. *Laing* v. *Cundal.* 760

61. So a clerk to an attorney though not articled, was rejected. *Corniſh* v. *Roſs.* 761

62. But in a criminal caſe, the defendant's attorney may be bail. *K.* v. *Bowes.* 761

63. But an attorney, though he cannot juſtify, is ſufficient bail to ſurrender the principal. *Jackſon* v. *Trinder.* 761

64. And if a perſon, who is not permitted to become bail, ſhall be put into the bail-piece, and not excepted to, the plaintiff cannot take an aſſignment of the bail-bond, and

and proceed upon it, as if no bail had been put in. *Thomſon* v. *Roubell.* 761

65. In the king's bench if the original debt be under 10l. the inhancement of it by adding the coſts, and ſo raiſing the total to above 10l. is not ſufficient to oblige the defendant to give ſpecial bail. *Palmer* v. *Needham.* 761

66. But the two courts of B.R. and C.B. differ in their practice, C.B. hold to ſpecial bail in ſuch caſes, and B.R. accepts common bail. *Belither* v. *Gibbs.* 762

67. And the court will order a defendant to be diſcharged upon common bail, where the action is brought upon a judgment of nonſuit, merely for coſts. *Buſh* v. *Bates.* 762

68. A defendant who has been ſuperſeded for want of being charged in execution within two terms after judgment, cannot be held to ſpecial bail in an action brought upon ſuch former judgment; although he may be charged in execution after judgment obtained in the ſecond action. *Blandford* & al. v. *Foot.* 762

69. In the court of common pleas there was a judgment of nonſuit, and the coſts of the defendant amounted to upwards of 10l.; the caſe of *Belither* v. *Gibbs*, and other caſes in B. R. were cited, and relied on; the Court (C.B.) held, that coſts recovered for a groundleſs proſecution, are as fair a debt as for any other conſideration, and therefore refuſe to diſcharge the defendant on common bail. *Nightingale* v. *Nightingale.* 763

70. And the practice of the court of king's bench in this reſpect is now conformable to that of the court of common pleas. *Lewis* v. *Pottle.* 763

71. If a defendant be held to bail in this country, on an inſtrument entered into in a foreign country, and by which inſtrument his property only, and not his perſon, was according to the law of that country made liable, the court, on motion, will diſcharge him on filing common bail. *Melan* v. *Duke de Fitzjames.* 763

72. Plaintiff ſhall loſe his ſpecial bail where he declares differently from his writ; as if the writ is in his own right and he declares as executor. *Halley* v. *Tipping.* 766

73. And the court will examine whether a cauſe be bailable, though it be removed from an inferior court by *habeas corpus*; but they will not diſcharge on common bail, unleſs the caſe is manifeſtly vexatious. *Echlin* v. *Hartop.* 766

74. In debt on a baſtardy bond; the penalty was 50l. and the plaintiff had ſworn to that ſum, the defendant now ſwore that only 3l. and ſome odd ſhillings were really due; and the Court diſcharged the defendant on common bail. *Kirk* v. *Strickland.* 767

75. Where a cauſe has been referred to arbitration, and the arbitrator awards a ſum exceeding 10l. the defendant may be holden to bail again upon the award. *Collins* v. *Powell.* 767

76. If two actions be brought by the ſame plaintiff at the ſame time, for cauſes of action which might have been comprized in the ſame declaration, and the defendant be holden to bail in both actions, the Court will compel the plaintiff to conſolidate them, and pay the coſts. *Cecil* v. *Briggs and Idem* v. *Idem.* 767

77. The court refuſed to interfere in a ſummary way, and order a bail-bond to be cancelled, on an affidavit of the defendant that he was

was not the perſon. *Salter* q. t. v. *Shergold.* 767

78. Becoming inſane ſince arreſt, no cauſe for diſcharge. *Kernot* v. *Norman.* 768

79. Or that a defendant was inſane at the time of the arreſt. *Nutt* v. *Verney.* 768

80. Neither will the court permit an exoneretur to be entered on the bail-piece, on an affidavit, ſtating that ſince the commencement of the action, a commiſſion of lunacy had iſſued againſt the defendant, under which he had been found a lunatic. *Ibbotſon* v. *Lord Galway.* 768

81. Only one defendant can be included in a bailable writ. *Holland* v. *Johnſon.* 768

82. The like point decided. *Holland* v. *Richards.* 768

83. But where the writ is not a bailable one, it is otherwiſe. *Yardley* v. *Burgeſs.* 769

84. So where the defendants were held to bail on an affidavit which ſtated a joint cauſe of action; and there was alſo one *ac etiam* in the writ, as on a joint debt; and afterwards the plaintiffs declared againſt the defendants ſeverally. The proceedings were ſet aſide. *Moſs* v. *Birch.* 769

85. But where a defendant has been holden to bail, and afterwards diſcharged on common bail, on account of the plaintiff having declared againſt him on a different cauſe of action from that mentioned in the writ and affidavit; he may, in an action on the judgment, be again holden to bail. *De la Cour* v. *Read.* 769

86. No bail is requiſite on bringing a writ of error on a judgment in debt, obtained upon a prior judgment. *Biddleſon* v. *Whytel.* 769

87. So, where judgment for goods ſold and delivered was ſigned in Trinity Term; on 10th of July a writ of error allowed and ſerved; and on 17th of July, the defendant was taken in execution on a rule, to ſhew cauſe why the *ca. ſa.* and ſubſequent proceedings ſhould not be ſet aſide for irregularity. The queſtion was, "Whether, under the ſtat. 3 *Jac.* 1. c. 8. § 1. it was neceſſary for the defendant to put in bail in error?" and the Court held not. *Alexander* v. *Biſs.* 771

88. A writ of error was ſued out, and allowed on 31ſt May, and ſerved, final judgment was ſigned on 14th June, within four days after which bail in error was put in: *Per Cur.* This is regular, for the practice which has obtained in ſuing out a writ of error before judgment ſigned, happens in almoſt all caſes, becauſe otherwiſe execution would iſſue inſtantly. *Jaques* v. *Nixon.* 772

89. So, where the judgment was ſigned on a Monday, and execution taken out on the Friday: on a motion to ſet aſide the *fieri facias*, on the ground of irregularity, the only queſtion was, how many days were allowed to a defendant to put in bail in error; held that he had four clear days. *Bennet* v. *Nichols.* 772

90. On a judgment in an action pending a writ of error to reverſe that judgment, the defendant cannot apply to ſtay proceedings in a writ of error until he has put in bail. *Smith* v. *Shepherd.* 773

91. An exoneretur cannot be entered on the bail-piece in error, the principal having become a bankrupt pending the writ of error, and having obtained his certificate, becauſe bail in error cannot ſurrender the principal at all. *Southcote* v. *Braithwaite.* 773

92. The defendant having been arreſted on 21ſt of November, was permitted

permitted to go at large on an undertaking given by his attorney for his appearance. Bail above not having been put in in time, or bail-bond taken, the plaintiffs brought an action againſt the ſheriff for an eſcape. On 7th of January, the defendant became a bankrupt. On 26th of this month notice of bail was given; and now a motion was made to juſtify theſe bail, the ſheriff offering to pay the coſts of the action brought againſt him. The juſtifying of the bail was refuſed. *Fuller and others* v. *Preſt.* 773

93. No juſtification is neceſſary of bail, who immediately ſurrender their principal. *Anon.* 774

94. Where the bail, who were going to juſtify, had not actually become bail before notice was given; they were rejected. *Collier* v. *Godfrey.* 774

95. Where bail in C.B. are put in in due time, the defendant is not bound to give notice, but the plaintiff muſt ſearch in the filazer's book: but if the bail be not put in in due time, then notice muſt be given. *Dawkins* v. *Reid.* 774

96. Of the four days allowed in C.B. to perfect bail after exception, the firſt is reckoned excluſively, and the laſt incluſively. *North* v. *Evans.* 774

97. Bail in this action were oppoſed and rejected on a former day, and the defendant ſurrendered on the next; freſh bail being now brought up for juſtification, the coſts of the firſt oppoſition were inſiſted on, but not allowed. *Holward* v. *Andre.* 775

98. Though the rule to bring in the body has expired, yet if the defendant juſtifies bail, before the plaintiff moves for an attachment againſt the ſheriff, it is in time to prevent the attachment. *Thorold* v. *Fiſher.* 775

99. Bail in error juſtified themſelves *de bene eſſe* at a judge's chambers; held to be no bail unleſs they juſtified again in court. *Hawkins* v. *Plomer and Hart.* 775

100. Bail above may be put in on *a dies non juridicus*, the 2d of February. *Baddeley* v. *Adams.* 775

101. If a foreigner offer to juſtify the merely having no effects in England, is not of itſelf a ſufficient objection without other auxiliary circumſtances. *Smith* v. *Scandrett.* 775

102. But where a merchant came to juſtify as bail, and juſtified incluſive of property in Jamaica, he was rejected, becauſe his property was not liable to the proceſs of the court. *Boddy* v. *Leyland.* 775

103. But a foreigner of reſpectability who had no conſiderable property in England, was admitted to juſtify as bail, the defendant being himſelf a foreigner. *Chriſtie* v. *Filleul.* 775

104. The ſufficiency of the bail is the object of which the Court is to take care; but there is no impropriety in their being indemnified. *Neat* v. *Allen.* 776

105. But the court of C.B. will reject bail, though they have no written indemnity from the defendant's attorney, if they declare that he has promiſed that they ſhall not be ſufferers, this being contrary to the general rule of Hil. 37 *Geo.* 3. *Greenſill* v. *Hopley.* 776

106. Where the bail were ordered to be ſet aſide, as being ſurreptitiouſly put in and juſtified; and in the mean time they ſurrendered the defendant, held no bail, and attachment againſt the ſheriff. *Jackſon* v. *Morris, and Richardſon* v. *Morris.* 776

107. B.R. now hold it not neceſſary for the bail to juſtify before they ſurrender the principal, after

an aſſignment of the bail-bond. *Edwin* v. *Allen.* 776

108. Bail is not regularly put in till the allowance of it has been ſerved, even though the plaintiff oppoſe the juſtification. *The King* v. *Sheriff of Middleſex.* 777

109. The Court, on reference to the maſter, ſaid, that the practice was, that if the bail do not juſtify on the day appointed, and no further time be allowed for them to do ſo, they are out of court, and cannot afterwards ſurrender the principal. *Hardwick* v. *Bluck.* 777

110. But the authority of the above caſe has been denied in ſome ſubſequent caſes, viz. *King* v. *Sheriff of Middleſex*, alſo *Calow* v. *Dury.* 778

111. Bail are not regularly put in, unleſs the name of the proper county be inſerted in the bail-piece. *Smith* v. *Miller.* 778

112. Defendant was arreſted by the name of *Noah*, and put in bail by the name of *Noel*; leave given to amend the bail-piece. *Anderſon* v. *Noah.* 778

113. Where the recognizance on a *certiorari* is actually forfeited, and the proſecutor has had coſts taxed to him for the defendant's neglecting to go on to trial, and has received no ſatisfaction for theſe coſts, the recognizance can only be diſcharged on payment of coſts. *Rex* v. *Lyon.* 778

114. The bail-bond cannot be put in ſuit, till after four days from the appearance-day of the return of the writ. *Bellis* v. *Milford.* 779

115. An action upon a bail-bond muſt be brought in the ſame court where the bail was given. *Walton* v. *Bent.* 779

116. The like point. *Morris* v. *Rees.* 779

117. The ſheriff cannot take the bond in a penalty of more than double the ſum ſworn to. *Mitchell* v. *Gibbons.* 780

118. The bail in the action are only liable to the debt ſworn to, and the coſts, and not for the ſum recovered by the verdict, if it exceed that for which the defendant was held to bail. *Jackſon* v. *Haſſel.* 780

119. Where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts. *Orton* v. *Vincent.* 781

120. The court of king's bench in this caſe made a rule, that in future, wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail-bond becomes forfeited, the notice (in caſe the party means to put in bail, in order to ſtay proceedings upon the bail-bond) ſhould be, that he will put in and perfect bail on ſuch a day, analogous to the caſe where the ſheriff is ruled, who before he can diſcharge himſelf, muſt give notice that he will put in and perfect bail, and in that caſe, the plaintiff may oppoſe the bail in court, without its being a waiver of the bail-bond. *Boldero* v. *Gray.* 781

121. The bail to the original action, are not liable to pay the coſts of a writ of error in the exchequer chamber. *Yates* v. *Doughan.* 781

122. Bail to the ſheriff cannot be held to bail on an aſſignment of the bail-bond. *Brander* v. *Robſon.* 281

123. The ſtat. 23 *Hen.* 6. c. 9. relating to bail-bonds is a public act: therefore the Court will take notice of it, though it be not pleaded. And if it appear on a declaration, by the aſſignee of the ſheriff on ſuch bond, that the bond is void by the proviſions of that ſtatute, the Court, on motion, will arreſt the judgment

judgment after verdict againſt the defendant, upon a plea of *non eſt factum*. *Samuel* v. *Evans*. 782

124. An *exoneretur* entered on the bail-piece, the defendant having become a peer, becauſe no longer in the power of the bail to ſurrender the principal. *Trinder* v. *Shirley*. 784

125. So, if a defendant (an alien) be ſent out of the kingdom under the alien bill, 33 *Geo.* 3. c. 4. *Merrick* v. *Vaucher*, *Hamp* v. *the ſame*, *Lazard* v. *the ſame*. 784

126. But the Court will require affidavits from the bail, that they have no effects in their hands belonging to the defendant, out of which they can repay themſelves in the event of the plaintiff's recovering, and that they were not indemnified. *Ibid.*

127. The like point. *Coles* v. *de Hayne*. 785

128. But if the bail defend the action, they muſt pay the coſts. *Ibid.*

129. And if a defendant be ſent out of the kingdom under the alien-act after a bail-bond has been given for his appearance, and before the return of the writ, the Court will order the bail-bond to be delivered up to be cancelled. *Poſtle* v. *Williams*. 785

130. Bail in a civil action for a perſon convicted of felony, and on board, upon the point of tranſportation, are too late for an *habeas corpus* to bring up the principal, in order to be ſurrendered. *Fowler* v. *Dunn*. 786

131. But in ſuch a caſe, the Court will permit an *exoneretur* to be entered on the bail-piece. *Wood* v. *Mitchell*. 786

132. And the Court, on the application of the defendant's bail, will grant an *habeas corpus* to the ſheriff in whoſe cuſtody the defendant may be, if it be only under a charge of felony, to bring him up, in order that he may be ſurrendered by his bail; the bail firſt juſtifying, to entitle themſelves to make ſuch an application. *Sharp* v. *Sheriff*. 786

133. If the ſum ſworn to be under 40l. the defendant may be arreſted and holden to bail on a *clauſum fregit*, without an *ac etiam*. *Lockwood* v. *Hill*. 787

134. Judgment having been obtained on a *ſcire facias*, againſt the bail, *cognovit* by the principal, without notice to the bail, does not diſcharge the bail. *Hodgſon* v. *Nugent*. 787

135. When bail above are excepted againſt, and cannot juſtify themſelves, they are conſidered as no bail, and therefore cannot render the defendant to priſon: but other freſh bail may be put in, and before any exception taken to them, they may render in diſcharge of themſelves. *Perrot* v. *Hele*. 788

136. As to the time and manner of ſurrendering, the Court held in this caſe, that a ſurrender at about half an hour after eleven at night on the laſt day (which was the laſt day of the term), without an actual bringing of the defendant into court (which was then riſen), or before a judge (none being acceſſible at that late hour), in order to have an *exoneretur* entered upon the bail-piece, was no ſufficient; though it was ſo late a night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tipſtaff, and even lodged in the king's-bench priſon that very night, which the bail ſwore was the utmoſt that the very late notice they received from the ſheriff of the *ca. ſa.* which was returned *ſcire feci*, gave opportunity to them to do. *Hunt* v. *Coxe*. 788.

137. But, in another caſe, the

Court obſerved, that ſummoning the bail only an hour before the riſing of the court could not anſwer any purpoſe. But as no *exoneretur* was entered on the bail-piece, nor render of the principal entered on the marſhal's book, the proceedings on the *ſci. fa.* were ſtayed on payment of coſts. *Webb* v. *Harvey.* 789

138. The eſtabliſhed rules of the court relating to the time and manner of ſurrendering their principal muſt be ſtrictly adhered to. *Hunt* v. *Coxe.* 788, 789

139. The *ca. ſa.* againſt the principal being left in the ſheriff's-office, gives notice to the bail, "that the plaintiff will proceed againſt the perſon;" and therefore it is incumbent upon the bail to ſearch whether any *ca. ſa.* be left in the office. *Ibid.*

140. The actual return of the *ca. ſa.* or the actual filing of ſuch return before the iſſuing of the *ſcire facias* againſt the bail, will not be examined into by the court; the rather becauſe if the bail even plead it, yet ſuch return may be filed at any time before the replication. *Ibid.*

141. A ſurrender half an hour before midnight of the laſt day, when the court was riſen, and no judge then acceſſible, and were lodging the principal that very night in the king's bench priſon, has been held not to be ſufficient; though it was the utmoſt that the bail had time to do, from the very late notice given them by the ſheriff of the *ca. ſa.* *Ibid.*

142. For as a *ſcire faci* had been duly returned, the Court will not meddle with the ſufficiency of the time for ſurrendering the principal. *Ibid.*

143. The *ca. ſa.* was returnable the 20th, and on the 19th a writ of error was allowed and ſerved, and on the 20th, the plaintiff got the *ca. ſa.* returned *non eſt inventus*, and brought his action againſt the bail; proceedings ſet aſide. *Perry* v. *Campbell.* 790

144. Four days excluſive are ſufficient between the *teſte* and return of the *ſcire facias*, when the proceedings are by bill. *Bell* v. *Jackſon.* 790

145. The bail ought to ſurrender their principal immediately upon the return of the *ca. ſa.* if they do not, a cauſe of action accrues againſt them; and therefore the coſts of the declaration delivered in the action againſt the bail, muſt be tendered, before they apply to ſtay proceedings. The allowing of the eight days after the return of the *ca. ſa.* for the bail to ſurrender the principal, is merely an indulgence given to them by the practice of the court; for they are liable even though the principal die the day after the return of the *ca. ſa.* *Perigal* v. *Melliſh.* 790

146. The principal having died after the return of the *ca. ſa.* but before the return was filed, it was moved that an *exoneretur* might be entered on the bail-piece, and the filing of the *ca. ſa.* returned by the ſheriff ſtayed, but refuſed. *Rawlinſon* v. *Gunſton.* 791

147. Where the *ca. ſa.* was teſted the term before judgment was ſigned againſt the principal, the proceedings againſt the bail were held irregular, as ſuch practice would tend to fix the bail, without giving them an opportunity to ſurrender the principal. *Gawler* v. *Jolley.* 791

148. The ſurrender of the defendant to the ſheriff before the return of the writ, held no ground for ſtaying proceedings upon a bail-bond. *Harriſon* v. *Davies.* 792

149. But

149. But the practice is now ſettled otherwiſe on payment of coſts. *Meyſey* v. *Carnel.* 792

150. And if the defendant, who has given a bail-bond, ſurrender himſelf to the ſheriff before the return of the writ, the bail-bond may be given up, and it will be conſidered as if no ſuch bond had been given. *Jones* v. *Lander.* 792

151. The bail to the ſheriff have no right to take the defendant on a Sunday, in order to ſurrender him: even on an eſcape (if voluntary) this cannot be done. *Brook* v. *Warren*, 793. But ſee *Atkinſon* v. *Jones.* 676

152. If on exception to bail, notice be given of other bail, only one of whom juſtifies, and the names of the former ſtill remain on the bail-piece, they may, unleſs a rule has been had to ſtrike out their names, ſurrender the principal. *King* v. *Sheriff of Eſſex.* 793

153. If an action be brought in B.R. againſt bail on a recognizance of bail taken in C.B. they have the ſame indulgence (of eight days in full term after the return of the writ againſt them) to render the principal as if the recognizance had been taken in B.R. *Fiſher and another, executors of Perry* v. *Branſcombe, and the ſame* v. *W. and J. Sutton, executors of Bowen.* 793

154. *Bowen* was ſerved with an attachment of privilege on a recognizance of bail, but died before the *quarto die poſt*, until which day he had time to ſurrender the principal: the plaintiff then ſerved the defendants with an attachment of privilege, and before the *quarto die poſt* of that writ the principal was ſurrendered: and the proceedings againſt the defendants were ſtayed on payment of coſts; for if the principal is ſurrendered within four days after the return of that writ, in which there is an effectual proceeding, it is ſufficient. *Meddowſcroft* v. *Sutton and another, executors of Bowen.* 794

155. Bail ſued on their recognizance by attachment of privilege, may render the principal on the appearance-day of the return. *Fletcher* v. *Angell.* 795

156. In both courts, where the bail are ſued by *ſcire facias*, and the proceedings are by original, they have till the *quarto die poſt* of the return of the firſt *ſcire facias*, if *ſcire feci* be returned, or if *nihil* be returned, till the *quarto die poſt* of the return of the ſecond *ſcire facias*, to render the principal. Where the proceedings are by bill in B.R. the time for rendering is the return-day of the *ſcire facias*, and in all theſe caſes it is abſolutely neceſſary that the render be made *ſedente curiâ. Ibid.*

157. The like point. *Lardener* v. *Baſſage.* 795

158. Bail above may juſtify the breaking and entering the houſe of *A.* (the outer door being open), in which the principal reſides, in order to ſeek for him for the purpoſe of rendering him. *Sheers* v. *Brooks and others.*

159. Upon articles of peace being exhibited, the Court may require bail for ſuch length of time as they ſhall think neceſſary for the preſervation of the peace, and are not confined to one year. *Rex* v. *Bowes.* 683

BAILIFF.

1. A bailiff is bound to make an affidavit of the ſervice of proceſs. *The King* v. *Rudge.* 695

BANKRUPT.

1. An action will lie for ſuing out a malicious commiſſion of bankrupt, notwithſtanding the ſpecific ſum of 200l. which the chancellor is authorized by the ſtatute

to allow. *Brown* v. *Chapman*. *Chapman* v. *Pickersgill*. 31

2. An affidavit of debt by the aſſignees of a bankrupt (the bankrupt refuſing to make it) as appears to them by the laſt examination of the bankrupt, and as they verily believe, is ſufficient to hold to bail. *Barclay* v. *Hunt*, 523. *Tonna* v. *Edwards*, 775. *Swaine* v. *Crummond*. 523

3. A bond payable by inſtalments, given in conſideration that the obligee would marry and ſettle a ſmall eſtate upon a ſervant maid, and alſo maintain a baſtard of the obligor, may be proved under a commiſſion of bankrupt againſt the obligor. Ex parte *Cotterell*. 324

4. If a creditor refuſes to ſign the certificate, unleſs the bankrupt conſents to give him a ſum of money, and the bankrupt gets the money from a friend or relation, and the creditor, in conſequence, ſigns the certificate, although the bankrupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may, notwithſtanding, bring his action, and recover the money back. *Smith* v. *Bromley*. 244

5. And, though the ſecurity be given for the benefit of all the creditors, it will make no difference. *Jones and another aſſig. of Gardiner* v. *Barkley*. 245

6. If all the creditors of an inſolvent conſent to accept a compoſition for their demands upon an aſſignment of his effects by a deed of truſt, to which they all are parties, and one of them before he executes, obtain from the inſolvent a promiſſory note for the reſidue of his demand, by refuſing to execute till ſuch note be made, the note is void in law, as a fraud on the reſt of the creditors; and a ſubſequent promiſe to pay it, is a promiſe without conſideration, which will not maintain an action. *Cockſhot* v. *Bennet*. 247

7. For no ſubſequent promiſe can ſet up a ſecurity which is void at its creation. *Ibid.*

8. If it be only voidable, like a ſecurity given by an infant, it may be revived by a ſubſequent promiſe. *Ibid.*

9. The like point. *Cockſhott* & al. v. *Bennet* & al. 247

10. The like point. *Jackſon* & al. v. *Lomas*. 247

11. The like point. *Nerot* v. *Wallace and others, aſſig. of Reily and Collins*. 248

12. But a bankrupt, after a commiſſion of bankruptcy ſued out, may, in conſideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend under the commiſſion, make ſuch creditor a ſatisfaction in part or for the whole of his debt, by a new undertaking or agreement; and aſſumpſit will lie upon ſuch new promiſe or undertaking. *Trueman* v. *Fenton*, 250. *Cockſhott* v. *Bennet*. 247

13. So, where an inſolvent debtor, who had been diſcharged under the inſolvent act of 1781, gave a note for a debt which had accrued before his diſcharge, it was held to be good. *Beſt* v. *Barber*. 252

14. And an agreement by a friend of a bankrupt, to pay all his creditors their full debts, in conſideration that they will not proceed any farther under the commiſſion, is good in law. *Kaye* v. *Bolton*. 550

15. If a ſurety bound with his principal for payment of money by inſtalments, take a bond from the principal conditioned for payment of the amount of the inſtalments before the firſt of them will be

be due, and before that time the principal become bankrupt, and obtain his certificate, and afterwards the inſtalment-bond is diſcharged by the ſurety, ſtill he cannot maintain an action againſt the principal for money paid to his uſe. *Touſaint* v. *Martinant.* 321

16. Aſſignees of a bankrupt having received 1500l. from a debtor to the bankrupt, as a debt due to his eſtate, and having commenced an action againſt him for a further demand on the ſame account, to which he had only pleaded the general iſſue, agreed with him to refer all matters in difference between the parties in the cauſe to arbitration: held that the arbitrator has power to award that the aſſignees ſhall repay a part of the ſum already received *in ſolido*, if it appear to have been paid by miſtake. *Malcolm* v. *Fullarton.* 732

BANK NOTES.

1. A tender of bank notes is good, unleſs ſpecially objected to on that account at the time. *Wright* v. *Reed.* 605

BARON AND FEME.

1. Aſſumpſit will lie for a loan to the wife at the requeſt of the huſband. *Stephenſon* v. *Hardinge.* 302

2. If a bond be given to huſband and wife adminiſtratrix, the huſband alone may declare on it as on a bond made to himſelf. *Ankerſteen* v. *Clarke.* 346

3. If a woman be ſuffered to live as a proſtitute, with the privity of her huſband, and a man is thereby drawn into *crim. con.* and the huſband brings an action, it will not lie. *Smith* v. *Alliſon.* 182

4. If the huſband conſent to the infidelity of his wife, it takes away altogether the ground of the action; and if he has been only guilty of groſs negligence or inattention to her conduct, it will go far in mitigation of damages. *Duberly* v. *Gunning.* 182

5. Neither can any action for *crim. con.* be maintained for any act of adultery, after a ſeparation between huſband and wife. *Weedon* v. *Timbrell.* 183

6. And to ſupport an action for criminal converſation with the plaintiff's wife, the plaintiff muſt bring proof of an actual marriage. *Morris* v. *Miller.* 183

7. But proof of a marriage in fact, may be made either by a copy of the regiſter, or by the teſtimony of one who was preſent at the ceremony: and it is not neceſſary to call one of the ſubſcribing witneſſes to prove the identity of the perſons married; for a copy of the regiſter is ſufficient evidence of the marriage in fact between perſons of the deſcription there mentioned; and any evidence which ſatisfies the jury as to the identity of the plaintiff and his wife being the perſons married, is ſufficient, as if the hand-writing of the huſband and wife to the regiſter is proved; or bell-ringers came to the parties, and ſaid they rung for the wedding, and were paid by them; or people dined at the wedding-dinner, or other circumſtances to aſcertain the perſons. *Birt* v. *Barlow.* 184

8. This action is conſidered as an action on the caſe, and not of treſpaſs; and the plaintiff is entitled to full coſts, though he recover leſs than 40s. *Weedon* v. *Timbrell.* 186

BILL OF EXCHANGE.

1. An agreement to accept may amount to an acceptance. *Maſon* v. *Hunt.* 537

2. Such agreement may be ſo expreſſed, as to put an indorſee in a better ſituation than the drawer. 537

3. But an agreement to accept on certain conditions is diſcharged, if the conditions are not complied with. *Ibid.*

4. If there is a virtual acceptance in conſideration that goods ſhall be conſigned to the acceptor to anſwer the bill, together with a policy on them, the holder of the bill by taking to the goods and ſelling them himſelf diſcharges the acceptor. *Ibid.*

5. An attorney does not loſe his privilege by accepting a bill of exchange. *Comerford* v. *Price.* 1

BOND.

1. Principal and intereſt due on bonds conditioned for payment of monies by inſtalments, may be paid into court. *Bonafous* v. *Rybot.* 367

2. A bond for cohabitation with a woman, ſeduced by the obligor, and for maintenance after his death, is void in law. *Walker* v. *Perkins.* 325

3. A bond to reimburſe a compounder of difference of ſtocks, half of what he has paid for himſelf, and a perſon jointly concerned in the contracts compounded, is not void. *Faikney* v. *Reynous.* 325

4. A bond of thirty years ſtanding cannot be read in evidence, if no payment of intereſt, or other marks of authenticity. *Forbes* v. *Wall.* 362

5. On a bond to pay intereſt half yearly, and the principal in three years; judgment ſhall be entered on failure of paying intereſt, but with ſtay of execution on diſcharging it. *Marſen* v. *Touchet.* 366

6. When a defendant is charged in execution with the penalty of a bond, it may be reduced to the principal and intereſt, and intereſt due on a note of hand, for which no damages were given by the verdict, ſhall not be covered by this penalty. *Amery* v. *Smalbridge.* 365

7. A defendant cannot take advantage of a void condition in a bond, without praying over and pleading it. *Colton* v. *Goodridge.* 347

8. In debt on bond, plea of payment before the day, is ill. *Anonymous.* 349

9. A bond for performance of covenants in an agreement, is only a ſecurity to the extent of the penalty. *White* v. *Scaly.* 363

10. But in a ſubſequent caſe in an action on a bond of indemnity it was held, that damages may be recovered for more than the penalty. *Ld. Lonſdale* v. *Church.* 363

11. As where the bond was with condition to account for money to be received, the Court would not ſtay proceedings upon paying the penalty into court. *Ibid.*

12. However, the laſt caſe has been ſince overruled, and the Court ordered ſatisfaction to be entered on the record in an action on a bond of indemnity, on the defendants paying the penalty of the bond, and the coſts of the action. *Wilde* v. *Clarkſon.* 364

13. If an inſtalment of an annuity ſecured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law. *Judd* v. *Evans.* 366

14. If the condition of a bond is, that a ſervant ſhall not embezzle any money that ſhall come to his hands on account of his maſter, it is neceſſary for the obligee in an action on the bond to ſhew in his replication ſome particular ſum or ſums embezzled, and how or from whom he received the ſame. *Jones* v. *Williams.* 345

15. The condition of a bond being

being to render a fair, juſt, and perfect account in writing, of all ſums received by the obligor, neglect to pay over ſuch ſums, is a breach of the condition. *Bache* v. *Proctor.* 345

16. The circumſtance of twenty years having elapſed without any demand made, is of itſelf a preſumption that a bond has been ſatisfied. *Oſwald* v. *Legh.* 347

17. A bond with a condition that a clerk ſhall faithfully ſerve and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk in the ſervice of the executors of the obligee, who continue the buſineſs, and retain the clerk in the ſame employment, with the addition of other buſineſs, and an increaſe of ſalary. *Barber* v. *Parker.* 333

18. But a bond for the fidelity of a clerk, who was taken into the ſervice of the obligees, as a clerk in their ſhop and counting-houſe, is not diſcharged by the obligees taking another partner into their houſe, and the obligees may recover money received by the clerk after ſuch change of partners. *Barclay* v. *Lucas.* 335

19. Under a bond of indemnity given by *A.* that *B.* who was appointed the general agent of *C.* the receiver of his rents, and the manager of his eſtates, ſhould pay over to *C.* all rents which he ſhould receive, as alſo the increaſe and improvements thereof upon any new contracts or renewals of leaſes, *A.* is anſwerable for all fines received by *B.* on renewing the leaſes which were not paid over by him. *Iriſh Society* v. *Needham.* 337

20. A bond given by an incumbent to the patron on preſentation, to reſide on the living, or to reſign if he do not return to it after notice, and alſo not to commit waſte, &c. on the parſonage-houſe is good. *Bagſhaw* v. *Boſley.* 326

21. In ſuch caſe a licence to the incumbent to abſent himſelf from the living, may be revoked. *Ibid.*

22. In conſideration that *A.* would take *B.* as an aſſiſtant in buſineſs as a ſurgeon, for ſo long time as it ſhould pleaſe *A.*; *B.* agreed not to practiſe on his own account for fourteen years, within ten miles of the place where *A.* lived, and gave a bond for this purpoſe; this bond was held good in law. *Davis* v. *Maſon.* 328

23. To debt on bond, conditioned for the payment of a certain ſum at a certain day, defendant pleaded that by articles of agreement between the plaintiff, her ſiſter, and the defendant, the intereſt of the money was to be paid to one of the ſiſters upon an event which had happened: but as the plea did not allege the payment of the intereſt, accordingly it was holden bad. *Baldee* v. *Elers.* 352

24. A bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if ſhe ſhould ſurvive, is not releaſed by their marriage. *Milbourne* v. *Ewart.* 353

25. A bond given by a ſervant of the African Company conditioned to take poſſeſſion of the effects of perſons dying inteſtate in one of their ſettlements on the coaſt of Africa, and ſell the ſame, and remit the produce to the Company in Europe, to be by them delivered to the lawful adminiſtrator, is a legal bond. *African Comp.* v. *Torrane.* 329

BREAKING OPEN OF DOORS.

1. A bailiff may break open the doors

door of a lodger, having firſt gained peaceable entrance at the outer door of the houſe. *Lee* v. *Gurnſell.* 662

2. So alſo may bail to ſurrender their principal. *Sheers* v. *Brooks.* 796

BRINGING GOODS INTO COURT.

1. Allowed under ſome circumſtances in trover. *Fiſher* v. *Prince.* 157

2. Alſo in treſpaſs. *Pickering* v. *Truſte.* *Vide* APPENDIX.

BUYING AND SELLING OFFICES.

1. Aſſumpſit to pay plaintiff 2l. *per cent.* to procure a purchaſor of plaintiff's place of ſurveyor of the baggage of the port of London, is bad and contrary to the ſtatute againſt ſale of offices. *Stackpole* v. *Earle.* 272

2. *A.* being poſſeſſed of an office in a dock-yard, *B.* in order to induce him to procure himſelf ſuperannuated, and retire on the uſual penſion, agrees without the knowledge of the navy-board, to whom the appointment belongs, in caſe *B.* ſhould ſucceed him in office, to allow him a certain annual ſhare of the profits. *A.* retires, *B.* is appointed to ſucceed him, but does not perform the agreement; *A.* can maintain no action againſt *B.* on the agreement. *Parſons* v. *Thomſon.* 265

3. *A.* by the intereſt and on the application of *B.* to the lords of the treaſury, is appointed cuſtomer of a port, having previouſly entered into an agreement, declaring that his name was uſed in the application in truſt for *B.*; that he would appoint ſuch deputies as *B.* ſhould nominate; and would empower *B.* to receive the profits of the office to his own uſe; on the failure of *A.* to comply with the agreement; no action will lie upon it againſt him. *Garforth* v. *Fearon.* 267

BY-LAW.

1. A by-law requiring the indentures of apprenticeſhip of ſuch who are bound apprentices to freemen to be inrolled within four months from the date, in order to intitle themſelves to their freedom, ſeems good. *Rex* v. *Marſhal.* 553

CARRIER.

1. Caſe and not trover lies againſt a wharfinger or common carrier for goods ſtolen or loſt. *Roſs* v. *Johnſon and Dowſon.* 149

2. In an action upon the caſe, on the cuſtom of the realm, againſt a common carrier, for not ſafely conveying goods, the defendant may plead, in abatement, that the goods mentioned in the declaration, were delivered to, and received by, the defendant and others jointly, they being partners in the trade or buſineſs of a carrier, and not by the defendant ſolely, averring that thoſe other perſons are living. *Buddle* v. *Wilſon.* 2. 9

3. A common carrier is by the nature of his contract liable for all due care and diligence; and for any negligence he is liable on his contract. *Forward* v. *Pitward.* 57

4. There is alſo a further degree of reſponſibility by the cuſtom of the realm; that is, by the common law, a carrier is in the nature of an inſurer: he is liable for every accident, except by the act of God, or the king's enemies: and although the jury find that the goods were deſtroyed without any actual negligence in the carrier, he is liable for any inevitable accident, as by a fire happening at a diſtance, and afterwards communicating with his warehouſe. *Ibid.*

5. So

5. So where an action was brought againſt a maſter of a ſhip to recover the value of ſome goods put on board his ſhip, in order to be carried to St. Sebaſtian; it was proved that an irreſiſtible force broke into the ſhip in the river Thames, and ſtole the goods; yet the defendant was held anſwerable. *Barclay* v. *Heygena.* 58

6. But if the goods be ſafely conveyed to the place of their deſtination, and the direction be, that they be there kept until they can be forwarded to another place, the carrier will not be anſwerable if they are deſtroyed in the intermediate time. *Garſide* v. *Trent and Merſey Nav.* 58

7. And a common carrier is bound to deliver goods, if it has been the uſual and accuſtomed courſe of his trade to do ſo. *Golden* v. *Manning and Peyton.* 59

8. It alſo ſeems from what was ſaid by the judges in a more recent caſe, that a carrier who undertakes to carry goods generally to ſuch a place, is bound to deliver them to the reſpective individuals to whom they are directed in ſuch place, and cannot ſatisfy his engagement, merely by taking them to the inn or other place where he happens to put up. *Hyde* v. *Trent and Merſey Nav.* 60

9. But it ſeems, according to the opinions of *Buller*, J. and *Groſe*, J. *contra* Lord *Kenyon*, Ch. J. that, in reſpect of goods brought by water-carriage, the delivery thereof on the uſual wharf is ſuch a delivery as will diſcharge the carrier. *Ibid.*

10. But if a carrier accepts the goods ſpecially, he ſhall be anſwerable no further than he undertakes. *Gibbon* v. *Paynton*, & al. 63

11. And if a common carrier gives notice, that caſh, plate, jewels, writings, or any ſuch kind of valuable articles will not be accounted for if loſt, of more than the value of a ſpecified ſum, unleſs they be entered as ſuch, and paid for accordingly; he will not, on a loſs of goods of that deſcription, delivered to him by one who knows his terms, but conceals the value, and pays no more than the ordinary price of carriage and booking, be liable either to the extent of the ſum ſpecified, nor to repay the price actually paid for the carriage or booking. *Clay* v. *Willan and others.* 65

12. An action againſt a common carrier, for not delivering goods ſent by him may be brought in the name of the conſignor. *Davis and Jordan* v. *James.* 66

13. And though the declaration ſtate, that the carrier undertook to carry the goods for a certain hire and reward, to be paid by the conſignor, and it be proved at the trial that the conſignee agreed with the conſignor to pay the carriage, it will be no variance. *Moore and others* v. *Wilſon.* 66

CASE.

1. An action on the caſe for a miſfeazance in office will lie againſt the deputy if he is a ſubſtantive officer, as well as againſt the principal. *Rowning* v. *Goodchild.* 38

2. All actions for breach of duty in the office of ſheriff muſt be brought againſt the high ſheriff, though the default be by the under ſheriff or bailiff. *Cameron* v. *Reynolds.* 38

3. An action on the caſe lies for ſuing plaintiff in an inferior court maliciouſly, and arreſting him, when that court had no juriſdiction of the cauſe. *Goſling* v. *Wilcock.* 31

4. The difference between caſe and treſpaſs. *Gates* v. *Bayley.* 196

5. Caſe does not lie at common law

law againſt a commanding officer in the army for reducing a non-commiſſioned officer (ſuch as a ſerjeant) to the degree of a private, if it be out of the king's dominions. *Barwis* v. *Keppel.* 36

6. An action does not lie againſt the juſtices of the peace, for refuſing to grant a licence to keep an alehouſe. *Baſſet* v. *Godſchal.* 39

7. It ſeems that an attorney is not anſwerable for any loſs his client may ſuſtain upon account of a mere involuntary, undeſigned miſtake in a nice point of practice. *Ruſſel* v. *Palmer.* 39

8. But if the client ſuſtains any loſs in conſequence of any groſs neglect, miſmanagement, ignorance, or corruption of the attorney, he ſhall recover damages in an action on the caſe. *Pitt* v. *Yalden.* 40

9. Thus where the attorney neglected to charge a defendant in execution, an action was held well to lie for ſuch negligence. *Ruſſel* v. *Palmer.* 40

10. But the jury ought to be left to find what damages they pleaſe, for the whole debt might not be recoverable, the party not totally inſolvent, or the like. *Ruſſel* v. *Palmer*, & *Pitt* v. *Yalden.* 40

11. And although in ſome caſes the court may, upon motion, proceed in a ſummary way againſt the attorney, yet, unleſs it is a very clear caſe, the court will not interfere, but leave the party to bring his action. *Pitt* v. *Yalden.* 40

12. An action may be maintained againſt the governor of any Britiſh ſettlement on his return to England, for an injury done by him under the colour of his authority. *Moſtyn* v. *Fabrijas.* 41

13. The like point. *Sutherland* v. *Murray.* 44

14. And a perſon repreſenting the king in all functions, civil and military, ſhall anſwer for an abuſe of his authority, though the act complained of was in itſelf legal, if it appears to have been aggravated by unneceſſary cruelty, malice, and oppreſſion. *Wall* v. *Macnamara.* 44

15. The like point. *Swinton* v. *Molloy.* 45

16. The poſt-maſter is obliged to deliver the letters ſent by the general poſt at the reſpective habitations of the perſons reſiding in the poſt-town, to whom ſuch letters are addreſſed, for the mere rate or prices ſettled by act of parliament; and for a refuſal or neglect ſo to do, an action will lie. *Stock* v. *Harris*, 46. *Rowning* v. *Goodchild*, 48. *Smith* v. *Powditch*, 50, 51. *Barnes* v. *Foley.* 51

17. But an action will not lie againſt the poſt-maſter general for any loſs or damage that may happen through the negligence or diſhoneſty of any perſons employed under him to conduct and carry on the buſineſs of the office. *Whitfield* v. *Lord Le Deſpenſer.* 53

18. An action on the caſe will lie againſt the commiſſioners of the lottery for a miſfeaſance in the diſcharge of their duty, for they are mere miniſterial officers. *Schinotti* v. *Bomſted and others.* 56

19. Wherever there is a ſuppreſſion of truth, in a return to a mandamus, and the party is thereby injured, he may maintain an action; and although a return be true in words, yet if it is falſe in ſubſtance, an action will lie. *The King* v. *Lyme regis.* 56

20. An action on the caſe will lie againſt the bank of England for refuſing to permit a transfer of ſtock to be made. *The King* v. *the Bank of England.* 56

11. In all caſes where a damage accrues to another by the negligence,

gence, ignorance, or miſbehaviour of a perſon in the duty of his trade or calling, an action on the caſe will lie. 67

21. Therefore, if a ſurgeon tries an experiment on a ſubject, and therein acts contrary to the uſual and common courſe of practice among ſurgeons; if the perſon be damnified by ſuch act, he may maintain an action on the caſe. *Slater* v. *Baker and Stappleton.* 68

22. But, where an action on the caſe is brought for a nonfeaſance, it muſt appear on the face of the declaration, that there was a conſideration, or a promiſe and contract on the behalf of the defendant to do the particular thing, for the non-performance of which the action is brought. *Elſee* & al. v. *Gatward.* 69

23. And if a perſon undertake to perform an act gratuitouſly, not being in a buſineſs in which he is particularly ſkilled, he ſhall not be anſwerable for any damage that may happen if he act *bona fide*, according to the beſt of his knowledge. *Shiells* v. *Blackburne.* 72

24. An action on the caſe will lie for an injury done to premiſes, by raiſing the pavement of a ſtreet, though done under the authority of the commiſſioners for paving, if the commiſſioners have therein exceeded their juriſdiction. *Leader* v. *Moxon.* 74

25. But, without an actual exceſs of juriſdiction, no action can be mainiained for any damages occaſioned by the act of the commiſſioners of paving, or the paviours acting under them. *Britiſh Caſt Plate-glaſs Manufacturers* v. *Meredith.* 75

26. An action on the caſe, in the nature of waſte, will lie againſt a tenant for years after the expiration of his term, for dilapidations committed during the term. *Kinlyſide* v. *Thornton.* 77

27. In an action for ſtopping and obſtructing the plaintiff's lights, *Wilmot*, J. ſaid, that where a houſe has been built forty years, and has had lights at the end of it; if the owner of the adjoining ground builds againſt them, ſo as to obſtruct them, an action lies. *Lewis* v. *Price.* 77

28. And a reverſioner, as well as the party in poſſeſſion, may bring an action for an injury done to the value of the inheritance. *Jeſſer* v. *Gifford.* 78

29. But no action will lie againſt a ſteward, manager, or agent, for damages done by the negligence of thoſe employed by him in the ſervice of his principal; but the principal, or thoſe actually employed, are only liable. *Stone* v. *Cartwright.* 78

30. An action on the caſe will lie for diſturbing another in a right, which is annexed to a right of common. *Bean* v. *Bloom.* 79

31. In an action on the caſe, by one commoner againſt another, for a diſturbance of his right of common, the plaintiff in his declaration may ſhew his own particular right of common, and charge, in general, that the defendant, wrongfully and injuriouſly eat up, depaſtured, and ſpoiled the graſs. *Atkinſon* v. *Teaſdale.* 81

32. And one commoner may maintain an action againſt another for ſurcharging the common, notwithſtanding he may himſelf have ſurcharged it. *Hobſon* v. *Todd.* 82

33. If a man turn his cattle into black-acre, where he has no right, and they ſtray into my field for want of fences, he cannot excuſe himſelf,

himſelf, or juſtify for his cattle treſpaſſing in my field. 213

34. If a man who has a right of common upon the lord's waſte, for cattle levant and couchant on his land, ſurcharge the common, the lord cannot for that cauſe diſtrain. 213

35. A commoner cannot juſtify cutting down trees planted by the lord on the waſte, although there be not a ſufficiency of common left; but his remedy is by action on the caſe, or by aſſize. *Sadgrove* v. *Kirby*. 213

36. The right of commoners in a common may be ſubſervient to the enjoyment of the common by the lord. *Folkard* v. *Hemmett*. 214

37. Pleadings reſpecting rights of common. *Clarkſon* v. *Woodhouſe*, 215. *Bateſon* v. *Green*, 217. *Dunſtan* v. *Treſider and another*, 218. *D'Ayrolles* v. *Howard*, 219.

38. A right to take a profit in *alieno ſolo*, cannot be ſet up under a cuſtom, it can only be claimed by preſcription. *Grimſtead* v. *Marlowe*. 218

CERTIFICATE.

1. A certificate by a rector to the biſhop, appointing a curate of his church, promiſing to allow him a ſalary and to continue him in office till preferred or removed, is no contract with the biſhop, but merely information to him of a matter of fact; the contract is with the curate. *Martyn* v. *Hind*. 292

2. If the biſhop ordains ſuch curate in the above certificate, it is a licence within the intent and meaning of the canon law. *Ibid.*

COMPOUNDING PENAL ACTIONS.

1. When leave is given to compound, the king's ſhare is to be paid into the hands of the maſter of the crown office. *Brown* q. t. v. *Bailey*. 431

2. A popular indictment cannot be compounded after conviction. *Brery*, q. t. v. *Levy*. 431

COMPOSITION.

1. An agreement between a debtor and his creditors, that they will accept a compoſition in ſatisfaction of their reſpective debts, to be paid in a reaſonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. *Heathcote* v. *Crookſhanks*. 307

CONDITION PRECEDENT.

1. No preciſe technical words are required in order to make a ſtipulation or condition precedent or ſubſequent, neither does it depend upon its being prior or poſterior in the deed; but it muſt depend on the nature of the contract, and the acts to be performed by the contracting parties. *Hotham* v. *Ea. Ind. Co.* 401

See alſo the caſes from p. 396 to 403.

CONTRACT.

1. There are two ſorts of prohibitions in reſpect of contracts. 1ſt, To protect weak or neceſſitous men from being overreached; and here the rule *in pari delicto potior eſt conditio defendentis*, does not hold. 2dly, Prohibitions founded upon reaſons of public policy, in which the above rule does hold. *Clarke* v. *Shee*. 239

2. The above doctrine exemplified. *Browning* v. *Morris*. 241

3. Aſſumpſit for money had and received lies when a payment has been made on a conditional contract which has been put an end to. *Towers* v. *Barrett*. 135

4. Where goods are delivered under an agreement to take a ſpecific parcel

parcel of copper money in payment; a delivery of the ſame copper will be a good bar to an action for the value of the goods, though in fact it was counterfeit money. *Alexander* v. *Owen.* 555

See alſo ASSUMPSIT COVENANT.

CONSIDERATION.

1. Conſideration failing, contract void and no action maintainable thereon, 115, 233, 651.

CONSIGNMENT.

See CARRIER.

COPYHOLD.

1. The lord of a manor may maintain an action againſt an infant copyholder, when he comes of age, for the fine due on his admittance during his nonage. *Evelyn* v. *Chicheſter.* 254

2. Aſſumpſit will lie for copyhold fines. *Whitfield* v. *Hunt*, 253. *Aſſle* v. *Grant*, 255.

COPYRIGHT.

1. The copyright of authors conſidered and aſcertained. *Millar* v. *Taylor.* 116

See AUTHORS. Alſo the caſe of *Beckford* v. *Hood*, in the APPENDIX.

COSTS.

1. In an action for entering plaintiff's dwelling-houſe, and making great noiſe till defendant compelled plaintiff to give him a promiſſory note; the jury giving only a guinea damages, no more coſts than damages were allowed. *Appleton* v. *Smith.* 224

2. *Secus* if the treſpaſs had been juſtified. *Redridge* v. *Palmer.* 224

3. Coſts were allowed on an attachment for contempt, where it appeared clear that the proſecutor muſt within his own knowledge have been ſatisfied that his complaint was ill-founded. *Rex* v. *Plunket.* 697

4. If coſts have been incurred in the courſe of the proceedings, the bail cannot get their recognizance diſcharged without payment of them. *Rex* v. *Lyon.* 778

5. In an action for words, if they be in themſelves actionable, and leſs damages than 40s. are given, there ſhall not be full coſts, unleſs there be a colloquium and ſpecial damage laid. *Surman* v. *Shelleto.* 29

6. In action for words with ſpecial damage and verdict for it, if the words are in themſelves actionable, no more coſts than damages. *Collier* v. *Gaillard.* 29

7. But if the words *are not actionable* in themſelves, there ſhall be full coſts. *Savile* v. *Jardine*, 29. *Collier* v. *Gaillard.* 29

8. In actions of treſpaſs for *crim. con.* with the plaintiff's wife, the plaintiff is entitled to full coſts though the damages are under 40s. *Batchelor* v. *Biggs.* 186

2. Coſts of ſuit on a rule of reference muſt be common coſts unleſs ſpecially ordered otherwiſe. *Barker* v. *Tibſon.* 737

10. In treſpaſs for breaking free warren, though the damages be under 40s. the plaintiff ſhall have full coſts. *Lord Ducre* v. *Tebb.* 227

11. The plaintiff recovering on one count ſhall have coſts of the whole declaration. *Norris* v. *Waldron.* 227

12. Coſts on a rule of reference are coſts as between party and party, not as between attorney and client. *Marder* v. *Cox.* 737

13. The plaintiff is entitled to no more coſts than damages in treſpaſs for an aſſault and battery *and tearing the plaintiff's clothes*, if the jury find that the tearing was in conſequence of the beating, and give leſs than 40s. damages. *Cotterill* v. *Jolly.* 160

14. Alſo if plaintiff recover leſs than

than 40s. damages on a count alleging that the defendant aſſaulted him *and then and there* tore the clothes, he is entitled to no more coſts than damages. *Lockwood* v. *Stannard.* 162

15. The like point in *Morris* v. *Greenaway.* 161

16. In treſpaſs for an aſſault and battery where the defendant juſtifies the aſſault only, and the plaintiff obtains damages under 40s. and the judge does not certify, the plaintiff is entitled to no more coſts than damages. *Page* v. *Creed.* 162

17. But if to an action for an aſſault and battery, the defendant plead the general iſſue and a juſtification to the whole, and the plaintiff obtain a verdict, with damages under 40s. the plaintiff is entitled to full coſts. *Smith* v. *Edge.* 162

18. The like point determined in an action of treſpaſs for breaking the plaintiff's cloſe, when the whole treſpaſs was juſtified. *Redridge* v. *Palmer.* 226

19. Same point. *Comer* v. *Baker.* 226

20. If it appear on the trial that the treſpaſs, however ſmall, was committed after notice, and the jury give leſs than 40s. damages, the judge is bound under the ſtat. 8. & 9. W. 3. c. 11. § 4. to certify that the treſpaſs was wilful and malicious, in order to entitle the plaintiff to full coſts. *Reynolds* v. *Edwards.* 228

21. In treſpaſs for throwing ſtones and breaking the plaintiff's windows, if the plaintiff recover leſs than 40s. damages, he is not entitled to more coſts than damages, unleſs the judge certifies that the title came in queſtion. *Adlem* v. *Greenaway.* 226

22. The bail to the action are not liable to pay the coſts of a writ of error. *Yates* v. *Doughan.* 781

23. Where there are many defendants, one of whom goes to trial and obtains a verdict, but others ſuffer judgment by default; the damages and coſts on the judgment by default may be deducted from the coſts taxed to thoſe defendants who obtained a verdict. *Schoole* v. *Noble.* 715

24. How far B.R. hold that an attorney has a lien for his bill of coſts. *Welſh* v. *Hole*, 710. *Griffin* v. *Eyles*, 710. *Mitchell* v. *Oldfield*, 711. *Morland* v. *Laſbly*, 712. *Read* v. *Dupper*, 712. *Randle* v. *Fuller.* 713

25. How far C.B. *Barker* v. *Braham*, 714. *Schoole* v. *Noble*, 715. *Nines* v. *Modigliani*, 715. *Dennie* v. *Elliott.* 715

COVENANT.

1. An expreſs covenant ſhall bind to performance. *Shubrick* v. *Salmond.* 376

2. A party may either receive the penalty, and reſcind the contract, or bring an action on the covenant, and let the contract ſtand. *Winter* v. *Trimmer.* 418

3. Money allowed to be paid into court on a ſpecial breach aſſigned in an action of covenant where the damage is aſcertained, not otherwiſe. *Fullwell* v. *Hall.* 418

4. *Non infregit conventionem* is not an iſſuable plea to a breach of covenant aſſigned in the negative. *Boone* v. *Eyre.* 393

5. If one party covenants to do one thing, the other party doing another, this is not a condition precedent, but a mutual covenant, and one cannot be pleaded in bar of the other. *Ibid.*

6. Covenant as heir, and breach aſſigned for want of repairs on a leaſe for years; plea that leſſor was only tenant for life, and traverſes that the reverſion was in him and his heirs good. *Brudnell* v. *Roberts.* 407

7. In

7. In what caſe aſſumpſit will lie, as well as covenant. *Foſter* v. *Allanſon*, 368. *Moravia* v. *Levy*. 369

8. If a mortgagor and mortgagee of leaſehold premiſes make an under-leaſe of the mortgaged premiſes, in which the covenants are only with the mortgagor and his aſſigns, the aſſignee of the mortgagee, if he has alſo taken an abſolute conveyance of the reverſion in fee, cannot maintain an action for the breach of the covenants in the under-leaſe, becauſe the original term is merged in the fee, which he has acquired, and the covenants in the under-leaſe are only collateral to the grantor's intereſt in the land, and do not run with it. *Webb* v. *Ruſſel*. 369

9. But in the above caſe, if the action had been brought by the mortgagor, it might have been ſuſtained, becauſe the covenants with him, on the part of the leſſee, were expreſs. *Stokes* v. *Ruſſel*. 372

10. The defendant in the above caſe afterwards brought a writ of error in the Exchequer Chamber, and aſſigned for errors, "That by the declaration it appeared, that the ſeveral covenants were made by the plaintiff in error with *Stokes*, the defendant in error, in reſpect of the eſtate and intereſt of the ſaid *Stokes*, in the ſaid demiſed premiſes, and it did not appear thereby that the ſaid covenants were made with the ſaid *Stokes*, or that the action was brought by him in truſt for any other perſon; and although it was ſtated in and by the ſeveral pleas, that the eſtate and intereſt of the ſaid *Stokes*, in the ſaid premiſes, in reſpect of which the ſaid covenants were ſo made, became, and was wholly ended and determined before the breaches of covenant in the ſaid declaration mentioned; yet by the record, it is adjudged, that thoſe pleas and matters are not ſufficient in law to bar the ſaid *Stokes*, the defendant in error, from having and maintaining his action, &c. The judgment of B.R. affirmed. *Ruſſel* v. *Stokes*. 373

11. An expreſs covenant ſhall bind to performance. *Shubrick* v. *Salmond*. 376

12. Where there is an expreſs covenant on the part of the tenant to pay the rent, the conſequence of the houſe being burned down, is, that the landlord is not obliged to rebuild, but the tenant is obliged to pay the whole rent during the term. *Belſour* v. *Weſton*. 377

13. And in an action of covenant, uncertain damages cannot be ſet off. *Weigall* v. *Waters*. 378

14. In an action of covenant on a leaſe, the covenant for repairs was, that the leſſee would during the term repair without any exception as to fire; held, that on a general covenant like this, the leſſee is bound to rebuild. *Bullock* v. *Dommit*. 378

15. So in an action of covenant, for not upholding and keeping in repair a bridge: the plea was that the bridge by the act of God was deſtroyed; held, that as the defendants had not excepted any loſs of any kind, they were anſwerable. *Brecknock and Abergavenny Canal Navigation* v. *Pritchard*. 379

16. If in the firſt covenant in the leaſe to joint leſſees, the leſſees covenant, for themſelves jointly and ſeverally, and for their ſeveral and reſpective heirs, executors, and adminiſtrators, it extends to all the ſubſequent covenants on the part of the leſſees throughout the deed, unleſs there be ſomething in the nature of the ſubject to reſtrain them to the former part of the leaſe. *Duke of Northumberland* v. *Errington*, 379

17. It

17. It is not neceſſary in an action upon the covenant for peaceable enjoyment, that the party againſt whom it is brought ſhould have a title; it is ſufficient if he does the act under a claim of one. *Lloyd* v. *Tomkies.* 381

18. Againſt whom the action may be brought on a covenant for peaceable enjoyment. *Hurd* v. *Fletcher.* 382

19. But though a covenant for peaceable enjoyment is conceived in the moſt general terms, it ought to be reſtrained to lawful interruptions. *Dudley* v. *Folliot.* 383

20. A covenant in reſtraint of marriage is illegal and void; ſuch as an agreement not in fact to marry the plaintiff, but not to marry any one elſe. *Lowe* v. *Peers.* 386

21. Where one party cannot legally perform his part of the covenant, he cannot call upon the other for the breach of the agreement. *Gallini* v. *Laborie.* 388

22. There is a difference between covenants in general and covenants ſecured by a penalty or forfeiture. In the latter caſe, the obligee has his election; he may either bring an action of debt for the penalty, and recover the penalty (after which recovery of the penalty, he cannot reſort to the covenant, becauſe the penalty is to be a ſatisfaction for the whole); or if he does not chooſe to go for the penalty, he may proceed upon the covenant, and recover more or leſs than the penalty, *toties quoties. Lowe* v. *Peers.* 388

23. The defendant, in a leaſe, agreed not to cut any tree under a penalty of 500l. and in an action brought on this covenant, and *nil debet* pleaded, there was a verdict for the plaintiff, that the defendant owed the debt, 1s. damages, and 40s. coſts; held that the jury ought to have aſſeſſed the real damages, and a *venire facias de novo* awarded. *Drage* v. *Brand.* 389

24. Where a judgment for a penalty ſhall ſtand as a ſecurity for damages, by the non-performance of covenants. *Goodwin* v. *Crowle.* 389

25. A plaintiff in covenant muſt aſſign the breach of ſuch covenants, as he proceeds to recover the ſatisfaction for: and if the defendant plead to iſſue, and the cauſe goes to a jury for trial, the jury upon trial of ſuch cauſe muſt aſſeſs damages for ſuch of the breaches aſſigned as the plaintiff upon the trial of the iſſues ſhall prove to have been broken. *Hardy* v. *Bern.* 390

26. The like point. *Roles* v. *Roſewell.* 391

27. There are three different kinds of covenants:—Firſt, ſuch as are called *mutual and independent*, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuſe for the defendant to allege a breach of the covenant on the part of the plaintiff. *Kingſton* v. *Preſton.* 392

28. Secondly, There are covenants which are *conditions and dependant*, in which the performance of one depends on the prior performance of another, and therefore till this prior condition is performed, the other party is not liable to an action on his covenant. *Ibid.*

29. Thirdly, There are alſo a third ſort of covenants, which are *mutual conditions to be performed at the ſame time*, and in theſe, if one party was ready, and offered to perform his part, and the other neglected or refuſed to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of

of the other, though it is not certain that either is obliged to do the firſt act. *Ibid.*

30. And the dependance or independence of covenants, is to be collected from the evident ſenſe and meaning of the parties: and however tranſpoſed they may be in the deed, their precedency muſt depend on the order of time in which the intent of the tranſaction requires their performance. *Ibid.*

31. Mutual and independent covenants: what ſhall be deemed ſuch. *Boone* v. *Eyre*, 392. 393. *Campbell* v. *Jones*, 393. *Terry and another* v. *Duntzee*. 395

32. Covenants dependant on the performance of a precedent condition. *Duke of St. Albans* v. *Shore*, 396. *Kingſton* v. *Preſton*, 398. *Goodiſon* v. *Nunn*, 399. *Porter* v. *Shephard*, 399. *Hotham* & al. v. *Ea. Ind. Co.* 401. *Phillips* v. *Fielding*. 402

33. Mutual conditions to be performed at the ſame time: what ſhall be deemed ſuch. *Jones* v. *Barkley*. 404

34. On a diſſolution of partnerſhip, there was a covenant, "that the plaintiff ſhould have a moiety of the goods, and each bear an equal ſhare of the expence of weighing and dividing; but that the plaintiff ſhould ſolely bear the charges and expences of conveying his moiety of the goods to a warehouſe he had taken:" held that the defendant was not bound to deliver, though if he had obſtructed, it would have been a breach. *Stevens* v. *Carrington*. 404

35. In covenant for not permitting the leſſor to enter in the laſt year, and ſow clover, the breach aſſigned was, that the defendant had ſowed without giving him notice; held notice not neceſſary, therefore there was no breach. *Hughes* v. *Richman*. 405

36. If the conduct of a party be a fraud upon the covenant, perhaps a court of equity will give the plaintiff ſome relief; but a court of law cannot get rid of a covenant when it is drawn in clear and explicit terms. *Clifton* v. *Walmeſley*. 406

37. A covenant on the part of the leſſee, his executors and adminiſtrators, is binding on the aſſignee of the leſſee, though he be not named. *Tatem* v. *Chaplin*. 407

38. An action of covenant will not lie againſt an aſſignee of a term, for a breach before the aſſignment. *Churchwardens of St. Saviour's* v. *Smith*. 408

39. Neither will covenant lie at the ſuit of the leſſor againſt an under-leſſee. *Holford* v. *Hatch*. 408

40. But if the whole of a term is made over by the leſſee, although in the deed he reſerves the rent and a power of entry for non-payment to himſelf, and not to the original leſſor, and although he introduce new covenants, the perſon to whom it is made over may ſue the original leſſor or his aſſignee of the reverſion, or be ſued by them, as aſſignee of the term, on the reſpective covenants in the original leaſe. *Palmer* v. *Edwards*. 409

41. Covenant will not lie againſt the mortgagee of a term as aſſignee, unleſs he has taken actual poſſeſſion. *Eaton* v. *Jaques*. 410

42. An aſſignee of a term declared againſt as ſuch, is not liable after he has aſſigned over. *Walker* v. *Reeves*. 411

43. And though the aſſignment be to a feme covert, it is a good diſcharge to the aſſignee. *Barnfather and others* v. *Jordan* & al. 413

44. And in covenant which runs

with the land, evidence that the defendant is in as heir at law, will ſupport a declaration charging him as aſſignee. *Deriſley* & al. v. *Cuſtance.* 413

45. In declaring in an action of covenant, the party muſt not ſet out the deed at length, or the ſuperfluous parts of it. *Dundas* v. *Lord Weymouth.* 415

46. And if more than is neceſſary be inſerted, the Court will refer it to the maſter to ſtrike out the ſuperfluous matter, with coſts. *Price* v. *Fletcher.* 415

47. In aſſigning a breach of covenant for quiet enjoyment, it is ſufficient to allege, that at the time of the demiſe to the plaintiff, *A.* had lawful right and title to the premiſes; and having ſuch lawful right and title, entered, &c. and evicted him, &c. without ſhewing what title *A.* had; or that he evicted the plaintiff by legal proceſs, &c. *Foſter* v. *Pierſon.* 415

48. In an action of covenant, if the plaintiff ſtate, that "he is ſeized in his demeſne as of freehold," it will be bad on a ſpecial demurrer. *Polyblank* v. *Hawkins.* 16

49. Where the defendant pleads *non eſt factum*, he cannot controvert the plaintiff's title; for in that caſe, the iſſue only is, that there is no ſuch deed as ſtated in the declaration. *Friend* v. *Eaſtabrook.* 416

50. A covenant to pay money, which is by deed, cannot be diſcharged without deed. *Rogers* v. *Payne.* 416

51. If a declaration in covenant charges that the parties had ſtipulated by deed to perform a ſpecific thing (as to build two houſes by a certain day), averring that this was done in time; evidence that the time had been enlarged, by parol agreement, will not ſupport the declaration. *Littler* v. *Holland.* 416

COUNTY.

1. No action will lie by an individual againſt the inhabitants of a county for an injury ſuſtained in conſequence of a county bridge being out of repair. *Ruſſell* v. *Men of Devon.* 122

COVERTURE.

See ADULTERY. BARON and FEME. HUSBAND.

COUNTY COURT.

1. Where no action can be brought in the county court, it may be brought in the ſuperior courts: though for leſs than 40s. *Tubb* v. *Woodward.* 312

2. The like point. *Welſh* v. *Troyte.* 311

COURT ROLLS.

1. An attorney ruled to deliver up court books to the ſteward. *Marſhall's* caſe. 726

CURATE.

1. Cannot be removed without cauſe by the rector, who has appointed him by certificate to the biſhop, promiſing to allow him a ſalary and to continue him in the office till otherwiſe provided of ſome eccleſiaſtical preferment, unleſs lawfully removed for any fault. *Martin* v. *Hind.* 290

2. If removed for any fault he ſhould have notice. *Ibid.*

CUSTOM.

1. The occupier of a meſſuage and lands who has common in the lord's waſte, may ſet up a cuſtom to cut ruſhes, as annexed to his right of common. *Bean* v. *Bloom.* 79

2. A cuſtom to take a profit in *alieno ſolo*, is bad; ſuch a right can only be claimed by preſcription. *Grimſtead* v. *Marlowe.* 218

3. If, by an ancient cuſtom, the tenants, inhabitants, and reſiants of and in a manor, are bound to grind

grind all their corn, grain, and malt, which ſhall be by them uſed, or ſpent, ground, within the manor, at a particular mill; an action on the caſe will lie for uſing and ſpending, ground, within the manor, any corn, grain, or malt, ground elſewhere, than at the particular mill; and if ſuch a cuſtom has been eſtabliſhed and confirmed by a decree of the court of exchequer, its reaſonableneſs cannot be afterwards controverted, nor the exiſtence of the cuſtom litigated any further before a jury. *Cort* v. *Birkbeck.* 88

CUSTOMS AND EXCISE.

1. Perſons committed for forcibly reſiſting cuſtom-houſe officers in the execution of their duty, cannot demand to be bailed as of right. *Rex* v. *Dunn.* 760

2. Trover lies againſt cuſtom-houſe officers for ſeizing and carrying to the king's warehouſes goods not ſeizable. *Tinkler* v. *Poole.* 148

DAMAGES.

1. Where the ſum recovered ſhall carry intereſt, and from what time and to what time. *Robinſon* v. *Bland.* 313

2. £250. held not exceſſive damages in an action againſt a ſheriff for a malicious proſecution for nuiſances. *Farmer* v. *Darling.* 31, 37.

3. A common informer cannot have judgment of damages for the detention of the debt, therefore in this caſe the judgment was affirmed as to the recovering of the debt, and reverſed as to the damages and coſts. *Frederick* v. *Lookup.* 424

4. Damages cannot be ſevered, where the count is of a joint treſpaſs, and the jury find the defendants guilty accordingly. *Hill* v. *Goodchild.* 224

DEBT.

1. The action of debt upon a prior judgment oppreſſive. *Biddleſon* v. *Whytel.* 771

2. Wherever a perſon gives a ſecurity by way of indemnity for another, and pays the money, the law raiſes an aſſumpſit; but where he will not rely on the promiſe which the law will raiſe, but takes a bond as a collateral ſecurity, there he has choſen his own remedy, and he cannot reſort to an action of aſſumpſit. *Touſſaint and others* v. *Martinnant.* 321

3. But in this caſe (which was aſſumpſit for money had and received, and plea of non-aſſumpſit) it appeared on the trial, that the defendant, who was captain of an Indiaman, had borrowed of one Cox 1000l. upon two reſpondentia bonds of 500l. each, and in the preſence of Cox, ſigned thereon an indorſement, whereby he declared, if Cox ſhould chooſe to aſſign it to any perſon, he thereby acknowledged, "that he held himſelf bound to pay unto ſuch aſſignee." The plaintiff advanced money to Cox, upon an aſſignment of theſe bonds, and demanded payment; the defendant deſired time, and begged that the plaintiff would not ſue him; but ſtill delaying payment, this action was brought, and it was held that the action was maintainable. *Fenner* v. *Mears.* 323

4. A bond, conditioned for the payment of 30l. *per ann.* from the defendant to the plaintiff, where the conſideration appeared to be for cohabitation had by the ſaid above bounden, *T. V.* (the defendant) with the ſaid *C T.* (the plaintiff), is good. *Turner* v. *Vaughan.* 324

5. The like point. Ex parte *Cottrell.* 324

6. But where the bond was given for an unlawful conſideration, that "of living together in a ſtate of fornication," it was held void. *Walker* v. *Perkins.* 325

7. A bond given to procure a perſon to gain a ſettlement, good. *Whiting* v. *Punchard.* 325

8. How far a bond reſpecting ſtock tranſactions held good. *Faikney* v. *Reynous.* 276

9. A bond given by an incumbent for reſidence, valid. *Bagſhaw* v. *Boſsley.* 326

10. But a general reſignation bond, from the incumbent to the patron, is void. *Biſhop of London* v. *Fytche.* 327

11. But the laſt caſe was doubted in. *Partridge* v. *Whiſton.* 328

12. Bond not to carry on a particular buſineſs within a certain diſtance, valid. *Davis* v. *Maſon.* 328

15. A bond to the African Company, that a perſon appointed to the office of regiſtrar at one of their ſettlements, ſhall, whenever any perſon in the ſervice of the committee ſhall die inteſtate, forthwith take under his care, and into his poſſeſſion, the goods, chattels, &c. of ſuch perſon, and remit the ſame to the committee to be paid to the lawful adminiſtrator, held valid. *African Company* v. *Torrane.* 329

14. A bond given in purſuance of a corrupt agreement not to appear and give evidence on a proſecution for perjury, is void. *Collins* v. *Blantern.* 329

15. How far ſureties are liable on a bond entered into for the faithful ſervice of others. *Barker* v. *Parker.* 338. *Wright* v. *Ruſſell,* 334. *Barclay and others* v. *Lucas,* 335. *Iriſh Society* v. *Needham,* 337.

16. In an action on a general bond of indemnity, the defendant will be liable to anſwer any coſts that the plaintiff may have incurred, in an action brought againſt him on the default of the party for whom the defendant was ſurety. *Duffield* v. *Scott.* 338

17. An action of debt will not lie on a promiſſory note, payable by inſtalments till the laſt day of payment be paſt. *Rudder* v. *Price.* 340

18. In an action of debt on a ſimple contract, the plaintiff may prove and recover a leſs ſum than he demanded in the writ. *Aylett* v. *Lowe,* 340. *Mac Quillin* v. *Cox.* 340

19. Action of debt for goods ſold and delivered; and objections to the declaration overruled. *Emery* v. *Fell.* 341

20. In an action on a bond conditioned that another ſhall not loſe, embezzle, deſtroy, purloin, conſume, miſpend, or unlawfully make away with any money, notes, bills, drafts, &c. the breach muſt be particularly aſſigned: and if the money was taken out of the till, it muſt be ſo alleged. *Jones* v. *Williams.* 345

21. In an action of debt on a bond, with a penalty of 2000l. the condition was, that if *A.* who had been appointed treaſurer of a pariſh, did render a true, juſt, and perfect account in writing; held that the fair conſtruction of the condition was, that the money ſhould be paid by *A.* or on his default by the defendant. *Bache* v. *Proctor.* 345

22. The plaintiff declared on a bond, as given by the defendant's teſtator to himſelf; and it appeared to be given to the plaintiff and his wife, adminiſtratrix of *A. B.*; held well enough. *Ankerſtein* v. *Clarke.* 346

23. Upon a joint bond, the action cannot be brought againſt one of the obligors only. *Horner* v. *Moor.* 346

24. In

24. In action of debt, upon bond conditioned for payment at a certain day, it cannot be pleaded, that it was given as an indemnity againſt another bond. *Meaſe* v. *Meaſe*. 346

25. If the condition of the bond is not a good one, the defendant cannot take advantage of it upon *non eſt factum*; he muſt pray over of the condition, and demur. *Colſton* v. *Goodridge*. 347

26. *Non eſt factum* cannot be pleaded with *ſolvit poſt diem*. *Fox* v. *Chandler*. 347

27. Nor *non eſt factum* with *ſolvit ad diem*. *Arnold* v. *Baas*. 347

28. But the Court gave leave to withdraw the plea of *non eſt factum*, and plead infancy. *Olding* v. *Arundel*. 347

29. If a bond has lain dormant without payment of any intereſt for twenty years, it ſhall be preſumed to have been paid: and in ſuch caſe the defendant may plead *ſolvit ad diem*, and rely on the preſumption. *Ibid.*

30. But no leſs time than 20 years can of itſelf form a preſumption that a bond has been paid. *Oſwald* v. *Legh*. 347

31. In an action on a bond, *non eſt factum*, and a tender as to part, cannot be pleaded. *Jenkins* v. *Edwards*. 349

32. In debt on a bond, where the condition was to pay a certain ſum of money, on or before ſuch a day, the plea of payment before the day, to wit, on ſuch a day, held well. *Anon*. 349

33. But in general when the condition for payment is on a certain day: payment before the day cannot be pleaded. *Ibid.*

34. But a payment made before the day may be pleaded as a payment at the day. *Sturdy* v. *Arnaud*. 349

35. Plea of dureſs in debt on bond. *Knight* v. *Preſton*. 350

36. If a defendant plead performance generally to an action on a bond for the performance of covenants, and the plaintiff in his replication aſſign a particular breach, he ought to conclude *et hoc paratus eſt verificare*, in order that the oppoſite party may have an opportunity of anſwering the whole matter. *Sayre* v. *Minns*. 351

37. In debt on bond the plea of riens per deſcent, except certain lands; which ſaid lands and tenements are in the firſt place ſubject and liable to the payment of 70l. 10s. due and owing to the defendant, and alſo to the payment and ſatisfaction of a certain other ſum of 100l. laid out and expended by the defendant ſince the death of his father, for, in, and about repairs; held bad. *Shetelworth* v. *Neville*. 354

38. It is a general rule, that the ſubſcribing witneſs to a bond, muſt, in an action on it, be always produced to prove the execution of it. *Abbot* v. *Plumbe*, 361. *Coghlan* v. *Williamſon*. 361

39. Where the bond is for the payment of a ſum of money by inſtalments, or for an annuity; on default of payment, the court will allow the plaintiff to ſign judgment for the whole penalty; but on payment of the arrears and coſts, the *fieri facias* will be ordered to be ſet aſide, and the judgment to ſtand as a ſecurity for future arrears, with liberty to apply to the court, from time to time, to ſue out freſh executions thereon. *Marſen* v. *Touchett*, 366. *Howel* v. *Hanforth*, 366. *Ogilvee* v. *Foley*, 366. *Judd* v. *Evans*. 366

40. But if a bond be conditioned to pay by inſtalments, and if default be made in the payment of any one or more of the inſtalments, then the bond to ſtand in force for

the whole principal and intereſt then due and unpaid; the defendant is not entitled to this indulgence. *Gowlett* v. *Hanforth.* 367

41. The like point. *Bonafous* v. *Rybot.* 367

DECEIT.

1. An action upon the caſe, in the nature of a writ of deceit, will lie for a wilful falſe affirmation, if the party to whom it is made, and who relies thereon, receives thereby a damage. *Paſley* & al. v. *Freeman.* 124

DECLARATION.

1. A declaration that the defendant on the 6th of May, and on divers other days and times between that day and the commencement of the ſuit, aſſaulted the plaintiff, is bad. *Michell* v. *Neale,* 160

DEEDS.

1. Where a purchaſer of a ſmall part of an eſtate takes a covenant from the vendor to produce the title-deeds whenever it ſhall be neceſſary, and the deeds afterwards come into the vendee's poſſeſſion on his taking a mortgage of the other part of the eſtate, and he then aſſigns the mortgage to a third perſon, not mentioning the deeds, ſuch third perſon cannot maintain trover againſt him for the deeds. *Yea* v. *Field.* 154

DEL CREDERE.

1. Commiſſion *del credere*, nature of. 231 (n. 1)

2. A broker, when he bought goods for his principal, agreed for one-half per cent. to indemnify him from any loſs on the reſale: it was held that this undertaking was diſcharged when the principal had a fair opportunity of ſelling to advantage, but neglected it, though he was afterwards obliged to ſell at a loſs. *Curry* v. *Edenſor.* 547

3. Where a bankrupt has underwritten a policy to a broker acting under a commiſſion *del credere*, and a loſs upon the policy happens before, but is not adjuſted till after the bankruptcy, the broker may deduct the amount of the loſs from the debt which he owes to the eſtate of the bankrupt; and if by miſtake he pays it to the aſſignees, he may recover it back as money had and received to his uſe. *Biſe* v. *Dickaſon.* 231

DEMISE.

1. Words in an agreement, that *A.* ſhall hold and enjoy, &c. if not accompanied with reſtraining words operate as words of preſent demiſe. *Roe* ex dim. *Jackſon* v. *Aſhburner.* 531

DETINUE.

1. In detinue, the value of the ſeveral parcels need not be laid ſeparately in the declaration. *Pawley* v. *Holly.* 156

DISCONTINUANCE.

1. A ſide-bar rule to diſcontinue on payment of coſts was diſcharged becauſe obtained after bail had juſtified. *Bilchier* v. *Ganſell.* 784

2. A diſcontinuance is cured by the appearance of the party in penal as well as civil actions. *Humble* v. *Bland,* 435

DISTRESS.

1. An agreement between the leſſors and the aſſignee of the original leſſee, "that the leſſor ſhould have the premiſes, as mentioned in the leaſe, and ſhould pay a particular ſum over and above the rent annually towards the good-will already paid by ſuch aſſignee," operates as a ſurrender of the whole term; and the ſum reſerved for good-will is to be paid annually in groſs, not as rent, and the aſſignee cannot diſtrain either for that or for the original rent; but he has a remedy by aſſumpſit for the ſum reſerved

ſerved for the good-will. *Smith* v. *Mapleback.* 545

2. If a party pay money, in order to redeem his goods from a wrongful diſtreſs for rent, he may maintain trover againſt the wrong doer. *Shipwick* v. *Blanchard.* 148

ECCLESIASTICAL COURT.

See ADVOWSON. PEW.

EJECTMENT.

1. An amendment in ejectment may be made even in the time of the demiſe, to prevent being barred. *Doe* v. *Pilkington.* 782

2. No attorney can be leſſee in an ejectment. *Hawkins* v. *Magnall.* 760

3. The truſtee of a term not having notice of an agreement for a leaſe before the grant of the term, may maintain an ejectment againſt the tenant in poſſeſſion under the agreement. *Goodtitle* v. *Way.* 529

ELISORS.

1. Attachment directed to eliſors. *Andrews* v. *Sharp.* 696

2. Alſo, in the *King* v. *Peckham and Clarke,* 696

ERROR.

1. If error is aſſigned on a miſtake in form, the miſtake may be amended in the court below, pending the writ of error. *Richards,* q. t. v. *Brown.* 92

2. Bail in error muſt be put in within four days after final judgment ſigned, without reference to the time of the allowance, or ſerving the copy of it. *Jaques* v. *Nixon.* 772

3. Though a writ of error be ſued out before judgment ſigned, it cannot have any effect till the judgment is actually ſigned. *Ibid.*

4. A diſcontinuance is cured by the appearance of the party, by ſtat. 33 *Hen.* 8. c. 30. in penal as well as civil actions. *Humble* v. *Bland.* 435

5. It is not a cauſe of error to enter a judgment of *miſericordia in a qui tam* action for a penalty. *Ibid.*

ESTOPPEL.

1. *A.* aſſerting that he had a right to a patent machine, covenanted with *B.* that he ſhould uſe it in a particular manner, in conſideration of which *B.* covenanted that he would not uſe any other; in an action by *A.* on the covenant, *B.* is not eſtopped by his covenant from pleading in bar to the action that the invention was not new, or that the patentee was not the inventor; but he may thus ſhew that the patent was void, and conſequently that there was no conſideration to him. *Hayne* v. *Maltby.* 115

2. But in an action by the aſſignee of the patentee againſt the patentee himſelf, he is eſtopped from ſhewing that it was not a new invention againſt his own deed. *Oldham* v. *Langmead.* 116

See LANDLORD and TENANT, No. 6.

ESTRAY.

1. Treſpaſs lies, and not caſe for working an eſtray, although the original taking be admitted to be lawful. *Oxley* v. *Watts.* 196

EVIDENCE.

1. Upon what iſſues between the lord and commoner, plaintiff cannot give in evidence that there was ſufficiency of common left. *D'Ayrolles* v. *Howard.* 219

2. Evidence of a marriage in fact is neceſſary in an action for crim. con. *Morris* v. *Miller.* 183

3. Deduction may be given in evidence, in an action for money had and received, without a notice of ſet off. *Dale* v. *Sollet.* 310

4. Parol

4. Parol evidence is not admiſſible to prove an additional rent payable by a tenant beyond that expreſſed in the written agreement for a leaſe. *Preſton* v. *Merceau.* 519

5. In debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its having been delivered to him. *Blatch* v. *Archer.* 606

6. A legal arreſt muſt be proved in ſuch action. *Ibid.*

7. The bailiff's name indorſed on the writ is ſufficient evidence that he was authoriſed by the ſheriff to arreſt without proving the warrant. *Ibid.*

8. In debt on a bond, if it is proved that the defendant admitted the debt, and that the attendance of the ſubſcribing witneſs could not be procured, it is ſufficient to prove the hand-writing of the defendant, and of the witneſs. *Coghlan* v. *Williamſon.* 361

9. In an action by the aſſignees of a bankrupt, if the petitioning creditor's debt ariſes by bond, proof of the acknowledgment of the bankrupt (the obligor) that he owed that debt, does not ſuperſede the neceſſity of calling or accounting for the abſence of the ſubſcribing witneſs. *Abbot* v. *Plumbe.* 561

10. Nor is ſuch an acknowledgment ſufficient in the caſe of an action on the bond againſt the obligor. *Ibid.*

11. The miniſter and ſubſcribing witneſſes to the regiſter are not the only competent witneſſes to prove the identity of the perſons married. *Birt* v. *Barlow.* 184

12. Where an agent is employed to buy goods, an acknowledgment under his hand-writing of his having received them, is evidence of a delivery to the buyer. *Biggs* v. *Lawrence.* 271

15. If it be covenanted by deed that a particular thing ſhall be done by a certain day, evidence that the time was enlarged by parol agreement will not be ſufficient to ſupport a declaration, which avers that the thing was done within the time firſt agreed on. *Littler* v. *Holland.* 416

14. The ſentence of the conſiſtorial court, and reverſal of ſuch ſentence by the court of arches, is not concluſive evidence between the parties in an action at law. *Croſs* v. *Salter.* 87

15. Plea (to treſpaſs) that an ancient meſſuage, and twelve acres of land were immemorially parcel, and a cuſtomary tenement of the manor of *A.* and that there is a cuſtom in the manor for the cuſtomary tenant of the ſaid cuſtomary tenement, to have common, &c. on a replication traverſing the cuſtom, the plaintiff may prove that the meſſuage was built within twenty years, and not upon the ſcite of an ancient houſe. *Dunſtan* v. *Treſider.* 218

16. In an action for uſe and occupation by an incumbent againſt a tenant of the glebe-lands who has paid him rent, the defendant cannot give evidence of a ſimoniacal preſentment of the plaintiff, in order to avoid his title. *Cooke* v. *Loxley.* 319

17. Under a count for money had and received by ſeveral defendants, the plaintiff cannot give in evidence money had and received by them, and by a fourth partner, who is now dead. *Spalding* v. *Mure.* 522

18. The verbal declarations of an auctioneer at the time of the ſale, are not admiſſible evidence to contradict the printed conditions. *Gunnis* v. *Erhart.* 140

19. *A.* having given a bond to *B.* for

B. for the payment of money which it is underſtood between them is to be applied towards indemnifying *B.* from the expences of an election, in which *B.* is a candidate: in an action brought by *C.* againſt *D.* for money advanced and ſervices performed in ſupporting the intereſt of *B.* at the requeſt of *D.* *A.* is not a competent witneſs. *Trelawney* v. *Thomas.* 312

20. In an action againſt *A.* for enticing the ſervant of *B.* from his ſervice, it is ſufficient evidence of the enticement, that *A.* aſked the ſervant to enliſt in the army, and afterwards gave him money. *Keane* v. *Boycott.* 143

EXECUTORS.

1. Judgment againſt an executor *de bonis propriis* inſtead of *de bonis teſtatoris et ſi non*, &c. amended. *Short* v. *Coffin.* 583

2. On a perſonal demand againſt an executor, there can be no judgment, *de bonis teſt.* *Hawkes* v. *Saunders.* 287

3. Having aſſets is a ſufficient conſideration for a promiſe by him to pay a legacy. *Ibid.*

4. Declaration, "that *G. S.* by will bequeathed a legacy to the plaintiff, and made the defendant executrix; that ſhe proved the will, and had aſſets ſufficient to pay all debts and legacies; and by reaſon thereof became liable to pay the legacy, and being ſo liable, promiſed, &c." is a declaration againſt the defendant in her own right; and therefore the plaintiff cannot take judgment *de bonis teſtatoris.* *Ibid.*

5. But if aſſets be proved or admitted, and an aſſent of the executor to the legacy, judgment may be given on ſuch a declaration *de bonis propriis*, becauſe having aſſets is a ſufficient conſideration. *Ibid.*

6. What actions ſurvive againſt an executor. *Hambly* v. *Trott.* 152

7. Diſtinction as to actions which ſurvive againſt an executor, or die with the perſon on account of the cauſe of action, and which ſurvive, &c. or die, &c. on account of the form of action. *Ibid.*

8. Where the cauſe of action is money due, or a contract to be performed; gain or acquiſition by the labour or property of another, or a promiſe by the teſtator expreſſed or implied, the action ſurvives againſt the executor; *ſecus* if it be a tort, or ariſe *ex delicto*, ſuppoſed to be by force and againſt the peace; or where the plea to the action muſt be that the teſtator was not guilty. *Ibid.*

9. Where executors pay a ſum of money on the teſtator's account, which they need not have done, and afterwards bring an action to recover it back again, they muſt declare in their own right, and not as executors. *Munt* v. *Stokes.* 276

10. A perſonal repreſentative having found among the papers of the deceaſed a mortgage-deed, and having aſſigned it for the mortgage-money more than ſix years back, the aſſignee ſhall not recover back the mortgage-money, although it ſhall turn out that the mortgagee was a forgery, unleſs the aſſignor knew of it. *Bree* v. *Holbeach.*

FACULTY.

See PEW.

FALSE IMPRISONMENT.

1. In an action of falſe impriſonment, if the defendant juſtifies the commitment for a bailable offence, the plaintiff under the general replication *de injuria ſua propria*

pria cannot give in evidence a tender and refuſal of bail, but ought to reply to it ſpecially. *Sayre* v. *Lord Rochford.* 180

2. An action of treſpaſs, *vi et armis*, for falſe impriſonment, lies againſt the attorney, as well as againſt the client, for ſuing out an illegal *ca. ſa.* againſt a defendant, and cauſing him to be impriſoned thereon. *Barker* v. *Braham and Norwood.* 163

3. So, if a man be arreſted upon a writ that is void, treſpaſs *vi et armis* will lie againſt the plaintiff who ſued out ſuch writ. *Parſons* v. *Lloyd.* 165

4. But treſpaſs and falſe impriſonment will not lie againſt the ſheriff or his officer, for arreſting a perſon privileged from arreſts. *Tarlton* v. *Fiſher* & al. 166

5. Neither will it lie for arreſting one who has a temporary privilege from arreſts. *Cameron* v. *Lightfoot.* 169

6. Treſpaſs and falſe impriſonment has been held to lie in this country againſt the governor of a ſettlement in the Eaſt Indies, for procuring by awe, fear, and influence, and contrary to his own inclination, a ſovereign, independent, abſolute prince to impriſon another. *Raſael* v. *Verelſt.* 170

7. So where an action of treſpaſs *vi et armis* was brought by one *Fabrigas*, againſt general *Moſtyn*, who had been governor of Minorca, for an aſſault and falſe impriſonment, and baniſhing him from the iſland of Minorca, to Carthagena in Spain, without cauſe; the action was held to be well brought. *Moſtyn* v. *Fabrigas.* 172

8. So where the impriſonment which was at firſt legal, was aggravated with many circumſtances of cruelty, lord *Mansfield* directed a verdict for the plaintiff. *Wall* v. *Macnamara.* 172

9. So, where the defendant, who was captain of the Trident man-of-war, put the plaintiff, who was the purſer, into confinement, and kept him there for three days, and then liberated him, without any charge or court-martial: the plaintiff recovered for the impriſonment. *Swinton* v. *Molloy.* 173

10. But an action of treſpaſs and falſe impriſonment will not lie, where the impriſonment is merely in conſequence of taking a ſhip as prize, although the ſhip has been acquitted. *Le Caux* v. *Eden.* 173

11. In an action for falſe impriſonment, the plea of a juſtification under proceſs ſued out by the defendant, need not ſet forth the cauſe of action. *Rowland* v. *Veale.* 178

12. The like point. *Belk* v. *Broadbent.* 178

13. Another objection on a ſpecial demurrer was, that it was not alleged that the precept for taking the body was ever returned to the court. But this was overruled. *Rowland* v. *Veale.* 179

14. Another objection on the ſpecial demurrer in the ſame caſe was, that the writ was void, not being returnable on a day certain, but at the next court. But this was alſo overruled by the court. *Ibid.*

15. In an action for an aſſault and falſe impriſonment againſt the captain of a ſhip, who had pleaded not guilty; the defendant croſs-examined the plaintiff's witneſſes, as to expreſſions uſed by the plaintiff, which would have juſtified the impriſonment, they tending to create mutiny and diſobedience; and this evidence was admitted. *Bingham* v. *Garnault.* 180

FALSE CHARACTER.
See DECEIT, SLANDER.

FENCES.

FENCES.

1. An action on the caſe for not repairing fences, whereby another party is damnified, can only be maintained againſt the occupier, and not againſt the owner of the fee who is not in poſſeſſion. *Chatham* v. *Harriſon.* 120

FERRY.

1. An excluſive right to a ferry from *A.* to *B.* does not prevent perſons from going by any other boat from *A.* directly to *C.* though it be near to *B.* provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp* v. *Frank.* 90

FEME COVERT.

1. A *feme covert* is capable of purchaſing of others, without the concurrence of her huſband, ſubject to his diſagreement which will diveſt the eſtate. *Barnfather* v. *Jordan.*

5. Hence in covenant for rent againſt an aſſignee, an aſſignment before the rent accrued is a good plea, though the plaintiff reply that the aſſignee over is a *feme covert.* *Ibid.*

See ADULTERY. BARON and FEME. HUSBAND.

FISHERY.

1. An excluſive privilege of fiſhing in a navigable river, or an arm of the ſea, may be claimed by preſcription, and for a diſturbance of ſuch right, treſpaſs will lie. *Carter and another* v. *Murcott and another.* 219

2. And a grant of a ſeveral fiſhery may be ſubject to particular reſervations or exceptions. *Seymour and others* v. *Lord Courtenay and others.* 220

3. Pleadings reſpecting a right of fiſhery. *The mayor and Commonalty of Orford* v. *Richardſon.* 221, 222

FOREIGN JUDGMENT.

1. Debt will lie on a foreign judgment; for where *indebitatus* aſſumpſit will lie, debt will alſo lie: and it has been determined in the court of king's bench, that *indebitatus* aſſumpſit may be maintained on a foreign judgment. *Crawford* v. *Whittal.* 342

2. And it lies upon the defendant to impeach the juſtice thereof, or to ſhew the ſame to have been irregularly or unduly obtained. *Sinclair* v. *Frazer.* 343

3. The like point. *Plaiſtow* v. *Van Uxem.* 343

4. Wherever *indebitatus* aſſumpſit is maintainable, debt alſo is: and debt may be brought for a ſum capable of being aſcertained at the time of the action brought, and it is not neceſſary that the plaintiff, in debt, ſhould recover the exact ſum demanded. *Walker and others* v. *Witter.* 343

5. The foreign judgment ſhall be *prima facie* evidence of the debt, and concluſive till it be impeached by the other party. *Galbraith* v. *Neville.* 344

6. But the foreign judgment is only *prima facie* to be taken to be right; that is, the Court will allow the ſame force to a foreign judgment that we do to thoſe of our own courts of record. *Ibid.*

FOREIGN ATTACHMENT.

See ATTACHMENT FOREIGN.

FORFEITURE.

1. If a ſhip be ſeized as forfeited under the navigation-act, by a governor of a foreign country belonging to Great Britain, the owner cannot maintain treſpaſs againſt the party ſeizing, although the latter do not proceed to condemnation; for by the foreiture, the property

perty is diveſted out of the owner. *Wilkins* v. *Deſpard.* 151

2. *A.* being entitled to a life-eſtate ſubject to a condition not to charge or encumber it, granted an annuity, and demiſed the land as a ſecurity: but there being a defect in the memorial of the annuity, it was held that the deed was wholly void, and did not work the forfeiture of the eſtate. *Dann* ex dim *Dolman* v. *Dolman.* 624

FRAUDS, STATUTE OF.

1. The ſtatute of frauds will prevent a parol agreement to buy goods, without either earneſt or delivery, from giving the buyer any property in them. *Alexander* v. *Comber.* 557

2. So a verbal agreement for the ſale of goods to be delivered at a future period, where there is neither earneſt paid, a note or memorandum in writing ſigned, nor any part of the goods delivered, is void, being within the ſtatute of frauds, though it is executory, and though it has been admitted by the party in an anſwer to a bill in chancery. *Rondeau* v. *Wyatt.* 557

3. The like point. *Cooper* v. *Elſton.* 560

4. A promiſe to be anſwerable for another not being in writing, is void by the ſtatute of frauds, if it appear that credit was given to both. *Anderſon* v. *Hayman.* 54

5. A broker about to ſell the goods of an inſolvent, promiſed the landlord to pay him his rent if he would not diſtrain; it was held that this promiſe was not a collateral promiſe, but an original undertaking. *Williams* v. *Leper.* 562

6. But where a ſale is not immediate, it is not within the ſtatute of frauds, ſuch as a contract to purchaſe a carriage when it is built, and the like. *Clayton* v. *Andrews.* 562

7. So, ſales by auction ſeem not to be within the ſtatute of frauds. *Simon* v. *Motivos.* 563

8. Where an agreement depends upon a contingency, and it does not appear but the contingency will happen within the year; nor does it appear from the agreement that it is to be performed after the year; there a note in writing is not neceſſary, becauſe the contingency may happen within the year, and ſo the agreement be performed within that time: but where it appears from the whole tenour of the agreement, that it is to be performed after the year, there an agreement in writing is required under the ſtatute. *Fenton* v. *Emblers.* 564

9. Where the undertaking is before delivery, and there is a direction to deliver the goods, and "I will ſee them paid for," it is not within the ſtatute of frauds; but a promiſe to pay if *S.* does not, is a collateral undertaking within the ſtatute. *Jones* v. *Cooper.* 564

10. But where the words were "You know me, and I will ſee you paid," the Court overruled the diſtinction in *Jones* v. *Cooper*, and held, that if the party receiving the goods is at all liable, that a note in writing is neceſſary. *Matſon* v. *Wharam.* 564

11. The plaintiff had ſued out a a commiſſion of bankruptcy, and taken other proceedings againſt one *Harris*; and the defendant, to ſtay the proceedings, promiſed to give the plaintiff bills for 10s. in the pound, and to pay all the expences he had been put to; he accordingly accepted and paid the bills, but refuſed to pay the plaintiff's expences; upon which the plaintiff paid them to the attorney, and brought this action to recover the ſame from the defendant on his undertaking: held that this undertaking not being in writing

writing, was within the ſtatute of frauds. *Chater* v. *Beckett.* 595

12. So where the words were "He will run no riſk, I will ſee him paid:" "I will ſee you paid at the pay-table; are you ſatisfied?" anſwer, "Perfectly ſo:" held that the undertaking was within the ſtatute of frauds. *Keate* v. *Temple.* 566

FUNDS.

1. Stock in the public funds cannot be ſued for as money. *Nightingale* v. *Deviſme.* 282

GAME.

1. In treſpaſs for hunting laid upon the ſtat. 4. & 5. W. & M. c. 23. § 10. againſt the defendant "as a diſſolute perſon," if the plaintiff proves the treſpaſs but not the circumſtances under the ſtatute, he ſhall recover as in common actions of treſpaſs, viz. no more coſts than damages, if the damages are under 40s. *Pallant* v. *Roll.* 228

GAMING.

1. A gaming debt, even in a foreign country, is not recoverable in England: but money lent to play with is. *Robinſon* v. *Bland.* 273

2. Money paid as a premium for inſuring lottery tickets may be recovered back. *Jaques* v. *Golightly.* 242

3. The defendant having loſt a ſum of money, above 10l. upon a bet of a horſe-race, requeſted the plaintiff to pay it for him, which he did, and the court held that the action will lay, and gave judgment for the plaintiff. *Alcinbrook* v. *Hale.* 275

4. So where two perſons jointly engaged in a ſtock-jobbing tranſaction, and incurred loſſes, and employed a broker to pay the difference, and one of them repaid the broker, with the privity and conſent of the other, the whole ſum: he was allowed to recover a moiety from that other, in an action for money paid to his uſe. *Petrie* v. *Hannay.* 275

5. But where a diſpute aroſe between *Wilſon* and the defendant, reſpecting the amount of ſtock differences; and the matter was referred to the plaintiff and three others, who awarded 306l. 12s. 6d. to be due from the defendant to *Wilſon*; for 100l. part of which *Wilſon* drew the bill on which this action was brought: it was held that as the bill grew out of a ſtock-jobbing tranſaction, which was known to the plaintiff, he could not recover upon it. *Steers* v. *Laſbley.* 278

GAOL.

1. A common gaol is a houſe within the ſtatute againſt arſon. *The K.* v. *Donnevan.* 678

GLEANING.

1. The right or privilege, by law or cuſtom, of gleaning or leaſing, muſt be exerciſed under proper circumſtances and reſtrictions. *Rex* v. *Price.* 207

2. The practice of gleaning or leaſing held to be a treſpaſs, if it be without the conſent of the occupier of the land. *Steel* v. *Houghton.* 205

3. For no perſons have a right to glean in the harveſt-field by the common law. *Steel* v. *Houghton.* 205

4. Same point determined. *Worlidge* v. *Manning.* 205

HIGHWAYS.

1. An action on the caſe will not lie by an individual againſt the inhabitants of a place who may be bound to repair a common highway, for a conſequential damage ſuſtained from their neglect to repair. *Ruſſell* v. *Men of Devon.* 122

HORSES.

See WARRANTY.

HUNDRED.

1. In an action againſt the hundred for firing of barns, &c. under the black-act, the offence need not to be laid to be done unlawfully, wilfully, or maliciouſly, the ſtatute not expreſſing theſe adjuncts. *Allan* v. *Hundred of Kirton.* 681

HUSBAND.

1. In an action of covenant by the huſband of tenant in fee, he muſt declare on a ſeizin in their demeſne, as of fee in himſelf and his wife, in right of his wife. *Polyblank* v. *Hawkins.* 416

2. If he declare on a ſeizin in his demeſne, as of freehold in right of his wife, it will be bad on a ſpecial demurrer. *Ibid.*

See ADULTERY. BARON and FEME. FEME COVERT.

IDENTITY.

1. Of money or notes, if it can be traced, will entitle the true owner to maintain aſſumpſit againſt a third perſon into whoſe hands they have come *mala fide*. *Clarke* v. *Shee.* 239

2. What ſhall be evidence of identity in a queſtion of actual marriage. *Birt* v. *Barlow.* 184

IMPARLANCE.

1. A ſpecial imparlance (ſaving all exceptions to the juriſdiction) cannot be entered without leave of the court, nor can ſuch a plea be pleaded after appearance by attorney. *Grant* v. *Lord Sandys.* 119

INDEMNITY.

1. Declaration on bond: plea that it was conditioned for performance of covenants which were to indemnify the obligee from alimony and debts incurred by his wife after their ſeparation, and that defendant had performed the covenants; replication that a judgment was recovered againſt the obligee by a creditor of his wife, and he paid debt and coſts, of which defendant had notice: on demurrer, the defendant was held liable for the coſts as well as the debt. *Duffield* v. *Scott.* 338

2. A broker, when he bought goods for his principal, agreed for one half per cent. to indemnify him from any loſs on the reſale: held that the undertaking was diſcharged when the principal had a fair opportunity of ſelling to advantage, but neglected it, though he was afterwards obliged to ſell at a loſs. *Curry* v. *Edenſor.* 547

See DEBT. No 15.

INFANTS.

1. An infant cannot pray the parol to demur in any other ſtage of the proceeding than at the time of pleading. *Deriſley* v. *Cuſtance.* 413

See MONEY HAD AND RECEIVED. No. 14, 15, 16.

INFERIOR COURTS.

1. Juſtification (to an action of aſſault and falſe impriſonment) by proceſs out of an inferior court ſtated, that the plaintiff below levied his plaint in a plea of treſpaſs on the caſe, for a cauſe of action ariſing within the juriſdiction of the court, and held good without ſetting forth the cauſe of action, or that the defendant became indebted within the juriſdiction. *Rowland* v. *Veale.* 178, 179

2. Formerly nothing was preſumed in favour of the regularity of their proceedings, nor could they be ſet out with a *taliter proceſſum*; but theſe objections have of late years been overruled. *Ibid.*

3. If the cauſe of action does not ariſe within the juriſdiction, the defendant muſt avail himſelf of it by plea in the court below; or if not alleged in the plaint to be within the juriſdiction, he muſt bring error or falſe judgment. *Ibid.*

4. Where

4. Where the capias from the court below is under proceſs of execution, it need not be ſhewn in the juſtification that the precept was returned. Otherwiſe when it is under meſne proceſs. *Ibid.*

5. The court was held from three weeks to three weeks; and the writ was to have the body at the next court generally; it is good, and a day certain need not be ſhewn. *Ibid.*

INN-KEEPERS.

1. Inn-keepers are chargeable for all loſſes that may happen to their gueſts, while they remain as ſuch in their inns. *Bennet* v. *Mellor.* 67

INSANITY.

1. The Court will not diſcharge a defendant out of cuſtody on filing common bail on the ground that he has become inſane ſince the arreſt. *Kernett* v. *Norman.* 768

2. Nor on the ground that he was inſane at the time of the arreſt. *Nutt* v. *Verney.* 768

INSOLVENT DEBTORS.

1. A diſcharge under the inſolvent act does not protect the party againſt a covenant for payment of an annuity, as to payments occurring after his diſcharge. *Cotterell* v. *Hooke.* 599

2. If an inſolvent debtor give a creditor ſecurity for a debt which accrued before his diſcharge, it is valid, and he may be ſued thereon. *Beſt* v. *Barber.* 252

3. An action will not lie againſt the ſheriff, or his officer, for taking a diſcharged inſolvent in execution. *Tarlton* v. *Fiſher.* 166

4. The defendant having been charged in execution for the penalty of 1000 l. in a bond which became forfeited for non-payment of the inſtalment of an annuity ſecured thereby, on the day previous to the laſt inſolvent act, the Court refuſed to order that ſum to be reduced in the marſhal's book to the ſum actually due for the arrears of the annuity, in order that he might take the benefit of that act. *Judd* v. *Evans.* 366

5. Securities given to induce creditors to compound or ſign a certificate void. *Jackſon* v. *Lomas.* 247

INSURANCE.

1. A merchant reſiding in this country is under an obligation to inſure for his correſpondent abroad, if he receives an order for that purpoſe; and an action on the caſe will lie againſt him for neglecting to make ſuch an inſurance. Firſt, where a merchant abroad has effects in the hands of his correſpondent here. Secondly, where the merchant abroad has no effects in the hands of his correſpondent; if the courſe of dealing between them be ſuch that the one has been uſed to ſend orders for inſurance, and the other to comply with them. Thirdly, if the merchant abroad ſends bills of lading to his correſpondent here, he may engraft on them an order to inſure, as the implied condition on which the bills of lading ſhall be accepted, which the other muſt obey if he accept them. *Smith* v. *Laſcelles.* 141

2. So alſo if a merchant here accept an order for inſurance, and limit the broker to too ſmall a premium, in conſequence of which no inſurance can be procured, he is liable to make good the loſs to his correſpondent. *Wallace* v. *Telfair.* 141

3. But if a perſon to whom ſuch orders are ſent, does what is uſual to get the inſurance made, that is ſufficient, becauſe he is no inſurer, and is not obliged to get inſurance at all events. *Smith* v. *Cologan.* 141

4. For, to maintain this action, the defendant must be guilty either of a breach of orders, gross negligence, or fraud. *Moore* v. *Mourgue.* 142

INTEREST.

1. Where the sum recovered shall carry interest, and from what time and to what time. *Robinson* v. *Bland.* 133

2. So also interest is due on an account stated for money lent. *Blaney* v. *Hendricks.* 312

3. The jury may allow interest on book debts, in name of damages. *Eddowes* v. *Hopkins.* 315

See also *Trelawney* v. *Thomas.* 312

JOINDER IN ACTION.

1. A count for money had and received by defendant to the use of the executor, as such, may be joined to a count for money had and received to the use of the testator. *Petrie* v. *Hannay.* 590

2. But a debt due to the executor in his own right cannot. *Ibid.*

JOINT OBLIGATION.

1. Where two united parishes elected a sexton jointly, who was paid a certain sum by each: held that the obligation is not joint, for the sexton cannot bring his action against one of the parishes for the whole sum. *Stokes* v. *Lewis.* 262

JOURNEYMEN.

1. Journeymen not liable to penalties for exercising a trade without having served an apprenticeship. *Beach* q. t. v. *Turner.* 652

2. Trespass lies by a master for seducing his journeyman from his work, as for any other servant. *Hart* v. *Aldridge.* 142

3. So if he be employed only by the piece. *Ibid.*

JUDGMENT.

1. In debt for a penalty, for non-performance of covenant; judgment on demurrer may be entered up for the penalty in like manner as before the stat. 8 & 9 W. 3. c. 11. but then it can stand as a security for the damages sustained. *Goodwin* v. *Crowle.* 389

2. If some counts in a declaration are good and some bad, and general damages given, the Court will arrest the judgment *in toto*, and will not award a *venire de novo*. *Holt* v. *Scholefield.* 589

JURISDICTION.

1. If the Court has not a general jurisdiction of the subject-matter, the defendant must plead to the jurisdiction, and cannot take advantage of it upon the general issue: and in every plea to the jurisdiction another must be stated. *Mostyn* v. *Fabrigas.* 1

2. Also the defendant must appear in person, and not by attorney. *Grant* v. *Lord Sondes.* 1

3. If trespass and false imprisonment be brought against a governor appointed by letters patent under the crown, for wrongfully imprisoning the plaintiff during the term of such defendant's acting as governor, the king's courts in England can alone have jurisdiction; because such governor is in the nature of a viceroy, and therefore locally during his government no civil or criminal action will lie against him. *Mostyn* v. *Fabrigas.* 41

4. Such offence also is a species of abuse of the authority delegated to him by the letters patent: and therefore cognizable only in the king's courts, for no question concerning the seignory can be tried within the seignory itself. *Ibid.*

5. Where it appears that the court have no jurisdiction, they will not go into the merits of a cause. *Owen* v. *Hurd.* 731

6. If

6. If no action can be brought in the county court, the ſuperior courts will exerciſe a juriſdiction although the debt may be under 40s. *Tubb* v. *Woodward.* 312

7. The like point. *Welſh* v. *Troyte.* 311

JURORS.

1. The affidavit of jurors, in reſpect to their verdict, not to be received. *Rex* v. *Woodfall.* 254. *Vaiſe* v. *Delaval,* 525. *Jackſon* v. *Williamſon.* 525

JUSTIFICATION.

1. There may be caſes in which a governor of a garriſon may have a juſtification in time of war, which he would not have in time of peace. *Moſtyn* v. *Fabrigas.* 41

2. Whatever is a juſtification in the place where the thing is done, ought to be a juſtification where the cauſe is tried. *Ibid.*

KING.

1. The king in council can no otherwiſe puniſh any of the governors of his foreign poſſeſſions than by removing them and taking away any commiſſion which they may hold during his pleaſure. *Moſtyn* v. *Fabrigas.* 41

LANDLORD AND TENANT.

1. An action on the caſe may be maintained againſt the landlord of a houſe, if he and not the occupier is bound to repair, for any injury that a ſtranger may ſuſtain from the want of repair. *Payne* v. *Rogers.* 120

2. But unleſs it is ſhewn that the landlord is liable, the action can only be brought againſt the occupier. *Cheetham* v. *Hampſon.* 120

3. A leſſor who covenants to pay rent, and to repair, with an exception of caſualties by fire, is liable upon the covenant for rent though the premiſes are burned down and not rebuilt by the leſſor after notice. *Belfour* v. *Weſton.* 377

4. The landlord cannot ſue an under tenant on the covenant for rent. *Holford* v. *Hatch.* 408

5. When the whole term is made over by the leſſee, although in the deed by which that is done, the rent and a power of entry for non-payment is reſerved to him, and not to the original leſſor, this is an aſſignment and not an underleaſe. *Palmer* v. *Edwards.* 40

6. If both leſſee and leſſor ſign a leaſe, the former is eſtopped to plead *nil habuit in tenementis* to an action of debt for rent by the leſſor. *Wilkins* v. *Wingate.* 320

7. So where an action on the caſe was brought for not repairing a private road, leading through the defendant's ground, the declaration ſtated that the plaintiff was poſſeſſed of a certain meſſuage; and by reaſon of his poſſeſſion thereof, was entitled to a certain way from the ſaid meſſuage through and over a certain cloſe of the defendant into the king's common highway; and that the defendant was poſſeſſed of two other cloſes next adjoining, and by reaſon of his poſſeſſion of the ſaid cloſe, and the ſaid two other cloſes of land adjoining, of right ought to have repaired the ſaid way; yet he had not, *per quod*, &c. The Court were clearly of opinion, that the declaration ſufficiently charged the defendant, by reaſon of his poſſeſſion. *Rider* v. *Smith.* 121

8. In a leaſe the leſſor reſerved a right to enter and cut timber, making reaſonable ſatisfaction to the leſſee for any damage occaſioned thereby; covenant does not lie by ſuch leſſee for any wrongful act of cutting down by a third perſon, if without the conſent of the leſſor, how-

however he may countenance the act afterwards. *Griffiths* v. *Brome.* 405

LEASE.

1. An aſſignment of a leaſe held legal, though neither ſealed, delivered, or ſtamped upon the peculiar circumſtances of the caſe. *Beck* v. *Phillips.* 687

2. Where a leaſe came into the hands of the original leſſor by an agreement between him and the aſſignee of the original leſſee, "that the leſſor ſhould have the premiſes as mentioned in the leaſe, and ſhould pay a particular ſum over and above the rent annually towards the good-will already paid by ſuch aſſignee." Held that ſuch agreement operates as a ſurrender of the whole term. *Smith* v. *Mapleback.* 545

See AGREEMENT.

LEGACY.

1. A legatee may ſue at law for his legacy, if the executor has received aſſets, and made an expreſs promiſe to pay the legacy. *Atkins*, & ux. v. *Hill*, 286. *Hawkes*, & ux. v. *Saunders.* 287

2. But, unleſs there is an expreſs promiſe to pay, a legacy cannot be recovered in a court of law from an executor. *Deeks* v. *Strutt.* 289

LETTERS PATENT.

1. Queſtions concerning the effect or extent of them can only be tried in the king's courts. *Meſlyn* v. *Fabrigas.* 41

See alſo PATENTS.

LIEN.

1. Whoever ſupplies a ſhip with neceſſaries has a treble ſecurity; 1ſt, the perſon of the maſter; 2dly, the ſpecific ſhip; 3dly, the perſonal ſecurity of the owners. *Rich* v. *Coe.* 284

2. Caſes reſpecting the liens of attornies. 709

3. An agreement among a number of dyers not to take in any goods to dye without having a lien thereon, for what may be due to them for their work: valid. *Kirkman* v. *Shawcroſs.* 549

LICENCE.

1. A rector gives a certificate, appointing *A. B.* his curate, promiſing to pay him a ſalary, &c. the biſhop ordains him upon this title: this is a licence within the meaning of the canon law. *Martin* v. *Hind.* 290

2. At leaſt it is ſo as between the rector and curate. *Ibid.*

3. A licence from the patron to the incumbent to be abſent, may be revoked. *Bagſhaw* v. *Boſsley.* 326

LIMITATIONS.

1. Where a man deviſes his eſtate for payment of debts, a court of equity ſays, and a court of law would ſay, all debts barred by the ſtatute of limitations ſhall come in. *Trueman* v. *Fenton.* 250

LOTTERY.

1. Money paid as a premium for inſuring may be recovered back. *Jaques* v. *Golightly*, 242. *Jaques* v. *Withy.* 243

2. The number laſt drawn out of the lottery-wheel held to be entitled as a laſt-drawn ticket, though one other number was never drawn, and no account could be given of it. *Schinotti* v. *Bumſtead.* 56

MALICIOUS PROSECUTION.

1. No copy of acquittal need be granted by the Court, to found an action for a malicious proſecution, except in the caſe of felony. *Morriſon* v. *Kelly.* 36

2. To maintain an action for a malicious proſecution, there muſt be not only a thing done amiſs, but alſo a damage either already fallen upon the party, or elſe inevitable. *Farrel* v. *Nun.* 30

3. Thus

3. Thus an action will lie for ſuing out a malicious commiſſion of bankruptcy againſt another, although the ſtat. 5 *Geo.* 2. authoriſes the chancellor in ſuch caſe to award the party 200l. *Chapman* v. *Pickerſgill.* 30

4. So an action on the caſe will lie for falſely and maliciouſly ſuing another, and cauſing him to be arreſted without any juſt or probable cauſe of action. *Goſling* v. *Wilcock.* 31

5. The like point. *Smith* v. *Cattle.* 31

6. And it is neceſſary for the plaintiff to prove malice, either expreſs or implied, and alſo the want of probable cauſe. *Farmer* v. *Darling.* 31

7. The eſſential ground of the action is, that a legal proſecution was carried on without any probable cauſe. *Johnſtone* v. *Sutton.* 31

8. In an action for maliciouſly holding to bail, it is not neceſſary to prove that there was any affidavit to hold to bail, for the indorſement on the writ is ſufficient: alſo, if the declaration aver that ſuch an affidavit has been made, an office-copy of it is ſufficient. *Croke* v. *Dowling.* 32

9. The new action muſt not be brought before the firſt be determined. *Farrel* v. *Nun.* 32

10. The like point. *Fiſher* v. *Briſtow*, 32. *Morgan* v. *Hughes.* 32

11. And an action lies for a malicious proſecution, though the plaintiff be acquitted on a defect in the indictment. *Wicks* v. *Fentham.* 33

12. But an action on the caſe will not lie againſt a commanding-officer for a malicious proſecution before a naval court-martial, for an offence cognizable there; although there may not have been any probable cauſe, for it is not a ſubject upon which a common law judicature can exerciſe a juriſdiction. *Johnſtone* v. *Sutton in error.* 33

13. The like point. *Barwis* v. *Keppel.* 36

14. On the part of the defendant, it is adviſeable for him, if he can, to give evidence of a probable cauſe. *Parrot* v. *Kiſhwick.* 37

15. After a verdict in favour of a defendant, in an action for a malicious proſecution for felony, the Court will not ſet aſide the verdict, though it be given againſt evidence, and the direction of the judge. *Norris* v. *Tyler.* 37

16. The like point. *Farmer* v. *Darling.* 37

MARRIAGE.

1. Evidence of a marriage in fact muſt be given to ſupport an action for crim. con. *Morris* v. *Miller.* 183

2. A contract made in reſtraint of marriage is illegal and void. *Lowe* v. *Peers.* 386. 388

3. The actual celebration of a marriage need not be proved in any civil caſe, except in actions for crim. con. *Morris* v. *Miller.* 183

MASTER AND SERVANT.

1. A maſter may maintain an action againſt any one for taking and enticing away his ſervant, though he work by the piece, upon the ground of the intereſt which he has in his ſervice and labour. *Hart* v. *Aldridge.* 142

2. Caſe for enticing the plaintiff's ſervant-boy to leave his ſervice, and enter in the army. *Keane* v. *Boycott.* 143

3. And an action will lie for continuing to employ the ſervant of another, after notice, though the perſon ſo continuing to employ the ſervant did not procure him to leave his maſter, or know when he employed him that he was the

ſervant of another. *Blake* v. *Lanyon.* 144

4. But no action will lie for ſeducing an articled ſervant from his maſter, if the ſervant has paid the penalty ſtipulated by the articles for leaving him. *Bird* v. *Randall.* 144

5. Action on the caſe by the maſter for beating a ſervant *per quod ſervitium amiſit. Edmondſon* v. *Machell.* 181

MISNOMER.

1. Miſnomer ſhould be pleaded in abatement, and cannot be moved in arreſt of judgment. *Clerk of Taunton Market* v. *Kimberley.* 6

2. In what caſes advantage may be taken of a miſnomer, and how it is to be pleaded. 5

See alſo ABATEMENT.

MISRECITAL.

1. Miſrecital of a ſtatute in pleading fatal. 516

MILITIA.

1. Attornies are not privileged from ſerving in the militia, or paying for ſubſtitutes. *Gerard's Caſe.* 722

MONEY HAD AND RECEIVED.

1. The action for money had and received is a kind of equitable action, founded on the principles of juſtice, by which money which ought not in juſtice to be kept, may be recovered. 230

2. Therefore, if money, which there was no ground to claim in conſcience, be paid under a miſtake, the party may recover it back again by this kind of action. *Ibid.*

3. And if money be paid by miſtake to an agent, who places the ſame to the account of his principal, but does not pay it over, an aſſumpſit for money had and received to the uſe of the perſon ſo paying it by miſtake, will lie againſt the agent. *Buller* v. *Harriſon.* 231

4. But an action for money had and received, will not lie againſt a known agent or receiver, for money paid voluntarily to ſuch agent, for the uſe of his principal, unleſs he has paid it over after notice not to do ſo: but ſuch action muſt be brought againſt the principal only. *Sadler* v. *Evans.* 232

5. So a legatee may be compelled to refund, if a legacy be paid and debts appear, whether he hath given ſecurity to refund or not, for it is the caſe of payment upon a miſtaken ground. *Atkins* v. *Hill.* 233

6. So, alſo, if money be paid upon a conſideration which happens to fail, the party may recover it back again by this kind of action. *Shove* v. *Webb,* 233. *Cripps* v. *Reade,* 234. *Bree* v. *Holbeach,* 235. *Burrough* v. *Skinner.* 236

7. Alſo, though money paid upon a conſideration which fails, may be recovered back in this kind of action, yet it can only be recovered from the party by whom it was actually received, and not from one who joined as a ſurety only. *Stratton* v. *Raſtall.* 236

8. So, alſo, if money be got through impoſition (expreſs or implied) or extortion, or oppreſſion, or an undue advantage taken of the plaintiff's ſituation, contrary to laws made for the protection of perſons under thoſe circumſtances, it may be recovered back again in this action. *Robſon* v. *Eaton,* 238. *Cheap* v. *Harley,* 239. *Clarke* v. *Shee and Johnſon.* 239

9. Where the contract is executed and the money paid *in pari delicto,* the rule is, *in pari delicto, potior eſt conditio defendentis*; and the party who has paid it cannot recover it back: for inſtance, in bribery, if a man

a man pays a ſum of money by way of a bribe, he can never recover it in an action, becauſe both plaintiff and defendant are equally criminal. *Browning* v. *Morris*. 241

10. So alſo as to lottery tranſactions. *Ibid.*

11. The like point. *Jaques* v. *Golightly*, 242. *Jaques* v. *Withy and Reid*, 243. *Cobden* v. *Kendrick*, 243. *Smith* v. *Bromley*. 244

12. Where a man pays money by his agent, which ought not to have been paid, either the agent or principal may bring an action to recover it back. *Stevenſon* v. *Mortimer*, 253. *Whitfield* v. *Hunt*, 253. *Evelyn* v. *Chicheſter*, 254. *Aſtle* v. *Grant*. 255

13. An action for money had and received, will not lie to recover gratuities given to a perſon who has intruded into an office, unleſs they be the certain, known, and accuſtomed fees annexed to the office. *Boyter* v. *Dodſworth*. 260

14. If a man has actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back again, in an action for money had and received: as where a man has paid a debt, which would otherwiſe have been barred by the ſtatute of limitations; or a debt contracted during his infancy, and not for neceſſaries, which in juſtice he ought to diſcharge; though the law would not in either of theſe caſes have compelled the payment; yet if the money be paid, it will not oblige the payee to refund it. *Munt* v. *Stokes*. 276

15. A ſecurity given by an infant is only voidable: for it may be revived by a promiſe after he comes of age. *Cockſhott* v. *Bennet*. 271

16. And if to a plea of infancy, the plaintiff reply, that after the defendant had attained his age of twenty-one years, he ratified and confirmed the ſeveral promiſes and undertakings, and the defendant rejoin that he did not; on iſſue joined thereon, it is ſufficient at the trial for the plaintiff to prove a promiſe by the defendant, and reſt his caſe there; for it is not incumbent on the plaintiff to ſhew that the defendant was of age at the time when the promiſe was made, the proof of the fact lies on himſelf. *Berthwick* v. *Carruthers*. 279

17. Money due in point of honour or conſcience, though a man is not compellable to pay it, yet if paid, it ſhall not be recovered back. *Farmer* v. *Arundel*. 279

18. So if a perſon pays to the extent of principal and intereſt on an uſurious contract, or money fairly loſt at play; in neither of theſe caſes can the party recover it back; for it was paid through a motive of honour and honeſty, and the defendant may therefore retain it with a ſafe conſcience: and the law will not compel him to refund it. 280

19. An action for money had and received does not lie to recover back money paid for the releaſe of cattle damage feaſant, though the diſtreſs were wrongful. *Lindon* v. *Hooper*. 280

20. But where goods are taken in execution, and ſold under a warrant of diſtreſs upon a conviction, and the conviction is afterwards quaſhed; the party may waive the treſpaſs, and bring his action for money had and received, for the clear money produced by the ſale of the goods; for the conviction being quaſhed, there can be no juſtification. *Feltham* v. *Terry*. 281

21. So where goods are taken in execution which are not the property of the perſons againſt whom

execution is taken out, the owner may waive the treſpaſs, and bring his action for the amount of the money which the goods ſold for. *Ibid.*

22. But the plaintiff, by bringing ſuch action for money had and received, can only recover the money for the goods which were ſold. *Ibid.*

23. If treſpaſs be brought in ſuch a caſe, the defendant muſt plead ſpecially, and the plaintiff may recover damages beyond the money actually received from the ſale of the goods. *Ibid.*

24. The action for money had and received, does not lie to recover back ſtock improperly transferred, becauſe ſtock cannot be conſidered as money. *Nightingale* v. *Deviſme.* 282

25. So if bank notes be refuſed to be delivered up, aſſumpſit for money had and received will not lie, it muſt be trover. *Noyes* v. *Price.* 282

26. Although where the demand is for a ſpecific thing, an action of this kind cannot be maintained; yet if there be ground to preſume that it has been converted into money, and the defendant has had notice of the nature of the demand, it will lie. *Noyes* v. *Price*, 282. *Longchamp* v. *Kenny.* 282

27. The fees of a phyſician are honorary, and not demandable of right, and therefore no action can be maintained for them. *Chorley, M. D.* v. *Bolcot.* 284

28. The defendant, who was a member of an election committee, and had taken upon himſelf a very active part, in engaging the plaintiff to advance money, and attend in collecting the voters reſident in London, and conveying them to Briſtol, was held liable to anſwer payment. *Trelawney* v. *Thomas.* 285

29. *A.* being indebted to *B.* for brokerage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the ſum due from *A.* to *B.* as a ſecurity; on which *C.* lends a farther ſum; and the order is accepted by *A.* on the refuſal of *A.* to comply with the order, *C.* may maintain an action for money had and received. *Iſrael* v. *Douglas.* 296

MORTGAGE.

1. A mortgagee of a term cannot be ſued as aſſignee till he takes actual poſſeſſion. *Eaton* v. *Jaques.* 410

NEW TRIAL.

1. New trial was granted where a verdict had been given in favour of the defendant, who had undertaken to honour a certain bill of exchange which the plaintiffs ſhould draw upon them. *Pillans & Roſe* v. *Van Meirop.* 294

2. But a new trial will not be granted after a verdict agreeable to juſtice, although it may be irregular in form. *Aylett* v. *Lowe.* 340

3. The like point. *Edmondſon* v. *Machell.* 181

4. In an action for a malicious proſecution, the jury found for the defendant againſt evidence, but the Court would not grant a new trial, as the ſuit was of a criminal nature. *Norris* v. *Tyler.* 37

5. The Court will grant a new trial in a penal action, on account of a miſtake or miſdirection of the judge. *Wilſon* v. *Raſtall.* 433

NUDUM PACTUM.

1. A promiſe by a bankrupt after the bankruptcy, to revive a debt due before, in conſideration of the creditor's agreeing to take no dividend, is not *nudum pactum. Trueman* v. *Fenton,* 259

NUL TRIL RECORD

1. Is no plea to an action on a foreign judgment, and may be rejected as nugatory, although the plaintiff has called the judgment a record in his declaration, and concluded *prout patet per recordum*. *Walker* v. *Witter*. 343

OFFICES.

1. Assumpsit to pay plaintiff 2l. *per cent.* to procure a purchaser of plaintiff's place of surveyor of the baggage of the port of London, is bad, and contrary to the statute against sale of offices. *Stackpole* v. *Earle*. 272

See BUYING AND SELLING OF OFFICES.

OFFICERS.

1. An action on the case will lie for a misfeasance in office against the deputy, if he is a substantive officer, as well as against the principal. *Rowning* v. *Goodchild*. 38

2. In what cases an action will lie against sheriffs. 38

3. ——————— justices of peace. 39

4. ——————— attornies. 39

OPTION.

1. When one of two things is to be performed, the option is in the person who is to perform. *Layton* v. *Pearce*. 306

2. Upon an optional agreement, if one part of the alternative is prohibited and subject to a penalty, the party having made his option for that part shall incur the penalty. *Ibid.*

PARDON.

1. There are three ways by which accomplices obtain a right to a pardon, 1st, by approvement; 2dly, by coming within the statutes 10 & 11 *W.* 3. c. 20. § 5. 3dly, by being entitled to it by the royal proclamation. *Rex* v. *Rudd*. 634

2. An accomplice, though not within any of the three foregoing cases, may, if admitted a witness under the practice allowed, if he behaves fairly, and discloses the whole truth, obtain a recommendation to mercy: but it rests upon his being a person properly within the usage, and upon his own behaviour in fully complying with the requisite conditions. *Ibid.*

3. But a justice of peace has no authority to select whom he pleases, and to tell such offender he shall be a witness. *Ibid.*

PARISH.

1. Where two parishes had been a long time united, and had had a joint sexton, who was paid by both, and afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other: held that the other parish could not maintain an action for money paid, laid out, and expended to the use of the first parish for their quota of the sexton's salary. *Stokes* v. *Lewis*. 262

2. Neither can the right of the sexton be tried in such case, without his being a party to it. *Ibid.*

3. Neither is the payment of the salary a joint obligation to two parishes, for the sexton in such case cannot bring his action against one of the parishes for the whole sum. *Ibid.*

PARTNERS.

1. If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership. *Green* v. *Waring*. 735

2. Surety for the faithful service of *J. S.* to a sole trader does not extend to a subsequent partnership. *Wright* v. *Russel*. 334

3. An action for partnership debts

debts may be brought againſt one partner only; and unleſs he pleads in abatement he is excluded. *Rice* v. *Shute.* 3

4. If an action be brought againſt one partner only, no advantage can be taken of the omiſſion, but by plea in abatement. *Abbot* v. *Smith.* 3

5. But in torts there is a difference to be obſerved, viz. if the cauſe of action ariſe *ex contractu*, the party muſt ſue all the contracting parties; but where it ariſes *ex delicto*, he may ſue all or any of the parties at his election, upon each of whom individually a ſeparate treſpaſs attaches. *Mitchell* v. *Tarbutt.* 2

6. And although ſome of the parties to the contract be out of the juriſdiction of the court, they muſt be joined in the action and outlawed, otherwiſe the defendant may plead in abatement. *Shepard* v. *Baillie.* 4

7. One partner may maintain an action for money had and received againſt the other partner for money received to the ſeparate uſe of the former, and wrongfully carried to the partnerſhip-account. *Smith* v. *Barrow.* 240

8. Where money is owing to two partners, and, after the death of one, it is paid to a third perſon, the ſurviving partner may maintain an action for money had and received in his own right, and not as ſurvivor. *Ibid.*

9. The ſame, of money received after the teſtator's death, for which his executor may maintain this action in his own right. *Ibid.*

10. Where two enter into articles of partnerſhip for ſeven years, in which is a covenant to account yearly, and to adjuſt, and make a final ſettlement at the expiration of the partnerſhip, and they diſſolve the partnerſhip before the ſeven years are expired, and account together, and ſtrike a balance which is in favour of the plaintiff, including ſeveral items not connected with the partnerſhip, and the defendant promiſes to pay it, an action of aſſumpſit lies on ſuch expreſs promiſe. *Foſter* v. *Allanſon.* 368

11. An action of aſſumpſit may be maintained upon an expreſs promiſe for the amount of a balance ſtruck on a partnerſhip-account, though there be a covenant between the parties to account. *Moravia* v. *Levy.* 369

12. A contract made by two partners to pay a certain ſum of money to a third perſon, equally out of their own private coſts, is a joint contract, and they muſt be jointly ſued upon it. *Byers* v. *Dobey.* 554

13. An action cannot be maintained by ſeveral partners for goods ſold by one of them living in Guernſey, and packed by him in a particular manner for ſmuggling, though the partners who reſide in England know nothing of the ſale. *Biggs* v. *Lawrence.* 271

PATENTS.

1. If the king grant a patent for the ſole uſe of a new invention, and the patent is good in law, an action lies againſt any perſon who infringes upon it. 92

2. But to render the letters patent valid, all the conditions required by the ſtatute muſt be obſerved. *Millar* v. *Taylor.* 92

3. The general queſtion on patents are, 1ſt, Whether the invention were known and in uſe before the patent? 2dly, Whether the ſpecification is ſufficient to enable others to make it up? *Liardet* v. *Johnſon.* 92

4. The

4. The meaning of the ſpecification is, that others may be taught to do the thing for which the patent is granted; and if the ſpecification is falſe, the patent is void; for the meaning of the ſpecification is, that after the term the public ſhall have the benefit of the diſcovery. *Ibid.*

5. Therefore, in a patent for truſſes for ruptures, the patentee omitted what was very material for tempering ſteel, which was rubbing it with tallow, and for want of that, Lord *Mansfield* held it void. *Ibid.*

6. On a *ſcire facias* to repeal a patent, four iſſues joined on the record: 1ſt, That the patent was inconvenient to his majeſty's ſubjects in general. 2dly, That the invention at the time of granting the patent was not a new invention, as to the public uſe and exerciſe of it in England. 3dly, That it was not invented and found out by the defendant. 4thly, That the defendant had not, by ſpecification, particularly deſcribed and aſcertained the nature of the invention, and in what manner it was to be performed. *The King* v. *Arkwright.* 93

7. Patent void where the ſpecification, 1ſt, directed an ingredient to be taken, which would not anſwer the purpoſe; 2dly, that it directed any kind of foſſil ſalt to be taken, whereas only one would anſwer the purpoſe; 3dly, that all the things put together did not produce the thing intended. *Turner* v. *Winter.* 93

8. If any one part of the invention be not ſufficiently deſcribed, the patent is void, but if any one part of the invention be new and uſeful, that is ſufficient to ſuſtain a patent for the particular object of the invention. *The King* v. *Arkwright.* 96

9. The like point. *Morris* v. *Branſon.* 96

10. But the patent muſt not be more extenſive than the invention, therefore, if the invention conſiſt in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void. *The King* v. *Elſe.* 96

11. And whether a patent for a new-invented method of uſing an old engine in a more beneficial manner than heretofore, by the mechanical employment of certain principles, is valid or not, has not been decided. *Boulton & Watt* v. *Bull.* 96

12. If the patent is void, the patentee cannot enforce the performance of a covenant, for the obſervance of the excluſive right, entered into by another, in contemplation of its being good. *Hayne, & al.* v. *Maltby.* 115

13. But the patentee, after an aſſignment of his intereſt, cannot himſelf ſet up that the patent is void. *Oldham* v. *Langmead.* 116

PAWN.

1. If goods be obtained from *A.* by fraud, and pawned to *B.* without notice, and *A.* proſecute the offender to conviction, and get poſſeſſion of his goods, *B.* may maintain trover for them. *Parker* v. *Patrick.* 156

PEACE OFFICER.

See ARREST. FALSE IMPRISONMENT.

PENAL ACTIONS.

1. Penal actions are civil ſuits. *Atcheſon* v. *Everitt.* 431

See ACTIONS ON PENAL STATUTES.

PEWS.

PEWS.

1. If a perſon hath right to ſit in a particular pew in a church, and is diſturbed therein, he may have an action of treſpaſs on the caſe; but he muſt ſet forth his title to be either by preſcription, as appurtenant to a meſſuage, or by a faculty from the ordinary, and bare poſſeſſion will not give a right, becauſe every pariſhioner has a right to go into the church. *Stocks* v. *Booth.* 83

2. But where the plaintiff claims by preſcription, evidence of an uninterrupted poſſeſſion for a ſeries of years, under a gift from the rector and church-wardens, after the rebuilding of the church, will be ſufficient to maintain the action. *Rogers* v. *Brooks.* 85

3. But though a preſcriptive right to a pew may be preſumed, from evidence of an uninterrupted poſſeſſion for a ſeries of years, yet that preſumption may be deſtroyed by proof of its origin being only of a modern date, and for accommodation. *Griffiths* v. *Matthews.* 85

4. And the ſentence of the eccleſiaſtical court, admoniſhing a party not to diſturb another in the enjoyment of a pew, is not concluſive evidence as to the right upon a trial at common law. *Croſs* v. *Salter.* 87

PHYSICIAN.

1. A phyſician cannot maintain an action for his fees. *Chorley* v. *Bolcot.* 284

PLEADNIG.

1. Another action in the ſame term cannot be pleaded to a popular action, but the defendant muſt ſhew the other action to be actually prior in point of time. *Coombe* v. *Pitt.* 426

2. A dilatory plea to an indictment ſet aſide for want of affidavit to verify it. *Rex* v. *Grainger.* 8

3. Leave given to withdraw a plea of *non eſt factum*, and plead infancy. *Olding* v. *Arundel.* 347

4. *Non eſt factum*, and *ſolvit poſt diem*, are incompatible pleas. *Fox* v. *Chandler*, 347. *Arnold* v. *Baas.* 347

5. In treſpaſs *quare clauſum fregit*, the plaintiff may declare generally, without naming the cloſes. *Martin* v. *Keſterton.* 212

6. Upon *non eſt factum* in covenant, the leſſee in poſſeſſion being defendant ſhall not controvert the title of the plaintiff his leſſor to demiſe. *Friend* v. *Eaſtabrook.* 416

7. A plea *puis le darrein continuance* cannot be rejected by the Court if it be verified by an affidavit. *Paris* v. *Salkeld.* 10

8. In debt on bond, plea of payment before the day is ill. *Anon.* 349

9. Plea to a bond conditioned for payment of money, that it was given as an indemnity againſt another bond, and that the plaintiff has not been damnified, is bad. *Meaſe* v. *Meaſe.* 346

10. If to an action by a ſheriff againſt a bailiff's ſurety, upon a bond for the performance of an indenture of covenant, to execute all warrants, and to pay over all money received by him: a plea of performance generally be put in: if the replication ſtate a particular warrant to the ſaid bailiff, and that he neglected to return it, the plaintiff muſt conclude with an averment. *Sayre* v. *Minns.* 351

11. Other objections to the above plea overruled. *Ibid.*

12. Bail above may juſtify breaking and entering the houſe of *A.* the outer door being open, in order to arreſt the principal, and ſuch a juſtification is good, without averring

ting that the principal was in the houſe at the time. *Sheers* v. *Brooks.* 796

13. And on ſuch a plea, an averment that the defendants duly became bail, and entered into a recognizance, is ſufficient, without ſtating that the principal was delivered to their cuſtody. *Ibid.*

14. In a declaration for not fulfilling the conditions of a ſale, where the purchaſe-money was to be paid at a certain time, on having a good title, and a proper ſurrender; it muſt be averred, that the ſeller actually made a good title, and ſurrendered the eſtate. *Phillips* v. *Fielding.* 402

15. Pleadings in a fiſhery cauſe. *Richardſon* v. *Mayor and Commonalty of Oxford.* 222

16. Pleading in foreign attachment. *Morris* v. *Ludlam.* 701

17. On a declaration that all an original leſſee's eſtate came to the defendant by aſſignment, and a plea that all, &c. did not come *in modo et forma*, and iſſue joined thereon; evidence of an underleaſe, will not ſupport the iſſue. *Holford* v. *Hatch.* 408

18. In covenant for rent againſt the defendant, as aſſignee of all the leſſee's intereſt, &c. by virtue whereof he became, and ſtill is poſſeſſed, &c. if the defendant plead that all, &c. did not come to him by aſſignment, and that he did not become poſſeſſed, &c. it is good evidence to ſupport the plea that the aſſignment was by way of mortgage, with a clauſe of redemption, and that the defendant has never taken actual poſſeſſion, and this although the mortgage is forfeited. *Eaton* v. *Jaques.* 410

19. But if the defendant plead an aſſignment over before the rent accrued, it will not be a good replication, that the aſſignee over never took actual poſſeſſion, without adding, that the aſſignment over was by way of mortgage. *Walker* v. *Reeves.* 411

20. Or that it was colluſive and fraudulent. *Ibid.*

21. Nor is it a good replication that the aſſignee over was a *feme covert*. *Barnfather* v. *Jordan.* 413

22. In an action againſt executors in their own right, on a covenant for good title and quiet enjoyment, againſt any perſon or perſons whatſoever contained in an aſſignment of a leaſe of the teſtator by way of mortgage, the declaration muſt ſhew a breach by ſome act of the covenantors. *Noble* v. *King and another.* 385

23. In an action of debt on a ſimple contract, the plaintiff may prove and recover a leſs ſum than is ſtated in the declaration to be due. *M'Quillin* v. *Cox.* 340

24. An action of debt on a promiſſory note, payable by inſtalments, will not lie till the laſt day of payment be paſt. *Rudder* v. *Price.* 340

25. Where there are mutual covenants which do not go to the whole conſideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Boone* v. *Eyre.* 392, 393

26. *Non eſt factum*, and a tender, cannot be pleaded to a bond. *Jenkins* v. *Edwards.* 349

27. Accord without ſatisfaction not pleadable. *James* v. *David.* 223

28. If the plea in an action of treſpaſs juſtifies under a cuſtom appurtenant to an ancient meſſuage; a replication traverſing the cuſtom does not admit the antiquity of the meſſuage, but the plaintiff may prove it built within twenty years and not on the ſcite of an ancient houſe. *Dunſtan* v. *Treſſider.* 218

29. On a writ in debt for 1066l. plaintiff declared for 1000l. borrowed;

rowed; and in a ſecond count for 66l. for intereſt of a certain other ſum, the defendant pleaded in abatement of the writ, that "the ſaid ſum of money in the ſaid writ mentioned, and thereby ſuppoſed to be borrowed from the plaintiff," was borrowed by the defendant and others: on demurrer becauſe this plea only anſwered one of the cauſes of action, viz. that mentioned in the firſt count, the Court held the plea bad *Harris* v. *Jameſon.* 341

30. The heir may be charged as aſſignee in covenant, which runs with the land. *Deriſley* v. *Cuſtance.* 413

31. An infant cannot pray the parol to demur in any other ſtage of the proceeding than at the time of pleading. *Ibid.*

32. A plea in abatement is bad after a general imparlance. *Evans*, q. t. v. *Stevens.* 430

33. So it is if it do not give a better writ, but tends to ſhew that the plaintiff hath no action at all. *Ibid.*

34. If to an action of treſpaſs for pulling down and carrying away a gate, the defendant pleaded a right of way; and that the gate being wrongfully erected acroſs the ſame, he took it down, and depoſited it in a convenient place for the uſe of the plaintiff, to which the plaintiff reply a ſubſequent converſion: proof that the defendant put the gate upon his own premiſes, from whence the plaintiff might have taken it if he had pleaſed; will not ſuſtain the replication. *Houghton* v. *Butler.* 212

35. When executors pay a ſum of money on account of the teſtator, which they need not have done, and bring an action to recover it back, they muſt declare in their own right and not as executors. *Munt* v. *Stokes.* 276

36. If a bond be given to huſband and wife adminiſtratrix, the huſband alone may declare on it as on a bond made to himſelf. *Ankerſtein* v. *Clarke.* 346

37. In alleging a breach of covenant for quiet enjoyment, it is ſufficient to allege, that at the time of the demiſe to the plaintiff, *A. B.* had lawful right and title, and entered and ejected without ſhewing what title *A. B.* had, or that he evicted the plantiff by legal proceſs. *Foſter* v. *Pierſon.* 415

38. Where a plaintiff in poſſeſſion brings an action on the caſe againſt a wrong doer, it is ſufficient to declare generally without diſcloſing any title: but when a defendant juſtifies under a right, it muſt be ſet out formally in the plea. *Grimſtead* v. *Marlowe.* 218

39. A defendant in an action for falſe impriſonment, pleading a juſtification under meſne proceſs, ſued out by him in a cauſe in which he was plaintiff, may ſtate that the writ iſſued upon an affidavit to hold to bail without ſetting forth the cauſe of action. *Belk* v. *Broadbent.* 178

40. And if the writ be pleaded as ſued out on a day between the eſſoign-day and the firſt day of the term, and there be a ſpecial demurrer for that cauſe, the objection will not prevail, though the Court do not in fact ſit till the *quarto die poſt.* *Ibid.*

41. In treſpaſs for breaking and entering the plaintiff's houſe, and expelling him therefrom, the breaking and entering are the giſt of the action, and the expulſion is merely aggravation; therefore a juſtification as to breaking and entering will cover the whole declaration. *Taylor* v. *Cole.* 201. 203

42. If the plaintiff mean to inſiſt on the expulſion, as making the

the defendant a treſpaſſer *ab initio*, he ſhould now aſſign it. *Ibid.*

43. In debt for goods ſold and delivered, the plaintiff declared, that the defendant, at Weſtminſter, in the county of Middleſex, was indebted to him in a certain ſum for goods ſold and delivered, without alleging an expreſs contract and place where ſuch contract was made: upon ſpecial demurrer for theſe cauſes, the Court held the contract and venue well laid. *Emery* v. *Fell.*

44. The ſtat. 23 *Hen.* 6. c. 9. relating to bail-bonds is a public act; therefore the Court will take notice of it, though it be not pleaded. *Samuel* v. *Evans.* 783

45. A declaration entitled generally of the term, relates to the firſt day of the term; and the promiſes and breach being laid on the firſt day of the term, may be preſumed to have been made before the delivery of the declaration; becauſe by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be ſuppoſed to have been delivered till the ſitting of the court on that day. *Pugh* v. *Robinſon.* 303

46. If a tenant from year to year hold for four or five years, either he or his landlord at the expiration of that time may declare on the demiſe, as having been made for ſuch a number of years. *Birch* v. *Wright.* 315

47. A plea by an heir at law, who was ſued by an obligee of his anceſtor, that he claimed to retain a certain ſum for money laid out in repairing the premiſes, cannot be ſupported. *Shettleworth v. Neville.* 354

48. A covenant in a charter-party, "that no claim ſhall be admitted or allowance made for ſhort tonnage, unleſs ſuch ſhort tonnage be found, and made to appear on her arrival, on a ſurvey to be taken by four ſhipwrights to be indifferently choſen by both parties," is not a condition precedent to the plaintiff's right of recovering for ſhort tonnage, but is a matter of defence to be taken advantage of by the defendant; and the not averring performance is no ground for arreſting the judgment. *Hotham* v. *the Eaſt India Com.* 401

49. If a leſſor covenant for quiet enjoyment againſt the lawful let, ſuit, entry, &c. of himſelf, his heirs, and aſſigns, the declaration for a breach of the covenant need not expreſsly allege that he entered claiming title, if the diſturbance complained of be ſuch as clearly appears to be an aſſertion of right. *Lloyd* v. *Tomkies.* 381

See alſo ABATEMENT.

POST OFFICE.

1. The poſtmaſter in a country town cannot demand money for delivering letters at private houſes. *Barnes* v. *Foley.* 50

2. The poſtmaſters in the country are obliged to deliver the letters to the perſons they are directed to, at their places of abode. *Stock* v. *Harris*, 46. *Barnes* v. *Foley.* 50

4. An action on the caſe for damages lies againſt a deputy poſtmaſter for non-delivery of letters gratis in a country poſt town. *Rowning* v. *Goodchild.* 38. 48

3. A poſtmaſter is bound to deliver all letters to the inhabitants in a poſt town, at their reſpective places of abode, at the rate of poſtage eſtabliſhed by act of parliament. *Smith* v. *Powditch.* 50, 51

5. The poſtmaſter-general is not liable perſonally for the value of a bank-note ſtolen by one of the ſorters of the poſt-office, out of a letter delivered into the office; for he is not like a common carrier. *Whitfield* v. *Lord le Deſpenſer.* 53

PRACTICE.

1. *As to abatement.*] The four days to plead in abatement are inclusive. *B.R. Harbord* v. *Perigal.* 9

2. *As to arrests.*] If a person be arrested after the writ is returnable, the officer cannot legally detain him, though for the shortest time, till the writ be continued. *Loveridge* v. *Plaistow, C.B.* 677

3. *As to attachment of privilege.*] On an attachment of privilege sued, the precipe must be left with the prothonotary. *C.B. Frogatt* v. *Tapscott.* 717

4. *As to attachments for contempt.*] The Court will put interrogatories to a defendant brought up on an attachment for a rescue, unless the prosecutor waive putting them. *Rex* v. *Horsley.* 697

5. *As to attornies.*] A bill may be filed against an attorney in vacation. *B.R. Waghorne* v. *Fields.* 720

6. *As to bail.*] Where the defendant has not put in bail in time, whereby the bail-bond is forfeited, and afterwards gives notice that he will put them in, in order to stay proceedings on the bail-bond, the plaintiff may except to such bail, and it will not be a waiver of the assignment. *B.R. Boldero* v. *Gray.* 781

7. Of the four days allowed to perfect bail in after an exception, the first is reckoned exclusively, and the last inclusively. *North* v. *Evans. C.B.* 774

8. Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance-day of the return. *Fletcher* v. *Angell. C.B.* 795

9. A clerk to an attorney, though not articled, cannot be bail to the action. *Cornish* v. *Ross. C.B.* 761

10. Bail must render the principal before the rising of the court, in order to discharge themselves from an action of debt on the recognizance. *C.B. Lardner* v. *Bassage.* 795

11. The defendant in an action on a judgment cannot apply to the court to stay the proceedings pending a writ of error upon that judgment, until he has put in bail. *B.R. Smith* v. *Shepherd.* 773

12. Bail above may be put in on a *dies non juridicus. B.R. Baddeley* v. *Adams.* 775

13. A cognovit by the principal without notice to the bail does not discharge the bail. *B.R. Hodgson* v. *Nugent.* 787

14. If upon the return of *non est inventus* to the *ca. sa.* the plaintiff will proceed against the bail and deliver a declaration conditionally; the bail cannot apply to the court to stay proceedings on payment of the debt and costs of the original action only, but must also pay the costs of the second action, though the bail tendered the original damages and costs before the end of eight days from the return of the *ca. sa.* within which time, by the practice of the court, they might have discharged themselves by surrendering their principal. *B.R. Perigal* v. *Mellish.* 790

15. Bail may render the principal, after an assignment of the bail-bond, though they have not justified. *B.R. Edwin* v. *Allen.* 776

16. Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified. *B.R. Meysey* v. *Carnell.* 792

17. If, on exception to bail, notice be given of the bail, only one of whom justifies, and the names of the former still remain on the bail-piece: the former may surrender the principal. *B.R. Rex* v. *Sheriff of Essex.* 793

18. If

18. If the plaintiff hold two defendants to bail on a joint writ, and declare againſt them ſeverally, the court will ſet aſide the proceedings. *B.R. Moſs* v. *Birch.* 769

19. Or if one defendant be held to bail on an affidavit which ſtates two ſums to be due to two ſeveral plaintiffs. *B.R. Dean and Chapter of Exeter* v. *Seagell.* 521

20. If there be a variance between the affidavit upon which a defendant has been held to bail and the declaration, the court will diſcharge him. *B.R. Spalding* v. *Mure.* 522

21. If a foreigner ſue two defendants, and only one of them puts in bail, that one may require the plaintiff to give ſecurity for coſts, without juſtifying bail for the other defendant. *B.R. Carr* v. *Shaw.* 593

22. A defendant has four clear days after final judgment to put in bail in error, *B.R. Bennet* v. *Nichols.* 772

23. The time for putting in bail, where there has been a rule to ſet aſide proceedings for irregularity, remains the ſame after the rule is diſcharged as it was when it was granted. *B.R. Swayne* v. *Crammond.* 523

24. Bail is not regularly put in till the allowance of it has been ſerved, even though the plaintiff oppoſe the juſtification. *B.R. Rex* v. *Sheriff of Middleſex.* 777

25. When there is only one *ſcire facias* againſt bail, and the proceedings are by bill, there need be only four days excluſive between the teſte and return of it. *B.R. Bell* v. *Jackſon.* 790

26. Only the defendant or defendants in one action can be included in a bailable writ: *ſecus* if the writ be not bailable. *B.R. Holland* v. *Johnſon.* 768

27. Where a *ca. ſa.* is returnable againſt the principal on a particular day, before which a writ of error is allowed and ſerved, that operates as a ſuperſedeas to any proceedings againſt the bail, though the *ca. ſa.* has lain four days in the office before the allowance of the writ of error. *B.R. Perry* v. *Campbell.* 790

28. If two actions be brought for cauſes of action which may be joined, and the defendant is holden to bail in both, the court will compel the plaintiff to conſolidate them, and to pay the coſts of the application, *B.R. Cecil* v. *Briggs.* 767

29. Bail in error muſt be put in within four days after final judgment ſigned, without reference to the time of the allowance or ſerving the copy of it. *B.R. Jaques* v. *Nixon.* 772

30. Bail in error cannot ſurrender their principal, though he become bankrupt pending the writ of error, *B.R. Southcote* v. *Braithwaite.* 773

31. *As to priſoners.*] A detainer may be lodged againſt a debtor who happens only to be accidentally within the walls of a priſon. *Wilkinſon* v. *Jaques.* 607

32. *As to defendants brought up for judgment.*] When a defendant who has ſuffered judgment by default in a criminal proſecution is brought up for judgment, each party ſhould come prepared with affidavits diſcloſing his own caſe (if he mean to produce any affidavit at all); but if in the courſe of the inquiry the court wiſh to have any point further explained, they will give the defendant an opportunity of anſwering it on a future day. *B.R. Rex* v. *Wilſon.* 526

PRESENTATION.

See ADVOWSON.

PRESUMPTION.

1. Where a bond may be preſumed

ſumed to have been ſatisfied. *Oſwald* v. *Legh.* 347

PRIVILEGE.

1. An Engliſh ſecretary to a foreign miniſter is privileged from arreſt, though formerly a trader, and now under very ſuſpicious circumſtances. *Triquet* v. *Bath*, and *Peach* v. *Bath.* 577, 579

2. An attorney at law has no privilege againſt the court of conſcience in London. *Silk* v. *Rennett.* 717

3. Privilege denied to a domeſtic phyſician to a public foreign miniſter, it appearing to be a mere ſcheme to ſcreen him from his debts. *Lockwood* v. *Coyſgarne.* 578, 580

4. An attorney at law is not obliged to obey a ſubpœna *duces tecum* in order to give evidence on a charge of felony againſt his client. *Rex* v. *Dixon.* 705

5. A defendant, in order to ſubſtantiate his claim to privilege as a domeſtic to an ambaſſador, ought to ſhew the nature of the ſervice, and ſwear to the actual performance of it. *Fontainier* v. *Heyl.* 579

6. And it muſt be ſhewn that he was in actual ſervice at the time of arreſt. *Heathfield* v. *Chilton.* 578, 579

7. An attorney at law has privilege to keep the venue in Middleſex, when he is plaintiff; but not to change it thither when he is defendant. *Pope* v. *Redfearne.* 716

8. An attorney is privileged from ſerving corporation offices, though reſiding in the corporation town. *Mayor of Norwich* v. *Berry.* 721

9. A party who has attended his cauſe all day, and in the evening retires to dine with his attorney and witneſſes, is privileged from arreſt till he returns home. *Lightfoot* v. *Cameron.* 659

PRIZE.

See ADMIRALTY.

PROHIBITION.

See ADMIRALTY, ADVOWSON, SLANDER, No. 12.

QUAKERS.

1. A quaker's affirmation is admiſſible in an action *qui tam* on a penal ſtatute. *Atcheſon* v. *Everitt.* 431

QUARE IMPEDIT.

See ADVOWSON.

RAMSGATE.

1. No ſhips but ſuch as ſail into the downs are liable to the duties of Ramſgate harbour. *Pole* v. *Johnſon.* 59

RANSOM.

See ALIENS, No. 1, 2, 3, 4.

READERSHIP.

1. If the rector of a pariſh, by certificate to the biſhop, appoint *A. B.* curate of the ſaid pariſh, till otherwiſe provided of ſome eccleſiaſtical preferment,; the readerſhip of the pariſh is not an eccleſiaſtical preferment within the meaning of ſuch certificate. *Martin* v. *Hind.* 290

RECEIPT.

1. A receipt is not concluſive evidence againſt the party ſigning it; but he may ſhew that he did not receive the ſum or thing in queſtion. *Stratton* v. *Raſtall.* 236

RECOVERY.

1. Amendment of a common recovery by inſerting a new vill. *Henzell* v. *Lodge.* 584

REPLEVIN.

See AMENDMENT, No. 27.

RESIGNATION BOND.

1. Qu. Whether a bond of reſignation

nation with condition to reſide, and to reſign for the patron's ſon to be preſented, and to keep the premiſes on the living in repair be not good in law? *Partridge* v. *Whiſton.* 328

RESTITUTION.

1. If goods be obtained from *A.* by fraud, and pawned to *B.* without notice; and *A.* proſecute the offender to conviction and get poſſeſſion of his goods, *B.* may maintain trover for them. *Parker* v. *Patrick.* 156

REVERSION.

1. A reverſioner may bring an action for an injury done to the value of the inheritance. *Jeſſer* v. *Gifford.* 78

RIVERS.

1. The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right muſt be founded either on ſtatute or on uſage. *Ball* v. *Herbert.* 208

SCIRE FACIAS.

1. A ſcire facias to revive a judgment entered on a bond for ſecuring an annuity granted before the annuity-act, 17 Geo. 3. c. 26. § 2. commanding that no action ſhall be brought on any judgment already entered, unleſs certain requiſites be complied with, is an action within that clauſe. *Fenner* v. *Evans.* 610

RULES OF COURT.

1. A rule of court giving a ſpecific relief, is a bar to an action for the ſame cauſe; unleſs in an action where, by law, the party is entitled to two different remedies; as upon an illegal contract. *Cameron* v. *Reynolds.* 38

SEDUCTION.

1. An action of treſpaſs will lie at the ſuit of a father for getting his daughter with child. *Tullidge* v. *Wade.* 187

2. But the daughter muſt be reſident in her father's houſe, and not in the ſervice of another. *Poſtlethwaite* v. *Parkes.* 187

3. An action merely for debauching a man's daughter, by which he loſes her ſervice, is an action on the caſe: but where the offence is accompanied with an illegal entry of the father's houſe, he has his election either to bring treſpaſs for the breaking and entering, and lay the debauching of the daughter and loſs of her ſervice as conſequential, or he may bring the action on the caſe, merely for debauching his daughter, *per quod ſervitium amiſit.* *Bennett* v. *Allcott.* 188

See alſo ADULTERY.

SESSIONS.

1. The court will refer an attorney's bill to be taxed, though all the buſineſs be done at the quarter ſeſſions. Ex parte *Williams.* 724

2. The ſheriff has no authority to take a bond for the appearance of perſons arreſted by him under proceſs iſſuing upon an indictment at the quarter ſeſſions for a miſdemeanour; he can only take a recognizance for their appearance. *Bengough* v. *Roſſiter.* 744, 746

SHERIFF.

1. All actions for breach of duty in the office of ſheriff, muſt be brought againſt the high-ſheriff, though the default be by the under-ſheriff or bailiff. *Cameron* v. *Reynolds.* 38

2. An action does not lie againſt the ſheriff upon a promiſe to execute a bill of ſale to the plaintiff's nominee. *Ibid.*

3. The legal and proper mode of compelling a ſale by the ſheriff, is by a writ of *venditioni exponas.* *Ibid.*

4. If a bailiff on a *fi. fa.* againſt the goods of *A.* take thoſe of *B.*

an action of treſpaſs lies againſt the ſheriff. *Ackworth* v. *Kempe.* 193

5. The ſheriff is anſwerable for the official acts of his under-ſheriff. *Ibid.*

6. A ſheriff or his officer is not liable to an action for arreſting a certificated bankrupt, a peer, a diſcharged inſolvent debtor, or a witneſs *eundo et redundo*, although the party is privileged from arreſt. *Tarlton* v. *Fiſher.* 166

7. A ſheriff can only take a recognizance, and not a bail-bond, when the party is arreſted under proceſs iſſuing upon an indictment. *Bengough* v. *Roſſiter.* 744, 746

8. A ſheriff's officer is not liable to the penalties of 32 Geo. 2. c. 28. § 1. for carrying a perſon taken in execution to priſon within twenty-four hours: that clauſe only relating to perſons arreſted on meſne proceſs. *Evans* v. *Atkins.* 675

9. An agreement in writing, to put in good bail for a perſon arreſted on meſne proceſs, at the return of the writ, or ſurrender the body, or pay debt and coſts, made by a third perſon with the bailiff of the ſheriff, in conſideration of his diſcharging the party arreſted, is void. *Rogers* v. *Reeves.* 543

SET OFF.

1. A judgment of the king's bench may be ſet off againſt a judgment of the common pleas, ſo as to narrow the execution to the balance due. *Barker* v. *Braham.* 714

2. If *A.* recover againſt *C.* and *C.* recover againſt *A.* and *B.* the court will permit *C.* on motion, to ſet off the damages which he has recovered, againſt thoſe obtained by *A.* on his undertaking that the bill of *A*'s attorney in the firſt action ſhall be ſatisfied. *Mitchell* v. *Oldfield.* 711

3. If two perſons agree to perform certain work in a limited time, or to pay a ſtipulated ſum for ſuch time afterwards as it ſhall remain unfiniſhed, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly ſum, and the work is not finiſhed at the time; ſuch weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be ſet off by one obligee in an action brought againſt him by the obligor who executed. *Fletcher* v. *Dyche.* 546

4. Where a partner's executor brings an action in his own right for money received after the death of the other partner's teſtator, the defendant may ſet off whatever was due to him from the plaintiff. *Smith* v. *Barrow.* 240

SHIPS.

1. Whoever ſupplies a ſhip with neceſſaries, has a treble ſecurity: 1ſt, The perſon of the maſter; 2dly, The ſpecific ſhip; 3dly, The perſonal ſecurity of the owners, whether they know of the ſupply or not. *Rich* v. *Coe.* 284

2. A ſhipwright is entitled to recover the amount of the repairs of a ſhip, though the ſhip be burnt in the dock by an accidental fire. *Menetone* v. *Athawes.* 285

3. If a ſhip be ſeized as forfeited under the navigation-act, by a governor of a foreign country belonging to Great Britain, the owner cannot maintain treſpaſs againſt the party ſeizing, although the latter do not proceed to condemnation; for by the forfeiture the property is diveſted out of the owner. *Wilkins* v. *Deſpard.* 197

6. If *A.* lend money on the ſecurity of a ſhip, and take poſſeſſion before

before execution executed at the ſuit of *B.* the veſſel cannot be ſeized under *B.*'s execution. *Ladbroke* v. *Crikett.* 439

SLANDER.

1. There muſt be malice, either expreſſed or implied, to maintain an action for ſlander of title. *Hargrave* v. *Le Breton.* 16

2. Judgment in an action for ſlander reſpecting a bribe, arreſted, becauſe the charge did not ſpecify to whom the money was given. *Purdy* v. *Stacey.* 22

3. Actionable words muſt contain an expreſs imputation of ſome crime liable to puniſhment, ſome capital offence, or other infamous crime or miſdemeanour, and the charge upon the perſon ſpoken of muſt be preciſe. *Onſlow* v. *Horne.* 18

4. Thus the words, "You are a bad man," and "I am thoroughly convinced you are guilty of the death of *Dolly* (meaning the murder of the ſaid Dolly), and rather than you ſhould want a hangman, I would be your executioner," are actionable. *Oldham* v. *Peake.* 18

5. Alſo the words, "He (meaning the plaintiff) was put into the round-houſe for ſtealing ducks at Crowland," which were alleged in the declaration to be ſpoken of the defendant falſely and maliciouſly, have, upon motion in arreſt of judgment after verdict, been held to be actionable, *Beavor* v. *Hides.* 19

6. But where the words were, "*Tim Holt* has forſworn himſelf, and I have three evidences that will prove it;" theſe words were held not in themſelves actionable, becauſe they do not neceſſarily imply that the plaintiff had forſworn himſelf in a judicial proceeding, which alone will conſtitute the crime of perjury. *Holt* v. *Scholefield.* 19

7. Alſo the word *ſwindler* is not actionable. *Savile* v. *Jardine.* 20

8. Another rule is, that words are actionable when ſpoken of one in an office of profit, which may probably occaſion the loſs of his office: or when ſpoken of perſons touching their reſpective trades, profeſſion, and buſineſs, and do, or may probably tend to their damage. *Onſlow* v. *Horne.* 20

9. Thus the words, "What, does he pretend to be a lawyer? he is no more a lawyer than the devil!" being ſaid of an attorney, are actionable. *Day* v. *Buller.* 20

10. And in an action by an attorney for words ſpoken of him in his profeſſion, he need not prove that he is an attorney by his admiſſion, nor by a copy of the roll of attornies; proof that he acted as ſuch is ſufficient. *Berryman* v. *Wiſe.* 20

11. But to impute to any man the mere defect or want of moral virtue, moral duties, or obligations, which render a man obnoxious to mankind, is not actionable. Thus, where the defendant ſaid at a public county meeting, convened for the purpoſe of ſupporting the rights of election: "As to inſtructing our members to obtain redreſs, I am totally againſt that plan; for as to inſtructing Mr. Onſlow, we might as well inſtruct the winds; and ſhould he even promiſe his aſſiſtance, I ſhould not expect him to give it us." Theſe words were held not actionable, *Onſlow* v. *Horne.* 21

12. Likewiſe, theſe words ſpoken of a woman, "I have kept her common theſe ſeven years; ſhe hath given me the bad diſorder, and three or four other gentlemen," are not

not actionable. *Carſlake* v. *Mapledoram.* 23

13. So, when words are ſpoken in confidence, and without malice, no action lies; ſuch as in giving the true character of a ſervant. *Edmonſon* v. *Stephenſon*, 24. *Hargrave* v. *Le Breton*, 24.

14. Neither can a ſervant maintain an action againſt his former maſter, for a letter written by him, aſſigning a reaſon for having given a diſadvantageous character of the ſervant, unleſs the latter can prove the words to be malicious, as well as falſe. *Weatherſton* v. *Hawkins.* 25

15. So, in an action for ſaying of the plaintiff, who was a tradeſman, "He cannot ſtand it long, he will be a bankrupt ſoon," where ſpecial damage was laid, it appearing that the words were not ſpoken maliciouſly, but in confidence and friendſhip, and by way of warning, that the words were not actionable. *Herver* v. *Dowſon.* 26

16. The plaintiff muſt prove the words as laid; therefore, if the words be laid in the third perſon, as for inſtance, "He deſerves to be hanged," proof of words in the ſecond perſon, viz. "you deſerve," will not ſupport the declaration. *Avarillo* v. *Rogers.* 26

17. Same point. *Rex* v. *Berry.* 26

18. But though all the actionable words are not proved, yet if ſome are, it will be ſufficient. *Compagnon* v. *Martin.* 26

19. And the plaintiff may, upon the trial, give evidence of a repetition of the words on days ſubſequent to thoſe laid in the declaration. *Snellger* v. *Shelly.* 27

20. Where two actions were brought for words, in the firſt of which the words were laid to be ſpoken by the wife of the defendant, and in the latter by the defendant himſelf; the Court refuſed to conſolidate the two actions, becauſe it would be error to join the wife in a declaration for words ſpoken by the huſband only. *Swithin* et ux. v. *Vincent* et ux. and *Swithin* et ux. v. *Vincent* only. 27

21. If there be ſome counts that are good, and others that are bad, and the evidence upon the trial is only upon ſuch counts as are good and conſiſtent; if there is a general verdict, it may be amended by the judge's notes, and entered up only on thoſe counts that are good; but if there be any evidence which applies to the other bad or inconſiſtent counts (as, for inſtance, where ſome actionable words are laid, and ſome not actionable, and evidence be given of both ſets of words, and a general verdict), there the *poſtea* cannot be amended, becauſe it is impoſſible for the judge to ſay on which of the counts the jury had found the damages, or how they had apportioned them. And in ſuch caſe, the only remedy is by awarding a *venire de novo*. *Eddowes* v. *Hopkins.* 27

22. The like point laid down in *Holt* v. *Scholefield*, 28; and *Spencer* v. *Goter.* 28

23. Where ſpecial damages are laid in the declaration, and the words are in themſelves actionable, there, if the jury find a verdict for leſs than forty ſhillings, there ſhall be no more coſts than damages. *Collier* v. *Gaillard.* 29

23. But if the words are not actionable in themſelves, there ſhall be full coſts, if ſpecial damages are laid, though the damages found be under forty ſhillings. *Savile* v. *Jardine.* 29

SMUGGLING.

1. An inhabitant of Guernſey cannot recover in the courts of this country the price of goods ſold by him

him there, if he knows it to be the buyer's intentions to ſmuggle the goods into England, and give him aſſiſtance for that purpoſe. *Clugas* v. *Penaluna*. 271

2. The like point. *Biggs* v. *Lawrence*. 271

3. *Secus* where the party knows not of the buyer's intention. *Ibid.*

SLAVE.

1. An indenture executed by an infant ſlave in the Weſt Indies may be for his own benefit, and therefore only voidable here by the infant himſelf. *Keane* v. *Boycott*. 143

STAMPS.

1. If two or more defendants in different actions are put into the ſame affidavit to hold to bail, it is not good, unleſs (perhaps) againſt the firſt-named. *Gibby* v. *Lockyer*. 520

2. So an affidavit to hold the ſame defendant to bail in two actions, viz. Debt and Aſſumpſit, is void as to both actions. *Crooke* v. *Davis*. 520

3. Two defendants for ſeveral cauſes of actions cannot be joined in one writ. *Moſs* v. *Birch*. 769

4. Nor one defendant be held to bail on an affidavit which ſwears to two ſeveral ſums due to two ſeveral plaintiffs. *Dean and Chapter of Exeter* v. *Seagell*. 521

STATUTE OF FRAUDS.

1. If a broker, who is about to ſell the goods of an inſolvent, promiſes the landlord to pay him his rent, if he will not diſtrain, this promiſe is not within the ſtatute of frauds, and need not be in writing. *Williams* v. *Leper*. 562

2. Auctions alſo are not within the ſtatute of frauds. *Simon* v. *Motives*. 562

3. An executory contract for goods is not within the ſtatute of frauds. *Clayton* v. *Andrews*. 562

4. An agreement to leave money by will is not within the ſtatute of frauds, and need not be in writing, though uncertain as to the time of performance. *Fenton* v. *Emblers*. 564

See alſo FRAUDS.

STAYING PROCEEDINGS.

1. Proceedings will not be ſtayed becauſe the cauſe of action is *infra dignitatem curiæ* upon the mere affidavit of the defendant. *Oulton* v. *Perry*. viii

2. The above caſe over-ruled. *Willington* v. *Arters*, 311. *Kinnard* v. *Jones*. 311

3. Proceedings on bond for payment of money by inſtalments, and on default to ſtand in force for the whole ſum due, ſhall not be ſtayed upn payment of the inſtalments in arrear. *Gowlett* v. *Hanſeth*. 367

SURETIES.

1. Sureties to a ſole trader for the faithful ſervice of another as his clerk, are not liable for a default happening to a ſubſequent copartnerſhip. *Wright* v. *Ruſſel*. 334

2. When the ſurety takes a counter-bond from the principal, he cannot maintain an action of aſſumpſit againſt him for a default. *Touſſaint* v. *Martinant*. 321

3. A contract cannot be carried beyond the ſtrict letter of it as againſt a ſurety. *Stratton* v. *Raſtall*. 236

SURPRISE.

1. If a rector, by certificate to the biſhop, appoint a perſon his curate, with a promiſe to allow him a ſalary, and to continue him in ſuch office of curate, till he is preferred or lawfully removed for

ſome fault, if he afterwards remove him without cauſe, and the curate bring an action for his ſalary, the rector ſhall not juſtify ſuch removal by an accuſation of irregularity in the plaintiff's morals or conduct, produced for the firſt time by ſurpriſe at the trial of the cauſe. *Martin* v. *Hind.* 290

2. In an action for money had and received, brought to try whether the defendant was entitled to take certain fees from the plaintiff under an act of parliament, if the parties go to trial upon an apprehenſion that that was the only queſtion to be tried, the plaintiff ſhall not be permitted to ſurpriſe the defendant at the trial, by ſtarting another ground upon which to recover a Norfolk groat. *Stevenſon* v. *Mortimer.* 252

TENDER.

1. A tender of bank-notes is good, unleſs ſpecially objected to on that account at the time. *Wright* v. *Reed.* 605

TOLL.

1. Toll thorough requires a conſideration to be ſhewn, in order to ſupport the demand of it. *Yarmouth, Mayor of,* v. *Eaton.* 256

2. Aſſumpſit will lie for tolls. *Seward* v. *Baker,* 255. *Yarmouth, Mayor of,* v. *Eaton.* 256

TRADE.

1. Judgment of the court for ſeducing artificers abroad. *Rex* v. *Cator.* 685

2. Journeymen are not liable to the penalties for exerciſing a trade, without having ſerved an apprenticeſhip thereto. *Beach,* q. t. v. *Turner.* 652

3. Trade is not tranſmiſſible; but is put an end to by the death of the trader. *Barker* v. *Parker.* 333

5. If executors carry on trade, they muſt do it as individuals, unleſs they carry it on under the direction of the court of chancery. *Ibid.*

TRESPASS.

1. Treſpaſs and not caſe lies for encroaching on a lead mine. *Harker* v. *Birkbeck.* 13

2. Treſpaſs *vi et armis* will lie wherever there is an excluſive right. *Wilſon* v. *Mackreth.* 13

3. Treſpaſs *vi et armis,* and treſpaſs on the caſe cannot be joined in the ſame action. *Howard* v. *Bankes.* 12

4. Damages cannot be ſerved where the count is of a joint treſpaſs, and the jury find the defendants guilty accordingly. *Hill* v. *Goodchild.* 224

5. Treſpaſs and aſſault held to lie againſt one who firſt threw a ſquib, which after having been thrown about in ſelf-defence by other perſons, at laſt put out the plaintiff's eye. *Scott* v. *Shepherd.* 158

6. Treſpaſs lies for procuring by awe, fear, and influence, and contrary to his own inclination, a ſovereign independent abſolute prince to impriſon the plaintiff. *Rafael* v. *Verelſt.* 170

7. Treſpaſs lies for ſetting tables in a market-place for the ſale of goods thereon without leave of the owner of the ſoil. *Mayor of Norwich* v. *Swann.* 223

8. It has been decided in the court of King's Bench, that for driving one carriage againſt another, and thereby damaging the latter, the proper remedy is treſpaſs *vi et armis.* *Day* v. *Edwards.* 189

9. The like point. B.R. *Savignac* v. *Roome.* 190

10. But it has been decided contrary

trary to the two laſt caſes in the court of common pleas. *Morley* v. *Gaiſford.* 191

11. Evidence, that the defendant's ſervant drove a cart againſt the plaintiff's horſe, will ſupport a declaration which charges the defendant with the fact, *Brucker* v. *Fromont.* 191

12. An action of treſpaſs *vi et armis* will lie againſt the ſheriff for taking the goods of a wrong perſon under a warrant iſſued to a bailiff upon a writ of *fieri facias.* *Saunderſon* v. *Baker and Martin.* 192

13. The like point. *Ackworth* v. *Kempe.* 193

14. The like point. *Aquilla Cole* v. *Hindſon.* 194

15. But treſpaſs will not lie againſt the ſheriff for taking the furniture of a houſe, let ready furniſhed, under an execution iſſued againſt the tenant, notwithſtanding he has notice that the furniture is not the property of the tenant. *Ward* v. *Macauley.* 194

16. Treſpaſs *vi et armis* will not lie againſt the keeper of a pound merely for receiving a diſtreſs, though the original taking be tortious; for he is bound to keep whatever is brought to him. *Secus*, if he goes beyond his duty, and aſſents to the treſpaſs. *Badkin* v. *Powell, King, and Chancellor.* 195

17. But treſpaſs will lie for working an eſtray, although the original taking be lawful. *Oxley* v. *Walts.* 196

18. But in theſe caſes, unleſs the plaintiff, on a plea of juſtification, replies, that the defendant abuſed the diſtreſs, the action cannot be ſuſtained. *Gates* v. *Bayley.* 196

19. The like point. *Dye* v. *Leatherdale and Simpſon.* 197

20. The like point. *Fiſherwood* v. *Cannon.* 197

21. Treſpaſs cannot be ſuſtained againſt a party for ſeizing a ſhip as forfeited, under the navigation-act, by alleging that the defendant did not proceed to condemnation. *Wilkings* v. *Deſpard.* 197

22. And if an act which authorizes the levying of a ſum of money on certain perſons gives an appeal to the ſeſſions, in all caſes where the parties think themſelves aggrieved, an objection to the aſſeſſment cannot be tried in an action of treſpaſs, but the party aggrieved muſt appeal. *Bonnel* v. *Beighton and another.* 198

23. And in treſpaſs for taking goods, the declaration muſt ſpecify the particulars, *Bertie* v. *Pickering*, & ux. 200

24. In an action of treſpaſs againſt an officer of exciſe for entering under a warrant of two commiſſioners, founded on the 10 *Geo.* 1. c. 10. into the plaintiff's houſe to ſearch for concealed goods, the Court held that the defendants were not treſpaſſers, even though they found nothing in the plaintiff's houſe, the act itſelf being legal; but that the only remedy was by an action on the caſe for obtaining or executing the warrant from bad motives. *Boot* v. *Cooper.* 200

23. Where the plaintiff declared that the defendant broke and entered the plaintiff's dwelling-houſe, and forced open his cloſet-doors, drawers, cheſts, cupboards, and cabinets, and the goods of the ſaid plaintiff, of the value of 500l. then and there found, toſſed, tumbled, and damaged, &c. there was a demurrer, becauſe the plaintiff had not particularly ſpecified the goods; the Court held the breaking and entering the plaintiff's dwelling-houſe to be the eſſential act; and that the further deſcription was only matter laid by way of aggravation.

vation. *Chamberlain* v. *Greenfield.* 201

24. The like point. *Taylor* v. *Cole.* 201

25. An action of treſpaſs will lie, if an officer, under an attachment againſt the goods, continues in poſſeſſion of the defendant's houſe, or keeps the goods therein, for a long and unreaſonable time, for he thereby becomes a treſpaſſer *ab initio*. *Reed* v. *Harriſon.* 204

26. The like point. *Moore* v. *Beaumont.* 205

27. If any one gleans in an harveſt-field, without the conſent of the occupier of the land, it is a treſpaſs, for which an action may be maintained; for a right to glean cannot be claimed by any perſon at common law. *Worlidge* v. *Manning.* 205

28. The like point. *Steel* v. *Houghton* & ux. 205

29. An action of treſpaſs will lie againſt a perſon for towing a veſſel on the banks of a navigable river, unleſs it has been cuſtomary to do ſo; for, at common law, the public have no right to tow veſſels on the banks of rivers. *Ball* v. *Herbert.* 208

30. Although a perſon may follow a fox, with hounds, over the grounds of another, yet treſpaſs will lie if he unneceſſarily trample down the hedges, or do more than is abſolutely needful. *Gundry* v. *Feltham.* 210

31. A merely accidental, involuntary treſpaſs may be juſtified, but a voluntary one cannot. *Beckwith* v. *Shordike and Hatch.* 211

32. Pleadings in treſpaſs. *Houghton* v. *Butler.* 212

33. Where a treſpaſs is jointly charged upon ſeveral defendants, and the verdict has found them all jointly guilty, the jury cannot afterwards aſſeſs ſeveral damages according to the degrees of guilt. *Hill* v. *Goodchild.* 224

34. In an action of treſpaſs *vi et armis*, "for breaking and entering" the plaintiff's dwelling-houſe, laid with matters of aggravation. The jury found for the plaintiff, and gave him a guinea damages; and it was held, that as on the firſt words, viz. "breaking and entering the houſe," the freehold might have come in queſtion, and there was no certificate, the plaintiff could have no more coſts than damages. *Appleton* v. *Smith.* 224

35. The like point. *Clegg* v. *Molyneux.* 228

36. The like point. *Adlem* v. *Grinaway.* 226

37. Where there is a ſpecial plea of juſtification in treſpaſs, and it is found againſt the defendant, the plaintiff is entitled to his full coſts. *Redridge* v. *Palmer.* 226

38. The like point. *Comer* v. *Baker.* 226

39. The plaintiff had taken in the whole complaint in one count: the defendant by his plea did not juſtify the whole; and therefore the plaintiff was obliged to make a new aſſignment; held that the plaintiff is entitled to all the coſts of the pleadings. *Gundry* v. *Sturt.* 227

40. Where the plaintiff has a verdict on any one count, he is intitled to his entire coſts on the whole declaration: and this, although he may put many cauſes of action, totally different, into one action, and ſucceed only upon one of them. *Norris* v. *Waldron.* 227

41. If it appear from the pleadings, that the freehold could not come in queſtion, the plaintiff ſhall have full coſts. *Lord Dacre* v. *Tebb.* 227

42. If an action be brought againſt

againſt any one for hunting on the ground of another, charging him as a diſſolute perſon, under the ſtat. 4 & 5 *Will.* and *Mar.* c. 23. § 10. to entitle the plaintiff to full coſts if the plaintiff does not prove the circumſtances, he ſhall have no more coſts than damages, if the damages be under 40s. *Pallant* v. *Roll.* 228

43. If it appears that the treſpaſs, however trifling, was committed after notice not to come on the ground, the judge is bound to certify under the ſtatute, that the treſpaſs was wilful. *Reynold* v. *Edwards.* 229

44. And the judge has no diſcretion, even where the treſpaſs is a continuation of that committed before notice. *Gely* v. *Day.* 229

TRIAL.

See NEW TRIAL.

TROVER.

1. What is a ſufficient affidavit to hold to bail in trover. *Charter* v. *Jacques*, 519. *Hubbard* v. *Pacheco.* 519

2. If money and a horſe are given in exchange for another horſe warranted ſound, which was unſound at the time, trover will not lie to recover the horſe given in exchange, becauſe the property is altered. *Power* v. *Wells.* 147

3. An action of trover muſt be founded on the property of the plaintiff. *Pyne* v. *Dor.* 147

4. The like point. *Power* v. *Wells.* 147

5. Poſſeſſion is a good title to maintain trover againſt a wrong doer. *Rackham* v. *Jeſſup and Thompſon.* 147

6. Trover lies againſt cuſtom-houſe officers, for ſeizing and carrying to the king's warehouſe goods not ſeizable, for the converſion is wrongful. *Tinkler* v. *Poole.* 148

7. So, if a party pay money in order to redeem his goods from a wrongful diſtreſs for rent, he may maintain trover againſt the wrong doer. *Shipwick* v. *Blanchard.* 148

8. But if the diſtreſs be only irregular, trover will not lie. *Wallace* v. *King.* 149

9. Trover does not lie againſt a wharfinger, or common carrier, for goods ſtolen or loſt out of their poſſeſſion. *Roſs* v. *Johnſon and Dowſon.* 149

10. But if a carrier is expreſsly directed not to deliver the goods with which he is intruſted to a particular perſon, it is a converſion if he deliver them contrary to ſuch direction, and trover may be maintained. *Syeds* v. *Hay.* 150

11. One tenant in common cannot maintain an action of trover againſt another. *Holliday* v. *Camſell and White.* 151

12. In trover againſt an adminiſtrator, the declaration charged both the trover and converſion to have been committed by the teſtator in his life-time. The plea therefore was that the teſtator was not guilty. Verdict having been found for the plaintiffs, a motion was made in arreſt of judgment, becauſe this is a tort, for which an executor or adminiſtrator is not liable to anſwer. The judgment was arreſted by the unanimous opinion of the Court, on the ground that *actio perſonalis moritur cum perſona. Hambly*, & al. v. *Trott.* 152

13. Trover does not lie againſt an executor for a converſion by his teſtator. *Ibid.*

14. In an action of trover for title deeds, it appeared that the defendant had purchaſed a parcel of the eſtate, but the reſt being in mortgage, no title deeds were produced; and he took

took a covenant from the vendor to produce them at any time, or on any trial: afterwards he took an aſſignment of the mortgaged premiſes, and had all the deeds delivered to him with the aſſignment. He then aſſigned the ſame mortgage to the plaintiff, who advanced the money on it, and the title-deeds, of which there was no mention in this laſt aſſignment, remaining with the defendant, who refuſed to deliver them up, this action was brought. At the trial of the cauſe, at the aſſizes, the plaintiff was nonſuited: and it being afterwards moved to ſet ſuch nonſuit aſide, the rule was refuſed. *Tea* v. *Field.* 154

15. The original owner of goods ſtolen, who proſecutes the felon to conviction, has a right to a reſtitution of them, and may maintain trover for them; but ſuch action is only maintainable againſt the perſon who had poſſeſſion of the goods at the time of the conviction of the thief, or afterwards, and not againſt any perſon who may in the intermediate time, between the felony and conviction, have had poſſeſſion thereof, by ſale in market overt, and afterwards parted with the property. *Horwood* v. *Smith.* 155

16. But if goods be obtained by fraud only, the owner is not on the conviction of the offender, intitled to a reſtitution. *Parker* v. *Patrick.* 156

17. Where trover is brought for a ſpecific chattel, of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the real value; but that its real and aſcertained value muſt be the ſole meaſure of the damages, there the ſpecific thing demanded may be brought into court. *Fiſher* v. *Prince.* 157

17. But where there is an uncertainty either as to the quantity or quality of the thing demanded or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to eſtimate the additional value, there it ſhall not be brought in. *Ibid.*

19. The like point. *Whitten, &* ux. v. *Fuller.* 157

VARIANCE.

1. Variance in a declaration of aſſumpſit for a ſum given by a judicature eſtabliſhed by ſtat. 4 & 5 *Philip* and *Mar.* deſcribing the ſtat. as the 4th of *Phil* and *Mar.* is fatal. *Rann* v. *Green.* 303

2. Where the contract declared upon was, that the defendant ſhould deliver to the plaintiff all his tallow at 4s. per ſtone; and the contract proved was, that the defendant ſhould deliver it at 4s. per ſtone, and ſo much more as the plaintiff paid to any other perſon; this was held a fatal variance. *Churchill* v. *Wilkins.* 305

3. Plaintiff covenanted to build two houſes for 500l. by a certain day, and averred in an action of covenant for the money that the houſes were built within the time; evidence that the time had been enlarged by parol agreement, and the houſes finiſhed within the enlarged time will not ſupport the declaration. *Littler* v. *Holland.* 416

4. An averment in a declaration of the day of a former trial, muſt exactly agree with the record to be produced in evidence to ſupport it; though it be laid under a videlicit. *Pope* v. *Foſter.* 304

5. In an action againſt three on a promiſſory note, two of whom are ſtated to be outlawed, the third may take advantage of the miſnomer of his companions upon the general

general iſſue; on the ground of a variance between the contract declared upon, and that proved. *Gordon* v. *Auſtin.* 6

6. Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another perſon. *Leery* v. *Goodſon.* 283

7. An agreement declared on to ſell oats at ſo much per buſhel muſt be taken to mean the Wincheſter buſhel; and will not be proved by evidence of an agreement to ſell by ſome other buſhel. *Hockin* v. *Cooke.* 305

8. The Court will not ſet aſide the proceedings for irregularity for a variance between the original writ and the declaration. *Spalding* v. *Mure.* 522

VENDOR AND VENDEE.

1. If a vendor actually takes upon himſelf to deliver the goods to the vendee, he ſtands all riſks; but if the vendee order a particular mode of conveyance, the vendor is excuſed, and the vendee muſt ſtand to any loſs that may happen. *Vale* v. *Bayle.* 283

VERDICT.

1. In what caſes the jury may give intereſt, and from what time and to what time. *Robinſon* v. *Bland.* 313

2. Verdict cures a defect in ſetting out a title, though it cannot cure a defective title. *Small,* ex dim. *Baker* v. *Cole & Skinner.* 582

3. The Court will not increaſe the damages given by a verdict, though all the jurors join in the affidavit, ſtating, that they unanimouſly intended to give ſuch increaſed damages. *Jackſon* v. *Williamſon.* 525

4. If the jury find a verdict generally, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former be bad in point of law; and though the evidence would have warranted the verdict on any other count. *Holloway,* q. t. v. *Bennet.* 434

5. The Court will not alter a verdict, unleſs it appear on the face of it that the alteration would be according to the intention of the jury. *Spencer* v. *Goter.* 28

USE AND OCCUPATION.

1. A plaintiff cannot firſt recover in ejectment, and then for uſe and occupation for the time ſubſequent to the day of the demiſe in ſuch ejectment, but his remedy is by action for the meſne profits only. *Birch* v. *Wright.* 315

2. In an action for uſe and occupation, the tenant cannot be permitted to impeach his landlord's title. *Cooke* v. *Loxley.* 319

3. And where there is a note in writing, expreſſing the amount of the rent, no evidence of a parol agreement for the payment of any greater rent than is therein expreſſed ſhall be admitted; for the courts muſt be very cautious in admitting any evidence to ſupply or explain written agreements, elſe the ſtatute of frauds would be eluded; and the ſame uncertainty introduced by ſuppletory or explanatory evidence, which that ſtatute has ſuppreſſed in reſpect to the principal object. It never ought to be ſuffered ſo as to contradict or explain away an explicit agreement, for that is in effect to vary it. *Preſton* v. *Merceau.* 319

USURY.

1. The declaration in a *qui tam* action for uſury amended in altering

ing the date of the note, all being in paper. *Bonfield*, q. t. v. *Milner*. 427

2. The declaration amended in an action for uſury after accord made up, carried down to trial, and withdrawn by plaintiff. *Mace*, q. t. v. *Lovett*. 428

3. If *A.* upon a loan of money ſtipulate to have half the profits upon a reſale of goods to be purchaſed by the borrower, which profits exceed 5l. *per cent.* and *A*'s principal is not riſked; *quere*, if ſuch contract be not uſurious. *Jeſtons* v. *Brooke*. 263

WARRANTY.

1. Where a horſe has been ſold warranted ſound, which it can be clearly proved was unſound at the time of ſale, the ſeller is liable to an action on the warranty, without either the horſe being returned, or notice given of the unſoundneſs. *Fielder* v. *Starkin*. 130

2. But if the warranty be accompained with an undertaking on the part of the ſeller, to take the horſe again, and pay back the purchaſe money, if, on trial, he ſhall be found to have any of the defects mentioned in the warranty, the purchaſer muſt return the horſe as ſoon as the fault is diſcovered. *Adam* v. *Richards*. 131

3. A horſe was ſold at a public auction, warranted ſix years old, and ſound; and one of the conditions of the ſale was, that the purchaſer of any horſe warranted ſound, who ſhould conceive the ſame to be unſound, ſhould return him within two days, otherwiſe he ſhould be deemed ſound; ten days after the ſale, the plaintiff diſcovered that the horſe in queſtion was twelve years old; and it was held, that the defendant ought to take the horſe again: the time of return being confined ſolely to the circumſtance of unſoundneſs. *Buchannon* v. *Parnſhaw*. 132

4. And the warranty including a promiſe, may be declared on as ſuch. *Stuart* v. *Wilkins*. 133

5. But the warranty cannot be tried in an action for money had and received. *Power* v. *Wells*. 134

6. However, if the horſe be returned to the party who warranted it to be ſound, within the time agreed on, an action for money had and received will lie, to recover back the price paid for it. *Weſton* v. *Downes*. 134

7. The like point. *Towers* v. *Barret*. 135

WASTE.

1. An action of trover cannot be maintained by a tenant in tail expectant on the determination of an eſtate for life, without impeachment of waſte, for timber which grew upon, and was ſevered from the eſtate. *Pyne* v. *Dor*. 147

WAYS.

1. In an action for obſtructing a way, if the plaintiff prove a long and uninterrupted uſe of it, it will be ſufficient to afford a preſumption of a grant or licence from the plaintiff. *Keymer* v. *Sommers*. 92

WHARFINGERS.

1. Wharfingers in London are not entitled to wharfage for goods unladen into lighters out of barges faſtened to their wharfs. *Stephens* v. *Coſter*. 258

2. Caſe not trover lies againſt a wharfinger for goods ſtolen or loſt. *Roſs* v. *Johnſon and Dowſon*. 149

WITNESS.

1. If a party wants the teſtimony of witneſſes whom he cannot compel to attend; the Court may put off the trial from time to time,

time, till the other party conſents that depoſitions ſhall be taken where they are. *Moſtyn* v. *Fabrigas.* 41. 172

2. A ſervant or clerk who has embezzled money or notes of his maſter's, is an admiſſible witneſs (provided he has a releaſe) againſt the perſon who received ſuch money or notes from him, in an action for money had and received, brought by his maſter to recover the amount. *Clarke* v. *Shee.* 239

3. In covenant for rent upon a leaſe by *A.* to *B.* the point in iſſue was, Whether *C.* whoſe title both admitted, demiſed firſt to *A.* or to another perſon? *C.* is a competent witneſs to prove the point in iſſue; for the verdict cannot be given in evidence in any action which may be afterwards brought either by or againſt him. *Bell* v. *Harwood.* 417

4. An attorney may be compelled to give evidence of any communication made by his client, after the termination of a ſuit, and which was not made by way of inſtruction for conducting his cauſe. *Cobden* v. *Kendrick.* 706

5. But if any matter be diſcloſed to an attorney in the cauſe pending the cauſe, he is not permitted to give it in evidence, either in that or in any other action. *Wilſon* v. *Raſtall.* 707

6. It is the privilege of the client and not of the attorney. *Ibid.*

7. But ſuch privilege is confined to counſel, ſolicitors, and attornies, when acting in their reſpective characters. *Ibid.*

8. If the ſubſcribing witneſs to a bond be intereſted therein, as well at the time of the atteſtation as at the trial, he cannot be examined as a witneſs to prove the execution; nor is proof of his hand-writing ſufficient for that purpoſe. *Swire* v. *Bell.* 362

WORDS.

See SLANDER.

APPENDIX.

APPENDIX

TO THE

FIRST VOLUME

OF

THIS ABRIDGMENT.

Compriſing Caſes determined during the time it has been at preſs: and including thoſe of Eaſter Term, 38 Geo. III.

ABATEMENT.

Plea of joint Contract.

IN a plea in abatement that another perſon ought to have been ſued with the defendant, it is not neceſſary to lay a venue; and if it be pleaded that ſuch other perſon is alive, to wit, in *Spain*, it will be conſidered as pleaded without any venue.—This was an action of aſſumpſit; to which the defendants pleaded, in abatement, that the ſuppoſed promiſes, if any ſuch were made, were made by them jointly with one *B. De Garay*, and not by them without the ſaid *B. De Garay*, which ſaid *B. De Garay* is ſtill alive, to wit, in *Spain*; wherefore, &c. To this plea the plaintiff demurred; and aſſigned for cauſes that no certain venue or place within this kingdom where the ſaid *B. De Garay* is alive was alleged or ſhewn in the plea; that the ſaid *B. De Garay* was in the ſaid plea alleged to be alive in *Spain*, which allegation being of a tranſitory nature ought to have been pleaded or averred at the place or venue mentioned in the declaration; and that the defendants in their plea varied from the place or venue mentioned in the declaration without any neceſſity for ſo doing. After an elaborate argument, *The Court* took time to conſider of the caſe; and now Per Lord *Kenyon*, Ch. J. It is laid down in the books as a general propoſition that ſome place ſhould in pleading be alleged for every material fact which is alleged and may be traverſed; and that without neceſſity the defendant ſhall not vary from the venue laid in the declaration, as where ſome local matter is pleaded. But to this it is admitted that there is an exception, and that there needs no venue where matter is pleaded in abatement which

Neale *et al. v.* De Garay, *et al.* Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 243.

which concerns the perſon; and to take this caſe out of that exception it has been ſaid that joint-tenancy &c. in the plaintiff with another not named is ſuch plea; but that is not the caſe of a ſimilar plea that *the defendant and another* not ſued were joint contractors. But this diſtinction is not true; both are pleas concerning the perſon; and *Comyns* Dig. *vol.* 1. *p.* 22. title "Abatement" (F. 8), claſſes the plea of a perſon not ſued being a joint contractor with the defendant, as a plea in abatement to the perſon of the defendant. When this was argued we doubted whether a diſtinction might not hold, which had formerly been allowed, between pleas in abatement to the perſon of the defendant triable by record, and thoſe triable by a jury; in which latter caſe it has been holden that there ſhould be a venue in the plea. This the Court held in *Stephens* v. *Squire*, *Carth.* 362. which was the caſe of an attorney who pleaded his privilege without annexing his writ of privilege to his plea; and the plea was holden to be bad for want of a venue, as it was not a matter triable by the record. The like was determined in *Fawkener* v. *Annis*, in 1 *Ventr.* 264. where the privilege of Chancery was held to be ill pleaded without a venue. But however this might have been formerly, it will not now be neceſſary to diſcuſs it, ſince the ſtatute of Queen *Anne* has directed that the venue ſhall come from the body of the county. In conſequence of which it is laid down by *Eyre*, Ch J. in the caſe of *Ilderton* v. *Ilderton*, 2. *H. Blackſtone* 161. that the principle now is, that the place laid in the declaration draws to it the trial of every thing that is tranſitory; and it ſhould ſeem that neither forms of pleading nor ancient rules of pleading eſtabliſhed upon a different principle ought now to prevail: and that ſince a defendant who pleads a matter ariſing in a foreign country would be obliged to lay the ſame venue as laid in the declaration, the repeating that venue or laying no venue at all, is a diſtinction without a difference. And upon theſe principles that Court decided that a replication to a plea of *ne unques accouple*, ſtating the marriage to have been at *Edinburgh* in *Scotland*, without laying any venue in *England*, was a good replication, for that as the inſerting it in the replication would be nugatory, the want of it can do no harm. On the authority of this caſe which ſtands on the principles of ſound ſenſe, this plea is good, notwithſtanding there is no venue alleged. With reſpect to the ſecond objection, if the plea be good notwithſtanding the want of a venue, the alleging the facts of the plea in a foreign country will not vitiate the plea; for the ground on which ſuch objection has prevailed is, that the ſtating a thing to have happened in a foreign country, *without going on to ſay, to wit, in the parish of St. Mary le Bow or ſome ſuch place*, is in effect pleading a traverſable fact, without alleging a venue for its trial: but when it is ſettled that no venue is neceſſary, the foundation of this ſecond objection fails. Judgment for defendants.

Briſtow v. James, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 257.

To an action of debt to recover back money won at play, the defendant may plead in abatement, that the money was due from others not named as well as from himſelf. This was an action of debt on the 9 *Ann. c.* 14. for 1890*l.* won at play. The defendant pleaded in abatement that, if the ſaid ſum was due and owing to the plaintiff, the ſame was jointly due and owing to him from the defendant, one *G. R.* and one *G. A.*, and that the ſame or any part thereof was not due and owing from the defendant alone or without the ſaid *G. R.* and *G. A.*, and that the ſaid *G. R.* and *G. A.* at the time of exhibiting the bill of the plaintiff againſt the defendant were and each of them was ſtill living, to wit, at &c. To this there was a general demurrer and joinder. PER CURIAM. (after argument.) In this caſe the act of parliament ſays, that if any perſon ſhall loſe at play a certain ſum he may recover it back again, not by way of a penalty, but by way of a contract raiſed by the act; the ſtatute gives this action on the idea of there being a contract, and the act has always been conſidered as a remedial law. The diſtinction

tinction taken between actions of tort and contract is right; that in the former the parties may be separately ſued, but that in the latter all muſt be joined if the defendant plead in abatement. This is an action founded on a contract raiſed by the act of parliament, and is not diſtinguiſhable from other actions of contract. In *Turner* v. *Warren*, 2 *Strange* 1079, it was decided that, where the party grieved ſues on this ſtatute, the defendant may be held to bail; and in *Bowes* v. *Booth*, 2 *Blackſtone* 1226, it was ſaid that this ſtatute makes the winning of 10*l.* at one time a nullity, and gives the loſer an action to recover back what ſtill properly continues to be his own money. Then it is ſo much money received by the defendant to the plaintiff's uſe. And in a caſe of *Brandon* v. *Pate* 2 *Hen. Black.* 308, it was holden that the aſſignees of a bankrupt might under this ſtatute recover money loſt by the bankrupt before his bankruptcy; now that determination muſt have proceeded on the ground of its being a contract. *The Court*, however, gave the plaintiff leave to withdraw the demurrer, and to take iſſue on the fact in the plea.

If one of two part-owners of a chattel ſue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards ſue alone, and the defendant cannot plead in abatement to ſuch action.—This was an action on the caſe brought by the plaintiff, who was deſcribed as the owner of three-fourth parts of a ſhip *The Sally*, againſt the defendants, the owners of another ſhip, for ſo negligently, careleſsly, and unſkilfully navigating their ſhip that ſhe ran foul of the plaintiff's and ſunk her. The defendants pleaded in abatement that the plaintiff at the time of the injury and loſs had no intereſt or property in the ſhip *Sally*, unleſs jointly and undividedly with one *J. Addiſon*. The plaintiff replied that at the time of the injury and loſs *J. Addiſon* was owner of one-fourth part of the ſhip *Sally*, and the plaintiff was then owner of the remaining three-fourth parts; that after the injury and loſs and before the commencement of this ſuit, to wit, in *Hilary* term, 35 *Geo.* 3. *Addiſon* impleaded the defendants for the damage ſuſtained by him as owner of the ſaid one-fourth part, and in *Trinity* term, 36 *Geo.* 3. recovered againſt them 472*l.* damages &c. To this replication the defendants demurred generally. Per Cur. (after argument): Ld. KENYON, Ch. J. The plaintiff is entitled to judgment. The caſe is ſhortly this; there were two perſons owners of a ſhip in unequal proportions, *Addiſon* being the owner of a fourth part, and the plaintiff of the remaining three-fourths; the former brought his action againſt the defendants, the owners of another veſſel, for wrongfully running down his ſhip, and we decided in that caſe (1) that though the defendants might have pleaded in abatement that another perſon ought to have been joined with the plaintiff, yet as the defendants omitted to put in ſuch a plea the plaintiff was entitled to recover; and in that caſe the plaintiff had judgment, and obtained a full ſatisfaction for all the damage that he had ſuſtained to his ſhare of the ſhip. But that did not ſatisfy the whole juſtice of the caſe, the preſent plaintiff being the owner of three-fourths of the ſhip: he now brings his action for the injury done to his ſhare, to which the defendants have pleaded, that at the time when the injury was done, there was another owner of the ſhip who ought to have ſued jointly with the plaintiff; the plaintiff has ſtated in his replication the proceedings in the former action, to ſhew that the plaintiff in that action has already received a ſatisfaction. And the queſtion now is, Whether that perſon, who has obtained complete ſatisfaction for the damage which he ſuſtained, ought to have ſued as a co-plaintiff in this action? It is ſaid that he ought to have been a party, becauſe he is a truſtee for this plaintiff: but that is not correct; they are tenants in common of

Sedgworth *v.* Overend, Ea. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 279.

(1) See the caſe of Addiſon *v.* Overend in page 3.

this ſhip. Then it was urged, that the owners by not ſuing jointly will haraſs the defendants by bringing ſeveral actions inſtead of one: but to prevent multiplicity of actions the defendants had an opportunity of taking this objection in the former action; and if they had availed themſelves of it at the proper ſeaſon they would not have been haraſſed with different actions. We do not ſee for what good purpoſe the other part-owner ought to have joined in bringing this action; having already received a ſatisfaction himſelf, he could not be entitled to any part of the damages to be recovered in this action, and he is not a truſtee for this plaintiff. Therefore on the grounds of law, reaſon, and juſtice this plea ought not to have been put in, and the replication gives a full anſwer to it. *Aſhurſt.* J. The caſe of *Nelthorpe* v. *Dorrington*, 2 *Lev.* 113, which was cited in *Addiſon* v. *Overend*, is in ſome degree an authority againſt the defendants; for there it was decided that two, out of three joint owners, might recover in trover; it is indeed added as a reaſon, "becauſe the defendant had not pleaded in abatement." But if it be competent to one part-owner to recover for his ſhare ſeparately, there is no reaſon why this plaintiff ſhould not recover in this action. The defendants might have pleaded in abatement to the firſt action, which would have ſaved them the expence of this action: but they omitted to do that at the proper time; and now by their demurrer to this replication, they admit the truth of the facts contained in it. *Groſe*, J. The defendants' objection tends to ſhew that if one part-owner recover for the damage done to his ſhare, the other part-owners ſhall never recover a ſatisfaction for the injury done to theirs: but that can never be ſupported. It was decided in *Addiſon* v. *Overend*, that one part-owner may recover if the defendant does not plead in abatement: but that is no reaſon why the other part-owners ſhould have no remedy for the injury done to their ſhare of the property; he could not plead in abatement in the firſt action. *Lawrence*, J. There is no objection to an action being brought by one tenant in common for an injury of this kind, if the defendant do not object to it on his own account. It is ſettled in a variety of caſes, that one tenant in common may recover for the injury done to his ſhare of the property. Then the defendants, not having pleaded in abatement in the firſt action, cannot now make this objection; by omitting to plead in abatement then, they aſſented to the ſeverance of the actions. There might have been greater weight in this objection if there had been ſeveral remaining owners and only one of them had ſued: but here the whole remaining intereſt in the ſhip is veſted in this plaintiff; however if there had been ſeveral remaining part-owners, I do not think that the defendants could ever have objected to the ſeverance of the actions after they had omitted to plead in abatement in the firſt action. Judgment for plaintiff.

Plea of Miſnomer.

Mayor and Burgeſſes of Stafford v. Bolton, Ea. Ter. 37 Geo. 3. C. B. 1 Poll et Roſan. 40. 124.

A miſnomer may be pleaded in abatement where the plaintiff miſnames himſelf. In an action on the caſe for tolls, the plaintiffs declared by the name of *the Mayor and Burgeſſes of the Borough of Stafford*, on the plea of not guilty, and iſſue joined thereon; the cauſe came on to be tried at the aſſizes, and the plaintiffs produced in evidence their charter, by which it appeared that they were incorporated by the name of *The Mayor and "Burgeſſes of the Borough of Stafford, in the County of Stafford.*" On this evidence it was objected by the council for the defendant, that there was a variance between the name of the corporation in the charter, and that in the declaration, and after ſome argument, the learned judge, *(Thompſon, B.)* nonſuited the plaintiffs: a rule was afterwards obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial had. *Per Cur.* (after argument) If this variance might have been pleaded in abatement, it decides the queſtion: a corporation is a mere creature of the crown, having no eſſence but what is derived from its name: on

on ſtrict reaſoning, therefore, we might be inclined to think that if a corporation ſued by a name which did not belong to it, it would be as nothing. In the caſe of a miſtake in the name or deſcription of an exiſting perſon having a right to ſue, it may be pleaded in abatement; but the caſe in *Brooke Miſnomer*, 73, ſeems to put a corporation in the ſame ſituation with a natural perſon, as to pleas in abatement; where it is ſaid, in an action by a corporation or a natural body, miſnomer of one or the other goes only to the writ: but to ſay that there is no ſuch perſon *in rerum naturâ*, or no ſuch body politic, this is in bar, for if he be miſnamed, he may have a new writ by the right name; but if there be no ſuch body politic or ſuch perſon, then he cannot have an action. Here there was a corporation of nearly the ſame name, for the plaintiffs ſtate themſelves to be "the Mayor and Burgeſſes of Stafford," only omitting "of the county of Stafford," and there is a difference in omitting matter of ſubſtance and mere matter of addition. If the variance can be pleaded in abatement it cannot in bar, *to make it pleadable in bar, it muſt appear that there is no* ſuch corporation; the year books are deciſive: in 22. Ed. 4. *c.* 34. which was an aſſize by "the maſter and brethren of the "fraternity of the nine orders of angels in B." and the defendant pleaded that they were incorporated by the name of "the maſter and bre-"thren of the fraternity of *all ſaints*, and the nine orders of angels in B." the writ was abated, which ſhews that a miſnomer may be pleaded in abatement, where the plaintiff miſnames himſelf, and we ought not to be more ſtrict then they were in the days of the year Books---*Rule* abſolute.

Replication to Plea in Abatement of the Writ.

IF a replication to a plea *in abatement of the writ* begin "that *the ſaid declaration* ought not to be quaſhed," but conclude properly, it is well enough for ſuch words may be rejected as ſurpluſage. This was an action of aſſumpſit: and plea in *abatement of the writ*, on the ground of miſnomer in the chriſtian name of the defendants, *praying judgment of the writ*. The replication was, that "*the ſaid declaration* ought not to be quaſhed, &c. becauſe the defendant was as well known by one name as the other, *concluding to the country*. To this there was a ſpecial demurrer aſſigning, for cauſe that the replication did not ſhew any reaſon why "*the writ* ſhould be quaſhed;" but on the contrary, only alleged, that *the declaration* ought not to be quaſhed," &c. joinder in demurrer PER CUR the rules of pleading ought to be maintained, but this is a frivolous objection: the plea is right in praying that the writ may be quaſhed, and the replication is right: it is an anſwer by matter of facts, and not by matter of law: it ſtates that the plaintiff was called and known by one name as well as the other, and concludes to the country, if the firſt had prayed judgment, "if the declaration ought to be quaſhed," it might have altered the caſe: but the anſwer on which the plaintiff relied, is an anſwer of fact. The conſequence is, that if that fact had been tried and found for the defendant, the judgment would have followed the praying of the plea, as to the beginning of the replication, it does not ſignify whether it ſays that the declaration or the writ ought to be quaſhed, or whether it ſays neither; if the plaintiff had ſimply replied, that the defendant was called and known, and concluded to the country, it would have been ſufficient, and the iſſue would have been well joined; it is therefore a ſurpluſage form. Judgment for plaintiff.

Sabine *v.* Johnſon, Tr. Ter. 37 Geo. 3. C.B. 1 *Pull. et Boſan.* 60.

ACTIONS.

I. *Action upon the Caſe for Slander.*

IT is no juſtification to an action of ſlander to plead that ſuch an one told the ſlander to the defendant. This was an action for ſlander, and the

Davis *v.* Lewis, Mic. Ter. 37

Geo. 3 B.R. 7 *Ter. Rep.* 17.

the defendant pleaded, in juſtification, that before the ſpeaking of the words, he, the defendant, had heard and been told by one *D. Morris* that the plaintiff was, &c. for which reaſon he ſpoke them; to this there was a general demurrer. PER CUR. the juſtification cannot be ſupported (1). If a perſon ſay that ſuch a particular man (naming him) told him certain ſlander, and that man did in fact tell him ſo, it is a good defence to an action to be brought by the perſon of whom the ſlander was ſpoken: but *if he aſſert the ſlander generally, without adding who told it to him, it is actionable.* To diſcloſe by the defendant's plea the perſon who told him the ſlander, is clearly no juſtification, after putting the plaintiff to the expence of bringing the action. The plaintiff can only impute the ſlander to the man who utters it, if the latter do not mention the perſon from whom he heard it. Juſtice alſo requires that, when a perſon repeats any ſlander againſt another, he ſhould at the ſame time declare from whom he heard it, in order that the party injured may ſue the author of the ſlander. Judgment for the plaintiff.

II. *Action on the Caſe for a Malicious Proſecution.*

Purton v. Honnor, Hil. Ter. 38 Geo. 3. C.B. 1 *Pull. & Boſan.* 205.

AN action on the caſe does not lie againſt the leſſor of the plaintiff, to recover damages ſuſtained in defending a vexatious ejectment. ſo held on a general demurrer on the authority of *Saville* v. *Roberts*, 1. *Salk*, 14.

III. *Actions on the Caſe for Miſfeaſance in a Duty.*

Baker v. Liſcoe, Hil. Ter. 37 Geo 3. B.R. 7 *Ter. Rep.* 171.

IN an action againſt a wharfinger, to whom goods were ſent to be ſhipped, for neglecting to take out a ſufferance, for want of which the goods were ſeized, it is not neceſſary to aver or prove that the goods were condemned by a ſentence in rem. But it is ſufficient to aver that "for want of ſuch ſufferance the ſaid goods were *ſeized as forfeited*, "whereby the ſame became wholly loſt to the plaintiff;" and proof of a ſeizure in fact by the officer for a juſt cauſe of forfeiture is ſufficient to ſuſtain the declaration.—This was an action on promiſes, in which the declaration ſtated, that in conſideration that the plaintiff would deliver certain goods to the defendant (a wharfinger) at his wharf to be ſhipped by him for a certain reward with a ſufferance or warrant, he, the defendant, undertook to procure a ſufferance from the cuſtom-houſe; that the plaintiff in conſequence delivered the goods to the defendant; but that the defendant did not procure a ſufferance according to his undertaking, by means whereof, and for want of ſuch ſufferance, *the ſaid goods were ſeized as forfeited to our Lord the King, whereby the ſame became wholly loſt to the plaintiff.* It appeared in evidence at the trial, that the plaintiff's goods had been ſent to the defendant's wharf in the uſual courſe of buſineſs to be ſhipped by him; and that *it was part of the wharfinger's buſineſs to obtain the ſufferance* from the cuſtom-houſe for ſhipping the goods, for want of which they had been ſeized by a cuſtom-houſe officer, and ſome time afterwards ſold in the uſual manner. It was ſuggeſted that the ſale had been made under a ſentence of condemnation in the Court of Exchequer, and that was probably the fact: but the record itſelf of ſuch ſentence was not given in evidence, which was contended on the part of the defendant to be neceſſary in ſupport of the action. The plaintiff however recovered a verdict, with leave to the defendant to move to ſet it aſide and enter a nonſuit: this motion was afterwards made upon the ground

(1) See the Earl of Northampton's caſe, 12 *Rep.* 133, 4.

either

either that *there was not a ſufficient averment in the declaration that the goods had been condemned as forfeited*, or if ſo, *that there was not ſufficient legal evidence of ſuch condemnation*, by the non-production of the record itſelf. But PER CUR. (after cauſe ſhewn), we are ſatisfied that the objection ought not to prevail. It is alleged in the declaration that the defendant engaged to procure a ſufferance, that he did not, and that for want of it the goods were ſeized *as forfeited*, whereby they were wholly loſt to the plaintiff. *This therefore was an injury ſuſtained by the plaintiff in conſequence of the defendant's negligence* (1). Suppoſe there was no condemnation in the Court of Exchequer, the plaintiff might *have recovered a ſatisfaction of the defendant for* this loſs. Rule to enter a nonſuit diſcharged.

IV. *Action on the Caſe for Conſequential Damages.*

THE right of property in new works being veſted in authors for certain periods by the ſtat. 8 Ann, c. 19. the common law gives the remedy by action on the caſe for a violation of it. This was an action on the caſe for publiſhing without the plaintiff's leave and againſt his conſent, a book called *Thoughts on Hunting*, during the term ſecured by the ſtatute to the author. The plaintiff pleaded the general iſſue, and on the trial there was a verdict for the plaintiff ſubject to the opinion of the court on the following caſe: the plaintiff was the author of a book called Thoughts upon Hunting, and had publiſhed three ſeveral editions in 1781, 1782 and 1784, but neither of the editions were ever entered at Stationer's Hall. In Auguſt 1796, the defendant publiſhed the ſame work. The queſtion whether the plaintiff was entitled to recover, turned upon three queſtions which aroſe and were fully diſcuſſed in this caſe, viz. FIRST, whether *an action on the caſe* for damages will lie ſince the ſtatute 8 Ann, c. 19? SECONDLY, whether, if ſuch action will lie ſince the ſtatute, it can be maintained unleſs the work be entered at Stationer's Hall previous to publication? THIRDLY, whether an author abandons his right of property in the work by publiſhing it without affixing his name to it? PER CUR. the queſtion is, whether the right of property being veſted in authors for certain periods, the common law remedy for a violation of it, does not attach within the times limited by the act of parliament: within thoſe periods the act ſays that the author *ſhall have the ſole right and liberty* of printing &c. Then the ſtatute having veſted that right in the author, the common law gives the remedy by action on the caſe for the violation of it, of this there could have been no doubt made if the ſtatute had ſtopped there: but it has been argued, that as the ſtatute in the ſame clauſe that creates the right has preſcribed a particular remedy, that, and no other can be reſorted to; but the meaning of the legiſlature in creating the penalties in the latter part of the clauſe in queſtion was to give an accumulative remedy; nothing could be more incomplete as a remedy than thoſe penalties alone, for without dwelling upon the incompetency of the ſum, the right of action is not given to the party grieved, but to any common informer. Now the action for the penalties given to a common informer can only be conſidered as an additional protection, but not intended to ouſt the common law right to proſecute by action any perſon who infringes this ſpecies of property, which would otherwiſe neceſſarily attach upon the right of property ſo conferred: where an act of parliament veſts property in a party the other conſequence follows of courſe, unleſs the legiſlature make a ſpecial proviſion: the penalties to be recovered may indeed operate as a puniſhment

Beckford v. Hood Ea. Ter. 38 Geo. 3 B. R. 7 *Ter. Rep.* 620.

(1) See the caſe of Shiells v. Blackburne in page 72.

upon the offender, but they afford no redreſs to the injured party, the action is not given to him, but to any perſon who may get the ſtart of him and ſue firſt: it is no redreſs for the civil injury ſuſtained by the author in the loſs of his juſt profits: it is alſo to be obſerved that the penalties given by the act attach only during the firſt fourteen years of the copy right, and during that time only is the offender liable for ſuch penalties if he invade the author's right; but he is liable during the whole period preſcribed by the act to make good in an action for damages any civil injury to the author. If this conſtruction were not to prevail; during the laſt fourteen years of the term, the author would be wholly without remedy for any invaſion of his property: *although ſix to five of the judges who delivered their opinions* in *Donaldſon* v. *Becket* (1) *were of opinion that the common law right of action was taken away by the ſtatute of Anne; it appears that the amount of their opinions went only to eſtabliſh that the common law right of action could not be exerciſed beyond the time limited by the ſtatute.* In reſpect to the entry at Stationer's Hall it has always been holden (2) that the entry in Stationer's Hall was only neceſſary to enable the party to bring his action for the penalty: the entry ſerves as a notice and warning to the public, that they may not ignorantly incur the forfeitures or penalties before enacted againſt ſuch as pirate the works of others.

V. *Treſpaſs* vi et armis *for an Aſſault.*

Jones *v.* Clay, Hil Ter. 38 Geo. 3. C B. 1 *Pull. et Baſ.* 191.

WHERE the party proceeds by action and alſo by indictment for the ſame aſſault, although it is the practice of the attorney general never to grant a nolle proſequi in ſuch caſes; the court will not make a rule to compel the plaintiff to make his election to purſue either the one or the other: for the fine to the king, and the damages to the party are perfectly diſtinct in their nature.

VI. *Action of Treſpaſs concerning Property.*

Pickering *v.* Truſte, Mic. Ter. 37 Geo. 3 B.R. 7 *Ter. Rep.* 53.

UNDER particular circumſtances the court will ſtay the proceedings in an action of treſpaſs for ſeizing goods, on the defendant's reſtoring the goods, or paying the full value of them, with the coſts of the action. This was treſpaſs againſt the defendants who had ſeized fourteen hides, as viewers and ſearchers of leather, under ſtat. 2 *Jac.* 1. *c.* 22. The defendants, finding they could not juſtify the ſeizure, the leather having been improperly ſeized, applied to the plaintiff's attorney, and afterwards to the plaintiff himſelf to ſettle the matter, offering to pay the price of the goods and the coſts of the action; on the refuſal of the plaintiff to accept the value of the goods and the coſts, a rule was obtained, before declaration delivered, calling on the plaintiff to ſhew cauſe why, on the defendants undertaking to reſtore the leather or to pay the value of it to the plaintiff, together with the coſts of the action, all further proceedings ſhould not be ſtayed. On ſhewing cauſe this was oppoſed. SED PER CUR. Formerly (3) ſuch an application as the preſent would not have been ſucceſsful. The Court, in anſwer to an application to bring goods into court, uſed to ſay they had no warehouſe for ſuch purpoſe; and the rule was confined to the inſtance of bringing money into court. But of late years it has been uſual to grant (4) ſuch applications as this, when a fit caſe has been brought before the Court for that purpoſe. And this appears to be

(1) See p. 117, Supra.

(2) Tonſon *v.* Collins.

(3) *Salk.* 597. *Bowington* v. *Parry*, 2 *Str.* 822. *Olivant* v. *Perineau*, *ib.* 1191. and 1 *Wilſ.* 23. and *Harding* v. *Wilkin*, *Say.* 120.

(4) 3 *Burr.* 1364. and *Cooke* v. *Holgate*, *Barnes* 281, in trover. But this appears to be the firſt inſtance *in treſpaſs.*

ſuch

ſuch a caſe: the officers in ſeizing the goods in queſtion made a miſtake; but no damage whatever to the plaintiff is ſuggeſted, and there ſeems to be no pretence to ſeek for vindictive damages. And as the defendants have offered to make every compenſation which juſtice requires, this rule ought to be made abſolute.

In treſpaſs for breaking and entering the plaintiff's cloſe, and diſtraining his goods, the defendant may juſtify under a ſufficient legal proceſs, although the diſtreſs was exceſſive—this was an action for breaking and entering the plaintiff's cow-houſe and taking away three cows. The defendants pleaded, 1ſt. not guilty; 2dly. a juſtification under a precept iſſued by the ſheriff of Lancaſter on a writ of juſtices, whereby they were commanded *to attach the plaintiff by his goods* to appear at the next County Court to anſwer one *Sobelefield*. The replication (admitting the writ of juſticies, &c.) alledged that the defendants of their own wrong broke, entered and carried away, &c. on this iſſue was joined, and on the trial it appeared, that "the defendants entered the cow-houſe while "the plaintiff's ſervant was milking, that one of them knocked her "down, overturned the milk-pan, and drove away three cows: upon "being aſked what they took the cows for, Ramſbottom ſaid he was a "ſheriff's officer, and was come for the cows for 7l. debt and 5l. "coſts, and he ſhewed his warrant; on the ſame day that the cattle were "taken the plaintiff's attorney applied to the defendants and tendered "them 2s. 6d. and demanded to have them reſtored. It appeared to "be the uſual practice in theſe caſes to attack the party in order to "compel an appearance by any ſmall chattel, and to return it on "paying 2s. 4d.: the cows were not returned till the fourth day;" the judge left it to the jury to ſay whether the defendants entered for the mere purpoſe of compelling an appearance, or whether for the purpoſe of compelling the plaintiff to pay the debt and coſts, and the jury found a verdict for the plaintiff with 20l. damages: a new trial was moved for on two grounds, 1ſt. becauſe the verdict was againſt law and evidence, 2dly. becauſe the evidence received of the tender of money by the plaintiff after the taking the cattle was not relevant to the iſſue, which was, whether the cattle were or were not taken under a lawful authority. PER CUR. (after cauſe ſhewn) a man is not obliged to juſtify a diſtreſs for the cauſe which he happened to aſſign at the time it was made, if he can ſhew that he had a legal juſtification for what he did, that is ſufficient. A man may diſtrain for rent, and avow for heriot ſervice: here the defendants were juſtified under the proceſs of the County Court in entering upon the plaintiff and taking his goods in order to compel an appearance; and therefore the queſtion ought not to have been left to the jury to ſay whether they entered for that or ſome other cauſe. In the caſe of *Dr. Grenville* v. *the College of Phyſicians*, *Holt*, CH. J. ſaid, "ſuppoſe one has a legal and an illegal warrant, and arreſts by virtue of the illegal warrant, yet he may juſtify by virtue of the legal one; for it is not what he declares, but the authority which he has is his juſtification." Now that very queſtion was left by the learned judge to the jury in this caſe, which was there ſtated to be immaterial: for it was not material to enquire what the defendants ſaid when they entered and ſeized, but only whether they had in fact a legal warrant to juſtify them; then as to the exceſs of the diſtreſs taken, an action on the caſe lies for that on the ſtatute of *Marlbridge*, but that will not warrant an action of treſpaſs; this queſtion was conſidered in the caſe of *Hutchins* v. *Chambers*, 1 BURR. 579, and the rule was then ſettled: though it was ſaid that there was an excepted caſe, namely, where gold or ſilver was taken to an exceſs apparent on the force of it, as where ſix ounces of gold and 100 ounces of ſilver were taken for 6s. 8d.; but that went on the ground that gold and ſilver were of a certain known value, and the meaſure of the value of other things; here the verdict having proceeded on a miſtake

Crowther v. Ramſbottom, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 654.

miſtake of the law, there muſt be a new trial.—Rule for new trial abſolute.

Peddell *v.* Kiddle Ea. Ter. 38 Geo. 3. B. R. 7 *Ter. Rep.* 659.

Wherever the treſpaſs is evidently ſuch that the judge who tries it cannot in any view of it grant a certificate that the title was chiefly in queſtion, it muſt be conſidered to be a caſe out of the ſtatute, and although the plaintiff recover leſs than forty ſhillings damages, he will be entitled to full coſts—to treſpaſs for breaking and entering the plaintiff's cloſe the defendant pleaded, 1ſt. the general iſſue, 2dly. a licence from the plaintiff; the plaintiff traverſed the licence, and new aſſigned the defendant took iſſue on the traverſe, and pleaded not guilty to the new aſſignment, the plaintiff having recovered a general verdict with one ſhilling damages; and the maſter having allowed him only one ſhilling coſts, the queſtion on a motion that the maſter might be directed to allow his full coſts was, whether or no he was entitled to the ſame. PER CUR. The words of the ſtatute 22 and 23 Car. 2. c. 9 (1) have always received a ſtrict conſtruction. Where an action *de bonis aſportatis*, has been brought, full coſts have always been allowed to the plaintiff notwithſtanding he may recover leſs than forty ſhillings, not becauſe the ſtatute has ſaid he ſhould have full coſts, but becauſe the caſe is not within the act. We have looked into the caſes (2), and find that this queſtion has been ſettled again and again; the principle on which thoſe determinations were founded is, that where the caſe is ſuch that the judge who tries it cannot in any view of it grant a certificate within the act, it is conſidered to be a caſe out of the ſtatute: now here was a plea of licence, upon which the queſtion could not ariſe whether or not the defendant had a title to the land—the queſtion was, whether or not he had liberty to go over the land; therefore the caſe was not within the ſtatute. Rule abſolute.

VII. *Action of Aſſumpſit.*

Giles *v.* Edwards Ea. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 181.

WHERE ſome act is to be done by each party under a ſpecial agreement, and the defendant by his neglect prevents the plaintiff carrying the contract into execution, the plaintiff may put an end to the whole contract, and in an action for money had and received, recover back any money he has paid under it. On the trial of an action for money had and received; it appeared that the defendant agreed to ſell to the plaintiff all his cord-wood, at ſo much *per* cord ready cut; the wood was to be coaled and cleared from off the premiſes by *Michaelmas* 1792, and the money was to be paid on the 1ſt of *March* 1792. The cuſtom was for the ſeller to cut off the bows and trunks, and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut ſixty cords, ten of which he corded, and the plaintiffs re-corded half a cord and meaſured the reſt. On the 8th of March 1792 the plaintiffs paid the defendant twenty guineas: but the defendant neglecting to cord the reſt of the wood, the plaintiffs brought this action to recover back the twenty guineas, as having been paid on a contract that had failed. The plaintiffs having obtained a verdict, a motion was afterwards made to ſet it aſide, and enter a non-ſuit, on the ground that the plaintiffs ſhould have brought a ſpecial action on the caſe for non-performance of the contract, on the principle eſtabliſhed in *Weſton* v. *Downes*; *Power* v. *Wells*; and *Towers* v. *Barrett* (3). But *The Court* ſaid, this was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, *they had a right to put an end to the whole contract and recover back the money that they had paid under it*; they were not bound to take a part of the wood only. Rule refuſed.

(1) See p. 225, ſupra. (2) Redridge *v.* Palmer, and Comer *v.* Baker, in p. 226, ſupra.

(3) See thoſe caſes in pages 151, 134, 135, 146.

Where

Where money has been paid by the plaintiff to the defendant *under the compulsion of legal process*, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received, in order to recover back the amount of the sum so wrongfully enforced in payment. But Ld. *Kenyon* was of opinion at the trial that after the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses* v. *Macfarlan*, 2 *Burr.* 1009, was referred to; and thereupon the plaintiff was nonsuited. It was afterwards moved to set aside the nonsuit and to grant a new trial; *Per Cur.* After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. We cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for *on the ground of evidence supposed to have been discovered after the trial*; and they are as often refused: but this goes much further. It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. If the case of *Livesay* v. *Rider*, Ea. 22 Geo. 3. B.R. which has been relied on in support of the present application be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment; which is too preposterous to be stated. Rule refused.

Marriott *v.* Hampton, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 269.

It being contrary to 7 & 8. Will 3. *c.* 4. for a candidate to furnish provisions to any voters *after the teste* of the writ, an innkeeper cannot recover against a candidate for provisions so furnished at his request. This was an action brought by an innkeeper against the defendants, who were two of the candidates at the last Ipswich election; for the amount of a bill *for provisions* furnished to the voters of the Borough, at the request of the defendants, the charges were, 1st. for provisions furnished *before the teste of* the writ. 2dly. for provisions furnished *after the teste* of the writ to *voters resident* in the Borough. 3dly. for provisions furnished to *voters not resident* in the Borough. The defendants paid into court sufficient to cover the charges of the first and last descriptions. At the trial the defendants contested the amount of the bill, and endeavoured to prove that the plaintiffs had charged for provisions furnished to persons not voters, but failing to establish that fact a verdict was found for the plaintiff. It was moved to shew cause why this verdict should not be set aside, and a new trial had on the ground that as part of the contract was contrary to 7. & 8. Will. 3. *c.* 4. the demand arose out of an illegal transaction, and could not be supported; and PER CUR. if the defendants think proper to insist on their objection, they must do it with success: the action is apparently founded on a contract to disobey the law, being to provide entertainment for voters during an election: the contract is bottomed in malum prohibitum. The legislature has drawn a strict line which is not to be departed from: it says that *after* the teste of the writ, no meat or drink shall be given to the voters by the candidate; and this being the case, the court cannot give any assistance to the plaintiff: with regard to the money paid into court, the plaintiff cannot be allowed to retain it for the illegal demand, and recover for the legal one: for such payment is only an admission of a legal demand, and we cannot allow it to be applied to an illegal account. Rule absolute.

Ribbans *v.* Crickett and another, Ea. Ter. 38 Geo. 3. C.B. 1 *Pul. & Bosan.* 264.

If

Tenant *v.* Elliot, Ea. Ter. 37 Geo. 3. C. B. 1 *Pull. & Foſon.* 3.

If A. receive money to the uſe of B. on an illegal contract between B. and C. he ſhall not be allowed to ſet up the illegality of the contract as a defence in an action brought by B. for money had and received:—In this caſe the defendant was a broker, and had effected an aſſurance for the plaintiff, a Britiſh ſubject, on goods from *Oſtend* to the *Eaſt-Indies*, on board the Koenitz, an imperial ſhip: the ſhip being loſt, the underwriters paid the amount of the inſurance to the defendant, who, without any deſire from them to retain the money, refuſed to pay it over to the plaintiff: the plaintiffs on this brought aſſumpſit and recovered a verdict; afterwards the defendant moved to ſet the verdict aſide, and enter a nonſuit on the ground that the contract was illegal under the Stat. 7 Geo. 1. St. 1. *c.* 21. § 2. (1) PER CUR. a man who has paid over money to another's uſe, cannot diſpute the legality of the original conſideration. Having once waived the legality, the money ſhall never come back into his hands again. The queſtion therefore is, whether he who has received money to another's uſe on an illegal contract can be allowed to retain it, and that not even at the deſire of thoſe who paid it to him? it is clear he cannot. Rule to ſhew cauſe refuſed.

Morton *v.* Lamb, Hil. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 125.

In an action on the caſe the plaintiff declared againſt the defendant, that in conſideration that the plaintiff had bought of the defendant 200 quarters of wheat at 5*l.* 0*s.* 6*d.* *per* quarter, the defendant undertook to deliver the ſaid corn to the plaintiff at *Shardlow*, in one month from the time of the ſale; and then alleged that the defendant did not deliver, &c. The defendant pleaded the general iſſue; and at the trial the plaintiff recovered a verdict; afterwards a rule was obtained, calling on the plaintiff to ſhew cauſe why the judgment ſhould not be arreſted, *becauſe it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery.* PER CUR. It has been argued, on behalf of the plaintiff, that this muſt be conſidered as a declaration on mutual promiſes, and that as this is a demand on the defendant on the ground of ſome mutual promiſe made by him, and which was the conſideration of the plaintiff's promiſe, it was not neceſſary to aver performance on his part; but if ſo, the declaration is not adapted to the truth of the caſe, in not ſtating that the defendant's promiſe was in conſideration of the plaintiff's. But on this declaration it can only be conſidered as an agreement by the defendant to deliver the corn at *Shardlow* on being paid for it. The payment of the money was to be an act concurrent with the delivery; and then the caſe of *Callonel* v. *Briggs*, *Salk.* 623. is an authority to ſhew that *where two concurrent acts are to be done, the party who ſues the other for non performance muſt aver that he had performed, or was ready to perform, his part of the contract.* That caſe was on an agreement to pay ſo much money ſix months after the bargain, the plaintiff transferring ſtock; and there Lord *Holt* ſaid, "If either party would ſue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one muſt *aver* and prove a transfer or a tender: he did not ſay, that the not doing it ſhould come from the defendant by way of excuſe, but that the doing it muſt be alleged in the declaration; Then the plaintiff in this caſe cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of juſtice, muſt ſhew that he is in a condition to maintain his action, the tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he muſt ſet out the whole of his title. But it has been argued that the delivery of the corn was a condition precedent, and ſome caſes have been cited to prove it: but they do not appear to be applicable. In the one,

(1) See p. 277. ſupra.

in

in *Saunders* 350, the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in *Salk.* 171. where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion; for whether covenants be or be not independant of each other must depend on the good sense of the case, and on the order in which the several things are to be done (1): but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

VIII. *The Action of Debt.*

A BOND given to an individual conditioned to be void, if the obligor on the obligee's agreeing not to prosecute him, should remove certain public nuisances, and not erect any other of the same kind is good in law. The defendant executed a bond to the plaintiff in a penalty with a condition which, (after reciting) that the defendants had erected and for some time continued three walls or cribs across the river Wye, which were a nuisance, and that the magistrates had directed the plaintiff (who was the clerk of the peace) to prosecute, &c. was, that he the defendant would on or before a certain day, take down and remove the said walls and cribs, and not at any time after erect any other: the plaintiff afterwards put the bond in suit, and the defendants after craving oyer of the condition, pleaded the general issue and performance of the condition, on which issue was joined: at the trial, the plaintiff obtained a verdict, and it was afterwards moved in arrest of judgment, on the ground that the contract disclosed in the condition of the bond was an illegal contract, and could not be enforced in a court of justice, because as the plaintiff was *directed to prosecute*, the taking a bond to his own use, to forbear might be an instrument of *collusion* or oppression; BUT the court were all clearly of opinion that they could not arrest the judgment: the want of a consideration to a bond affords no ground of objection: if there were any thing illegal in this consideration, the defendant should have pleaded it; the defendant might have given a bond to the plaintiff without any consideration at all: and why may he not give a bond for a consideration that is legal? Fallowes v. Taylor, Hil. Ter. 38 Geo 3. B R. 7 *Ter. Rep.* 475.

In debt on a bond, dated on a certain day in the penal sum of 800*l.* conditioned to pay 400*l.* but no day of payment expressly named, nor interest reserved in terms, the questions were 1st. whether the master could proceed on a rule of reference to compute what was due for principal, interest, and costs, because the 12 Ann c. 16, § 12, which authorizes such reference, speaks only of "any bond which hath a condition or defeazance to make void the same upon payment of a lesser "sum at *a day* or *place certain*;" 2dly. whether the plaintiff was entitled to interest. AND *the Court* held *first*, that this bond was payable at a certain day; for it was payable on the day of the date, no other time being mentioned for payment; *secondly*, that there was no doubt but that interest was payable from the time of payment, namely, from the date, though not expressly reserved. Farquhar v. Morris, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.*

If the condition of a bond be to render a person in execution who has once been discharged, it is void—In debt on bond given by the Da Costa, v. Davis, Ea. Ter.

(1) Campbell v. Jones, p 393. *supra.*

defendant

38 Geo. 3. C B. 1 *Pull. & Boſan.* 242.

defendant and another, to procure the releaſe of one May, who was in execution at the ſuit of the plaintiff; the condition was, that if the obligors or May ſhould pay to the plaintiff 730*l.* and intereſt on 10th January; OR, in default, if the obligors ſhould on 12th January ſurrender May to the plaintiff at a place certain, between the hours of twelve and two, ſo that he might be again taken in execution, the bond ſhould be void. THE PLEA was in ſubſtance, that though May was diſcharged from the execution at the plaintiff's ſuit, his other creditors refuſed to diſcharge him, and he continued a priſoner in the Fleet, whereby the obligors were prevented ſurrendering him at the time and place in the condition: that the obligors before the day gave notice to the plaintiff that they could not ſurrender May according to the condition, but that he was then in the Fleet, and they would be there on the day and then and there ſurrender him: that they accordingly attended, and that neither the plaintiff nor any perſon on his behalf, was there to receive him. On a general demurrer, and joinder in demurrer, THE COURT held, that the latter part of the condition was void, being to render a priſoner in execution who had been once diſcharged; and therefore as the other part had not been performed the bond was forfeited; for where the condition is to do one of two things, ſhewing that one could not be performed, is no good reaſon for not having performed the other.—Judgment for the plaintiff.

ACTIONS ON PENAL STATUTES.

Maddock *q. t.* Hammet. Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 55.

THE Court will grant leave to amend in penal actions, even after the time limited for bringing a new action; provided the plaintiff has not been guilty of any unneceſſary delay in proſecuting his ſuit, and the amendment prayed for, does not introduce any new ſubſtantive cauſe of action. A rule had been obtained, calling on the defendants to ſhew cauſe why the declaration, which was in an action for uſury, ſhould not be amended *by altering the times of payment of certain notes* in which the uſury was charged to conſiſt. It was admitted that the ſtatute of limitations had run, ſo that no new action could now be commenced. And on this ground cauſe was ſhewn againſt the rule. PER CUR. This is an application to the diſcretion of the Court; and in theſe caſes we muſt take care that the plaintiff ſhall not unneceſſarily hang his action over the head of the defendant: but no ſuch conduct is imputable to the preſent plaintiff, and the caſe of *Croſs* v. *Kaye* (1) is an authority in point for our granting the plaintiff leave to amend, though the time limited for bringing a new action is expired; inaſmuch as the amendment prayed for is not to introduce a new ſubſtantive cauſe of action, but merely to rectify a miſtake in ſetting out the notes. Rule abſolute.

AFFIDAVIT.

Dalmer *v.* Barnard, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 251.

THE Court will take cognizance of affidavits ſworn before foreign magiſtrates if properly authenticated to them. In this caſe in the courſe of ſhewing cauſe againſt a rule, a preliminary objection was taken by the counſel, that the affidavit on which the rule was obtained could not be read, not being ſworn before any perſon authorized to take affidavits in this Court, it having been taken before one *John Coſnahan* who ſtiled himſelf "high bailiff and chief magiſtrate of the diſtrict of *Douglas* in the *Iſle of Man*," of whom (they argued) that the Court could not take notice either that there was ſuch a perſon, or that

(1) See p. 429, ſupra.

he

he filled the office he deſcribed, or that ſuch officer had a power of taking affidavits in the *Iſle of Man*, or that this which purported to be an affidavit taken before ſuch a officer was really ſworn before him. But there being alſo an affidavit ſworn in this Court by one *Chriſtian*, who therein depoſed "that he had ſeen *J. C.* Eſq. high bailiff and chief magiſtrate of the diſtrict of *Douglaſs* in the *Iſle of Man* write, and that he verily believed the name *J. C.* ſubſcribed was of the proper hand-writing of the ſaid *J. C.* &c. The Court were very clearly of opinion that they could take cognizance of affidavits ſworn before foreign judicatures, properly authenticated to them. That it was the conſtant practice for the judges here to receive affidavits ſworn before the judges of *Scotland* and *Ireland*. And as to this not being properly authenticated before them, the affidavit of *Chriſtian* ſworn in this Court was a ſufficient anſwer to the objection in that reſpect.

By the courteſy which ſubſiſts between *England* and *Ireland* the Court will take judicial notice that ſo great an officer as the Chief Juſtice of a ſuperior Court in *Ireland* is competent to adminiſter an oath, and therefore will be ſatisfied with a verification of his hand-writing, yet there is a great difference with reſpect to an ordinary magiſtrate; and in ſuch caſes, the rule requiring the atteſtation of a notary public ought to be ſtrictly obſerved; therefore in this caſe the affidavit of the acknowledgement of a warrant of attorney to ſuffer a recovery having been taken at *Gibraltar* before a magiſtrate of that place, but not atteſted by a notary public was rejected. Exparte Worſley Mic. Ter. 34 Geo. 3. C. B. 2 *Hen. Black.* 275.

An affidavit to hold to bail in trover ſtated, that the plaintiff's cauſe of action againſt the defendant was for converting and diſpoſing of divers goods and chattels of the plaintiffs of the value of 250*l.* and upwards, which he refuſed to deliver, though the plaintiff had demanded the ſame; and that neither he (the defendant) nor any perſon on his behalf, had offered to pay to the plaintiff the ſaid ſum of 250*l.* or the value of the ſaid goods. PER CUR. This affidavit is not in the uſual form; it does not poſitively ſtate any cauſe of action againſt the defendant: in *Chester* v. *Jaques* (1) it was alleged, that the defendants were poſſeſſed, whereas here though the defendant refuſed to deliver up the goods, it does not appear that they were ever in his poſſeſſion.—Defendant diſcharged on common bail. Woolley *v.* Thomas, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 550.

The Chriſtian names, as well as ſurnames of the parties muſt be inſerted in the title of an affidavit produced to ſhew cauſe againſt any rule; otherwiſe the Court will not permit it to be read. Fores *v.* Diemar, Ea. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 661.

And the affidavit muſt be entitled in the Court in which it is made, otherwiſe it will be rejected: and in this caſe a rule was diſcharged becauſe the affidavit on which the rule niſi was obtained was not entitled in any Court, the words "in the" only being prefixed, without adding "Common Pleas". Oſborn *v.* Tatum Ea. Ter. 38 Geo. 3. C *Pull.* et *Boſa.* B. 1

A rule Niſi for entering a common appearance having been obtained on the ground of the affidavit to hold to bail, being entitled "W. G. plaintiff, againſt J. R. defendant," the Court held the objection good; ſaying, that it was in conſequence of a deciſion (2) of this Court that the Court of *King's Bench* had made a rule (3) that no affidavit to hold to bail ſhould in future be entitled. IT was then applied for leave to file a ſupplemental affidavit. SED PER CUR. The Court will never receive a ſupplemental affidavit unleſs to ſupply ſomething which is ambiguous on the face of the original affidavit, and which the Court for its own ſatisfaction wiſhes to have explained; but if it were allowed in this caſe it would be making that right which was wrong at the time when it was done; and would be in the nature of an amendment. Rule abſolute. Green *v.* Redſhaw, Ea. Ter. 38 Geo. 3. C B. 1 *Pull* et *Boſa.* 227

(1) See p. 519, ſupra. (2) Hollis *v.* Brandon in p. 753.
(3) Clarke *v.* Cawthorne 754, ſupra.

If

AGREEMENT.

Cook *v.* Jennings, Mic. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 381.

IF a party agree to pay ſo much for freight for *goods delivered at A.* the freight cannot be recovered, *pro ratâ itineris*, if the ſhip be wrecked at B. before her arrival at A. though the defendant accept his goods at B.—This was an action of covenant on a charter-party of affreightment, by which the plaintiff let a ſhip to the defendant to freight from *Liverpool* to *Wyburgh*, and back to Liverpool; and agreed that the maſter ſhould take on board there a cargo of ſalt to Wyburgh, and after delivering the ſame there, ſhould take on board there a cargo of deals, in conſideration of which, the defendant agreed to pay to the plaintiff "in full, for the freight and hire of the ſhip for the ſaid voyage, at "and after the rate of 7 *l.* per ſtandard hundred, for deals *delivered at* "*Liverpool*, the freight to be paid one fourth in caſh on her arrival, "and the remainder by an acceptance on London at four months date." The declaration, after ſetting forth the charter-party, ſtated that the ſhip after carrying the ſalt to Wyburgh, and taking on board a cargo of deals, was proceeding on her voyage home, and, after ſhe had performed great part of her voyage, was wrecked, by reaſon whereof the cargo of deals was obliged to be put on ſhore for the preſervation thereof, "which cargo ſo unladen, the defendant accepted and took into "his poſſeſſion, and then and there ſold the ſame to his own uſe, *whereby* "*he became liable to pay to the plaintiff a proportionable part* of the ſaid "freight, &c." PLEA that no part of the cargo of deals was delivered at Liverpool, DEMURRER, and cauſe aſſigned that the defendant attempted to put in iſſue collateral matters immaterial to the defence. PER CUR. (after argument) though the objection made by the defendant is a technical one, and does not meet the juſtice of the caſe, we are bound to pronounce judgment on the contract that the parties have made. It is a contract between theſe parties made in the moſt ſolemn manner by a deed under ſeal; and whether a preciſe formal contract be by parol, or under ſeal, the operation of the law on it is equally the ſame. By the terms of this agreement, the defendant engaged to pay ſo much *on delivery of the goods at* Liverpool; "one fourth in caſh on her arrival, and the remainder by an acceptance at four months;" but the goods never arrived, then at what time were thoſe bills to be dated? It is not neceſſary to determine whether or not the plaintiff might not have brought an action of aſſumpſit, it will be time enough to decide that caſe whenever the queſtion ariſes: there the queſtion is, whether or not he can enforce the payment of the money under the contract, not having carried the goods to Liverpool: now this is to be obſerved, that the defendant only covenanted to pay ſo much per hundred for deals delivered at Liverpool, and unleſs the goods were delivered there the defendant did not undertake to pay any thing. It is admitted on the record that the deals never were delivered at Liverpool, and therefore the caſe does not come within the covenant. There is a caſe in point, 1 *Brownl.* 21. *Bright* v. *Cowper*. It was an action of covenant, on a covenant made by the merchant with the maſter of a ſhip, that if he would bring his freight to ſuch a port, then he would pay him ſuch a ſum, and ſhews that part of the goods were taken away by pirates, and that the reſidue of the goods was brought to the place appointed, and there unloaded, and that the merchant had not paid, and ſo the covenant broken: and the queſtion was, whether the merchant ſhould pay the money agreed for, ſince all the merchandizes were not brought to the place appointed; and the court was of opinion, that he ought not to pay the money, becauſe the agreement was not by him performed;" now that is a direct authority againſt the plaintiff in this caſe, therefore the plaintiff cannot recover in this form of action.

Lawrence J. in the above caſe ſaid, that where a ſhip is driven on ſhore

ſhore, it is the duty of the maſter either to repair the ſhip or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unleſs he performs the whole voyage, except in caſes where the owner of the goods prevents him; nor is he entitled *pro rata*, unleſs under a new agreement.

See alſo *Abernethy* v. *Landale*, in *p.* 542, ſupra.

AMENDMENT.

THE court will grant leave to enter the continuances after verdict, in order to arrive at the juſtice of the caſe.—At the trial of this ejectment, a verdict was taken *pro formâ* for the plaintiff, with liberty to the defendant to move to ſet it aſide, and enter a nonſuit; ſuch motion was accordingly made, and a rule *niſi* granted on the ground that *the leſſor's right of entry was barred by the ſtatute of limitations*. In anſwer to this objection, the leſſor proved that he was an infant when his title accrued, and had not come of age till 1786; after which he had ten years to bring his action: to this the defendant objected, that the action was not brought within ten years, and adverted to the *niſi prius* record, the memorandum of which was of Hilary Term, 1798. The judge at the trial aſſented to the objection, unleſs it could be ſhewn that the writ was ſued out before the expiration of the ten years, and the ſuit continued down to the preſent time, which the leſſor of the plaintiff was not prepared to do; however, it was agreed that a verdict ſhould be taken for him without prejudice, with leave to the defendant to move as above; BUT pending that rule, another rule was obtained, calling on the defendant to ſhew cauſe why the leſſor of the plaintiff ſhould not be at liberty to amend the plea-roll and record of *niſi prius*, by making them of Eaſter Term, 1792, inſtead of Eaſter Term, 1797: the rule was obtained upon an affidavit, which ſtated, that the declaration, which was commenced by original, was ſerved on the tenants in poſſeſſion on 22d March, 1792, and that afterwards the uſual rules were entered into. PER CUR. (after cauſe ſhewn) There is no inſtance in which the court have refuſed the parties leave to amend according to the truth of their caſe, to prevent their being barred by the ſtatute of limitations for a ſuppoſed laches, of which they really have not been guilty; it is a matter of courſe to grant leave to amend in theſe caſes, to enable the parties to arrive at the real juſtice of the caſe: perhaps there may be ſome difficulty as to the form in which the continuances ſhall be entered, ſo as to bind the real parties, now before the court; but we conceive, if it were neceſſary, that the chancellor would iſſue an original writ applicable to them. Rule abſolute to amend.

Doe ex dim Mears v. Doſman, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 618.

ANNUITIES.

IF any part of the conſideration of an annuity be paid in *country bank notes*, the dates and times of payment muſt be ſet out in the memorial under the annuity-act: in this caſe a rule had been obtained calling on the plaintiff to ſhew cauſe, why the judgment ſigned on a warrant of attorney given to ſecure an annuity ſhould not be ſet aſide, on the ground of the memorial having ſtated that part of 600 *l.* the conſideration-money, was paid "in notes on the bank of England and *country bank* notes:" without ſpecifying the dates and times of payment of the latter: on ſhewing cauſe, it appeared by the affidavit of the plaintiff, that at the time of executing the deeds, the defendant had his option of being paid in caſh or notes, and accepted the latter, as equally convenient to himſelf: SED PER CUR. There are two determinations (1) that where

Morris v. Wall, Hil. Ter. 38 Geo. 3. C.B. 1 *Pull.* et *Boſan.* 208.

(1) Rumball v. Murray, and Berry v. Bently, ſee p. 604.

the conſideration is paid in notes, not of the bank of England, they muſt be ſet forth, in order that the court may ſee whether they are ſuch notes that they can be conſidered as caſh; and we muſt be bound by thoſe determinations.—Rule abſolute.

Vaux *v.* Anſell, Ea. Ter. 38 Geo. 3. C.B. 1 *Pull.* et *Boſan*, 224.

An annuity-memorial, ſtating that "the conſideration-money was paid to *A. B.* and *C.* ſome or one of them," was held bad; for, PER CUR. Although it appear by the indorſement on the deed that the money was paid on the ſame day on which the deed was executed, by the three parties, yet as it does not appear to have been paid at the ſame time, it cannot be preſumed that they were all preſent at the time of payment, and a defect of this kind, in an annuity-memorial cannot be remedied by a ſubſequent affidavit, ſtating that they were all preſent.

Kelſe *v.* Ambroſe, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 551.

Money lent and paid at different times for the education and advancement of the defendant, is a good conſideration for the grant of an annuity, and ſuch conſideration is ſufficiently expreſſed in the deeds for ſecuring the annuity, under the deſcription of "money lent and advanced, and alſo paid, laid out, and expended, to and for the maintenance, education, and advancement in the world, of the defendant."—It appeared, upon a motion to ſet aſide the ſecurities given for ſecuring an annuity, that the conſideration for granting the annuity, which was ſecured on the defendant's living, was "that the defendant on the 4th of April, 1797 (the day on which the ſeveral inſtruments bore date and were executed), ſtood juſtly and truly indebted to the plaintiff, in right of *Henrietta* the plaintiff's wife, in 1400*l.* for ſo much money by the ſaid *Henrietta*, before her intermarriage with the plaintiff, lent and advanced, and alſo paid, laid out, and expended to and for the maintenance, education, and advancement in the world, of him, the defendant, and which the defendant is thereby ſtated to admit." And the affidavits, on the part of the plaintiff, ſtated that the defendant was nephew to the plaintiff's wife, and had no property of his own, but that the plaintiff's wife being deſirous of ſerving him, ſhe, before marriage, laid out and expended for him, and lent him, various ſums of money to the amount of 1900*l.* for his maintenance, education, and advancement in the world, and that the 1400*l.* ſecured by the bond and other inſtruments, which was the conſideration for the annuity, was part of the ſaid 1900*l.* and that when the deeds were preparing, the defendant acknowledged to the attorney who was inſtructed to prepare them, that the conſideration therein ſtated was juſt and true: the objections taken to the ſecurities were, FIRST, that the conſiderations ſtated were not ſufficient to ſupport the grant of the annuity within the proviſions of the 17 Geo. 3. c. 26. ſ. 4. which are poſitive that the conſideration for granting an annuity muſt be in money only. SECONDLY, that if they were ſufficient, yet the ſeveral ſums advanced ſhould have been explicitly ſet forth, with the times when advanced, and to whom: and that conſequently for this defect the annuity was void. SED PER CUR. If there had been any doubt whether the conſideration-money had or had not been paid, we would have directed an iſſue to try that fact; but it appears beyond all doubt, that money has been advanced by the plaintiff's wife to the uſe of the defendant to a larger amount than the ſum ſtated as the conſideration of granting this annuity: in the caſe *ex parte Fallon* (p. 603, 621, ſupra) we laid down a rule, which has been ſince adopted in the common pleas, that the conſideration-money of an annuity need not be paid down in monies numbered at the time; in that caſe we ſaid that one great object of the legiſlature in paſſing the act, was to prevent goods being forced on neceſſitous perſons, inſtead of money, at a price much beyond their real value; but the legiſlature did not intend to prohibit a debtor from granting an annuity for a debt fairly and honeſtly contracted, which the debtor perhaps may have no means of paying but by granting an annuity. In the preſent caſe, it appears that the annuity was granted for the beſt of conſiderations. The different ſums had been fairly and

bona

bona fide paid by the grantee for the grantor, without any view to an annuity: theſe ſums created a debt in the grantor, which has fairly been ſtated as the conſideration of granting this annuity: this therefore was a money conſideration: with regard to the objection, that it ſhould have been ſet forth when the different ſums of money were paid; ſeveral caſes have been alluded to in which it has been ruled, that the names of the perſons *by whom* the conſideration-money is paid, muſt be ſet forth, but what was determined in the latter claſs of caſes ought not to be applied to ſuch a caſe as the preſent, where the grantor himſelf admitted that the conſideration was an antecedent debt, due from him to the grantor, ariſing from different ſums paid at different times for his uſe. It would be extending the act of parliament too far, to decide that this annuity could not be ſupported merely becauſe the reſpective times when thoſe reſpective ſums of money were advanced by the grantee are not mentioned: every thing that paſſed at the time of granting the annuity is ſufficiently ſet forth. Rule diſcharged with coſts.

Withy *v.* Woolley, Ea. Ter. 8 Geo. 3 B R

Where an ejectment was brought, to recover poſſeſſion of lands extended under an elegit—upon a judgment confeſſed, which had been entered up upon a warrant of attorney given for ſecuring an annuity. The Court held it too late for the grantor to object to the conſideration of ſuch annuity, upon a ſummary application for ſtaying the proceedings after the verdict in ſuch ejectment, becauſe he had an opportunity of making his defence to the action.—This was a rule calling on the plaintiff to ſhew cauſe, why the bond executed by the defendant to the plaintiff for ſecuring an annuity, and the warrant of attorney to confeſs judgment thereon, together with all ſubſequent proceedings on ſuch judgment, ſhould not be ſet aſide, and in the mean time all proceedings upon an ejectment brought on the demiſe of the plaintiff (for the recovery of the premiſes belonging to the defendant) on ſuch judgment, be ſtayed. It appeared from the affidavits, that the memorial of the annuity ſtated the bond and warrant of attorney, by which it appeared that the conſideration of granting the annuity was a precedent debt due from the defendant to the plaintiff on three ſeveral notes of hand, and which were at the time delivered up to be cancelled. The annuity, which was granted from 26 March, 1794, was paid up to 26 Dec. 1795, and there being one year's payment in arrear, at 26 Dec. 1796, the plaintiff, having firſt revived the judgment by ſuing out two *ſcire facias*, ſued execution upon that judgment, in February, 1797, and levied thereon; and there being a further half-year's annuity due, the plaintiff on 27 June, 1797, ſued out an *elegit*, upon which an inquiſition was taken, and the jury having found the defendant to be poſſeſſed of certain freehold lands in Middleſex, *an ejectment was brought upon the demiſe of the plaintiff, to recover poſſeſſion of the moiety which was extended, which ſuit the defendant was let in to defend, and the plaintiff at the ſittings after laſt Michaelmas term obtained a verdict, on which he had ſince entered up final judgment.* THE OBJECTIONS to the annuity on which the rule was obtained were, that the conſideration appeared to have been in notes, and not in money, and that at any rate thoſe notes ought to have been ſet forth with the conſideration upon which they iſſued: but in ſhewing cauſe againſt the rule, a previous objection was taken, that the defendant had precluded himſelf by his laches from taking any advantage of exception now, when the matter had paſſed in *rem judicatum*; according to the rule in *Buck* v. *Tyte* (p. 620 ſupra). PER CUR. (after cauſe ſhewn) The judgment by confeſſion in the firſt inſtance, which was by way of ſecurity, concludes nothing between the parties; ſo far they were acting together, and the defendant was afterwards at liberty to impeach the tranſaction. But as ſoon as the proceedings were adverſe, then the defendant ought to have made his ſtand; we do not mean to ſay that his not doing ſo then operates as a legal eſtoppel to him afterwards: but if unexplained, it is a reaſonable ground for the court to act upon,

7 *Ter. Rep.* 540.

in refuſing to entertain a ſummary juriſdiction upon his complaint: as to the proceedings on the two *ſcire facias* as they paſſed, according to the practice by ſurprize, it is an excuſe to the defendant for not appearing to them, and conteſting the matter then. The practice of two *ſcire facias* being equivalent to a *ſcire feci*, is not ſo commendable as to hold a party bound by ſuch a proceeding in this caſe; but why did not the defendant make his ſtand upon the ejectment? He has been guilty of great laches in not doing ſo: we ought not to ſuffer a party to go on in a courſe of fruitleſs litigation, to the great expence and vexation of his opponent: where there is an objection to the proceedings *in limine* he ought to apply in a reaſonable time to ſtay the proceedings. The ground of our deciſion in this caſe is the acquieſcence of the defendant under a judicial proceeding (1). Rule diſcharged.

ATTORNEY.

Webb *v.* Pritchett, Ea. Ter. 38 Geo. 3. C. B 1 *Pull.* et *Boſan.* 263.

IN an action on an attorney's bill, it is not incumbent on the plaintiff to produce the writ, in order to ſhew that the action was not commenced till the expiration of a month after the delivery of the bill; for the *niſi prius* roll is ſuch *primâ facie* evidence, as will, if uncontradicted, ſatisfy the ſtat. 2 Geo. 2, c. 23, which declares that no action ſhall be brought by an attorney upon his bill till that bill has been delivered a month. If therefore the plaintiff proves at the trial that his bill was delivered on a certain day, and then produces the record to ſhew that the action was commenced after the month had expired, it will be *primâ facie* evidence of the action being properly commenced; but this may be contradicted by the defendant, whoſe buſineſs it will be to ſhew by a copy of the writ that it was really commenced before the time. The record ſhews the commencement of the action, and ſome times indeed to the plaintiff's peril, if he has not had the precaution, to enter a ſpecial memorandum (2): as where the record is of the term generally, it relates back to the firſt day of the term (3); and if the record in ſome inſtances operates againſt a plaintiff, it ought alſo to operate in his favour.

AWARD.

Brown *v.* Goodman, Ea. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 592.

IN debt on bond, it appeared that the bond was a common arbitration-bond, in which the time was limited for the arbitrator to make his award: the declaration ſtated, that the time was afterwards, by the mutual conſent of both parties, enlarged; within which enlarged time the arbitrator made his award, and it then ſtated the breach, &c: to this there was a general demurrer; and after argument at the bar, it was held, that as it appeared that the defendant had bound himſelf to abide by an award under a penalty, if made within a given time, it could never extend the penalty to an award made after that time under a new agreement.

Holland *v.* Brooks, Hil. Ter. 35 Geo. 3. B R. 6 *Ter. Rep.* 161.

A party cannot, in ſhewing cauſe againſt an attachment for not performing an award, impeach the award for defects not appearing on the face of it.—On ſhewing cauſe againſt a rule for an attachment for not

(1) As to the principal objection which the Court left untouched, Lord *Kenyon*, CH. J ſaid, that the inclination of his opinion was, that the legiſlature in requiring that the conſideration of an annuity ſhould be in money only, meant *money* in contradiſtinction to goods, and that they conſidered any liquidated ſum due the ſame as monies numbered.—For this ſee the caſe of *Kelſe* v. *Ambroſſe* in p. 926, ſupra, and ex parte *Fallon* in p. 603, 621, ſupra.

(2) Dodſworth *v.* Bowen in p. 720, ſupra.

(3) Pugh *v.* Robinſon in p. 303, ſupra.

performing

performing an award, the application was reſiſted on ſeveral grounds, not appearing on the face of the award, but verified by affidavit. AND THE Court held, that a party cannot object to an award for any defect not appearing on the award itſelf, in ſhewing cauſe againſt a motion for an attachment; but that he muſt obtain a rule for that purpoſe, within the time limited by the act of parliament.

BAIL.

WHERE the ſheriff has neglected to take a bail bond, and the bail offered in the action have been rejected, the defendant will not, after an action for an eſcape commenced againſt the ſheriff, be permitted to juſtify new bail. This was a motion on the behalf of the defendant, after the plaintiff had brought eſcape againſt the ſheriff, who had neglected to take a bail bond, for leave to juſtify new bail, the former bail having been rejected; and it was urged, that this was not like the caſe of *Fuller* v. *Preſt*, p. 773, where the application was made on the part of the ſheriff, who came to aſk for a favour, for here the defendant not being implicated in the ſheriff's miſconduct ought not to be prevented from defending the action. SED PER CUR. As an action for an eſcape has been commenced againſt the ſheriff; if bail were now permitted to be put in, the proceedings in that action muſt be ſtayed: this motion is therefore the ſame as an application on the part of the ſheriff to ſtay proceedings againſt him in the action for the eſcape. As the ſheriff has neglected to do his duty, he ought not to be relieved, for the Court cannot too ſtrongly mark his conduct in omitting to follow the directions of the ſtatute, 23 *Hen.* 6. c. 9. If there was any reaſon for making a private engagement it ought to have been made to the plaintiff. Webb v. Matthew, Ea. Ter. 38 Geo. 3. C. B. 1 *Pull.* et *Boſan.* 225.

Where bail is taken under the order of a judge in C. B. each of the bail is liable to double the ſum ordered; in the ſame manner as they are liable to double the ſum ſworn to, in the caſe of an affidavit.—The defendant was held to bail for 25*l.* by a judge's order, *in an action of aſſault*, and each of the bail entered into a recognizance for double that ſum: the plaintiff obtained a verdict for 10*5l.* and ſigned judgment for his damages and coſts: accordingly a *ca. ſa.* iſſued againſt the defendant for 138*l.* 5*s.* and the bail were fixed. A rule *niſi* having been obtained by the bail for ſtaying all proceedings againſt them on their recognizance, upon payment of the ſum of 25*l.* and coſts; *it was contended*, on ſhewing cauſe againſt the rule, that whatever might be the practice of B. R. as laid down in *Jackſon* v. *Haſſel*, ante 780, each of the bail was liable in the Common Pleas to the full extent of the recognizance, and for this were cited *Calveraq et ux* v. *De Miranda*, 1 Barnes 74, and *Mitchell* v. *Gibbons*, ante 780. PER EYRE, CH. J. The bail always enter into a recognizance for double the ſum ſworn to, and no doubt they will be anſwerable to the extent of their recognizance for the damages ſuſtained by the plaintiff; therefore it cannot be argued that the parties were deceived in the contract into which they entered. The only queſtion is, Whether there has been ſuch a miſtake in this inſtance as ſhould induce the Court to relieve the bail upon equitable terms? This muſt depend upon the notion that *when there is a judge's order, the bail are only to be bound in that ſum which the order expreſſes*. If there had been any ſettled practice of that kind, we ſhould not have thought it unreaſonable, but on the principles which govern us with reſpect to bail in general, we can ſee *no difference between an order, and an affidavit to hold to bail*. The order is introduced becauſe, from the nature of ſome particular caſes, it is impoſſible for the plaintiff to ſwear to the preciſe ſum due; inſtead therefore of aſcertaining the ſum by affidavit, it is left Dahl v. Johnſon, Hil. Ter. 38 Geo. 3. C. B. 1 *Pull.* et *Boſan.* 205.

left to the diſcretion of a judge to ſay what it ſhall be; but when once that ſum is aſcertained, on what principle is it that the bail ſhould not enter into the ſame kind of ſecurity as in common caſes? What is to be done on affidavits, is to be done on a judge's order, and there is no way of making our practice conſiſtent but by holding it ſo: it was formerly a rule of the court, C. B. 5 W. *et* M. that if the defendant himſelf became bound, the bail ſhould only enter into a recognizance for the ſingle ſum: this was a general rule, and extended as well to caſes on affidavit, as to thoſe on a judge's order. Afterwards the court thought it improper for the defendant to become bound at all, and made a rule, Ea. Ter. 36 Geo. 3. accordingly with that I am well ſatisfied: if it was right for the court to make a further regulation, that the bail ſhould not be liable to more than the ſum ſworn to, they ſhould have ſaid ſo; but I cannot ſee that there is any diſtinction between this caſe, and the caſe of bail taken on affidavit. *Buller*, J. As the practice of this court ſtands ſettled, the preſent caſe muſt be decided by it. I cannot however but think the practice of B. R. more reaſonable; *the bail there become bound in double the ſum, but they are not ſeparately liable to that extent, each may diſcharge himſelf on paying the ſingle ſum ſworn to.* A man ſhould know the extent of his liability; if he conſent to become bound for 50*l.* why go beyond that ſum? If you do, he never can know the extent of his own liability. I do not think our practice good; but that conſideration cannot affect this caſe: it may be matter for the deliberation of the court, whether we ſhould not alter the practice, retaining it indeed in part, and making each of the bail liable to the ſum ſworn to, but not in the double ſum, as is now the caſe. The bail look to ſee what the debt is, and it is reaſonable that they ſhould infer from thence the extent of their obligation. In the preſent caſe, however, they muſt be held liable to the amount of their recognizance ſeparately, not exceeding the ſum recovered. *Rooke*, J. Agreed. *Per Cur.* Rule abſolute on payment of the amount of the recognizance by each of the bail with coſts.—But as the application was firſt made to the Chief Juſtice, who referred the parties to the Court, the coſts were reſtrained to the period of that application.

THE END OF THE FIRST VOLUME.